

***Argentina - Measures Affecting Imports of Footwear,  
Textiles, Apparel and Other Items***

***Report of the Panel***

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## I. INTRODUCTION

1.1 On 4 October 1996, the United States requested Argentina to hold consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 14 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), Article 19 of the Agreement on Implementation of Article VII of the GATT 1994 ("Customs Valuation Agreement"), and Article 7 of the Agreement on Textiles and Clothing ("ATC"), regarding certain measures maintained by Argentina affecting imports of footwear, textiles, apparel and other items, namely, measures imposing specific duties on various footwear, textiles and apparel in excess of the bound rate of 35 per cent *ad valorem* provided in Argentina's Schedule LXIV; a statistical tax of three per cent *ad valorem* on imports of all sources other than MERCOSUR countries; and measures imposing, *inter alia*, labelling requirements related to affidavits of product components (WT/DS56/1).

1.2 Pursuant to Article 4.11 DSU, Hungary requested to be joined in these consultations on 21 October 1996 (WT/DS56/2). The European Communities ("EC") made a similar request on 25 October 1996 (WT/DS56/3). In separate communications dated 6 November 1996, Argentina accepted the request of Hungary and the request of the EC to join the consultations which the United States had requested (WT/DS56/4).

1.3 During the consultations, a mutually agreed solution was reached between the United States and Argentina regarding Argentina's labelling requirements. However, the parties failed to reach a mutually satisfactory solution on the other aspects raised during the consultations.

1.4 On 9 January 1997, the United States requested the Dispute Settlement Body ("DSB") to establish a panel (WT/DS56/5). The United States claimed that Argentina's measures were "inconsistent with the obligations of Argentina under Articles II, VII, VIII and X of the GATT 1994; Articles 1 through 8 of the Agreement on Implementation of Article VII of the GATT 1994; and Article 7 of the Agreement on Textiles and Clothing".

1.5 On 25 February 1997, the DSB established a panel pursuant to the request made by the United States, in accordance with Article 6 DSU. In document WT/DS56/6, the Secretariat reported that the parties had agreed that the Panel would have the standard terms of reference as follows:

"to examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS56/5, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 The same document WT/DS56/6 reported the constitution of the Panel on 4 April 1997 with the following composition:

Chairman: Mr. Peter Palecka

Members: Ms. Heather Forton  
Mr. Peter May

1.7 The EC, Hungary and India reserved their rights to participate in the Panel proceedings as third parties, and all presented arguments to the Panel.

1.8 The Panel met with the parties on 17-18 June 1997 and 23 July 1997. It met with third parties on 17 June 1997. The Panel issued its interim report to the parties on 30 September 1997. Both parties requested the panel to review parts of the interim report. None of them requested the panel to hold an additional meeting.

## II. FACTUAL ASPECTS

### A. ARGENTINA'S IMPORT REGIME FOR TEXTILES, APPAREL AND FOOTWEAR

2.1 The great majority of Argentina's import tariffs are fixed in *ad valorem* terms. Regarding textiles, clothing and footwear, Argentina maintained a regime of minimum specific import duties as from 1993. This regime was applied through *resoluciones* (resolutions) and *decretos* (decrees) having fixed terms.

2.2 Argentina approved the results of the Uruguay Round through Law No. 24.425, promulgated on 23 December 1994. These results included a bound rate of duty of 35 per cent *ad valorem* with respect to textiles, apparel and footwear imported into Argentina. In parallel, Argentina continued to apply a system of minimum specific import duties in the footwear, textile and apparel sectors. Regarding footwear, the minimum specific duty was revoked in 1997. Provisional safeguard measures were applied in that sector on 25 February 1997.

2.3 Concurrently, since 1989, Argentina applied a tax on imported products intended to finance statistical services to importers, exporters and the general public.

2.4 The Panel procedure concerned the Argentine measures adopted in order to apply the above-mentioned regime, as established and maintained *inter alia* through the laws, decrees and resolutions referred to below. The latest measures adopted at the time of the request for the establishment of the Panel (9 January 1997) were, for textiles and apparel, Resolution No. 22/97 of 7 January 1997, extending the validity of the minimum specific import duties for those sectors until 31 August 1997,<sup>1</sup> for footwear Resolution No. 23/97 of 7 January 1997, extending the validity of the minimum specific import duties for that sector until 31 August 1997<sup>2</sup> and, with respect to the statistical services tax, Presidential Decree No. 389/95 of 22 March 1995. On 25 February 1997, the date of establishment of the Panel by the DSB, the minimum specific import duties for the tariff headings contained in Harmonized System ("HS") Chapter 64 (footwear) and listed in Annex IX to Decree No. 998/95, as amended, had been repealed by Resolution No. 225/97, dated 14 February 1997. Further to the initiation of a safeguard investigation, provisional safeguard measures in the form of minimum specific import duties became applicable on 25 February 1997 to certain imports of footwear in application of Resolution No. 226/97.<sup>3</sup>

### B. MINIMUM SPECIFIC IMPORT DUTIES ("DIEM")

#### 1. STATED PURPOSE AND FUNCTIONING OF THE MINIMUM SPECIFIC IMPORT DUTIES

2.5 The stated purpose of the minimum specific import duties, also referred to as "DIEM",<sup>4</sup> was to counteract injury allegedly suffered by Argentine manufacturers as a result of imports of textiles, apparel and footwear at prices lower than the production costs in the countries of origin or lower than international prices.<sup>5</sup>

2.6 The system operated as follows: for each relevant HS tariff line of textiles, apparels and footwear, Argentina calculated an *average import price*. Once it had determined the average import price for a particular category, Argentina multiplied that price by the bound rate of 35 per cent, resulting in a specific minimum duty for all products in that category. Upon the importation of covered textiles, apparel or footwear, depending on the customs value of the goods concerned, Argentina applied either the specific minimum duty applicable to those items or the *ad valorem* rate, whichever was higher.

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<sup>1</sup>Boletín Oficial de la República Argentina, No. 28.561 of 10 January 1997.

<sup>2</sup>Ibid.

<sup>3</sup>Boletín Oficial de la República Argentina, No. 28.592 of 24 February 1997.

<sup>4</sup>For *Derechos de Importación Específicos Mínimos* (minimum specific import duties)

<sup>5</sup>See, e.g., preambles of Resolutions No. 811/93 (textiles and apparel) and No. 1696/93 (footwear).

## 2. **MINIMUM SPECIFIC IMPORT DUTIES ON TEXTILES AND APPAREL**

2.7 Minimum specific import duties were originally applied by Argentina to approximately 200 categories of textiles and apparel by Resolution No. 811/93 of the Argentine Ministry of Economy, and Public Works and Services of 29 July 1993.<sup>6</sup> Article 3 of the Resolution provided that the specific import duties established by Article 1 were to operate as a minimum of the corresponding *ad valorem* import duty. The categories of products to which the minimum specific duties applied were listed, together with the duties, in Annex I to the Resolution. The minimum specific import duties established by the Resolution were to remain valid until 31 January 1995, with the possibility of a single, non-renewable extension of six months.

2.8 As a result of the Uruguay Round of multilateral trade negotiations, Argentina included in its Schedule of Concessions (Schedule LXIV) a maximum duty rate of 35 per cent *ad valorem*.<sup>7</sup> This bound rate became effective on 1 January 1995. It was generally applicable to imports, with certain specified exceptions for products subject to a different level of binding.

2.9 After the entry into force of the Uruguay Round results, Argentina continued to apply the minimum specific import duties. Presidential Decree No. 2275/94 of 23 December 1994 extended the application of these specific duties until 31 December 1995 and expanded the number of affected categories of merchandise.<sup>8</sup> Pursuant to Article 15 and Annex XII to the Decree, minimum specific import duties applied to categories of textiles and apparel (HS Chapters 51 to 63) and footwear (HS Chapter 64).

2.10 Presidential Decree No. 2275/94 was modified, on 22 September 1995, by two resolutions of the Argentine Ministry of Economy and Public Works and Services. Resolution No. 304/95 applied to textiles and apparel and modified the specific duties applicable. It increased the rate of the formerly established specific duties for a number of textiles and apparel tariff lines. Resolution No. 305/95 applied to footwear.

2.11 The application of the minimum specific import duties on textiles and apparel was extended until 31 December 1996 by Article 9 of Presidential Decree No. 998/95 of 28 December 1995.<sup>9</sup> This Decree was amended through Resolution No. 299/96 of the Ministry of Economy and Public Works and Services of 20 February 1996, which, *inter alia*, modified the specific duties applicable to imports of nylon carpeting, towels and undergarments.

2.12 As of 1 January 1997, the Ministry of Economy and Public Works and Services extended the application of the minimum specific import duties until 31 August 1997 through Resolution No. 22/97.<sup>10</sup>

2.13 The minimum specific import duties on textile and apparel products were finally modified by Resolution No. 597/97 of the Ministry of Economy and Public Works and Services of 14 May 1997.<sup>11</sup> This Resolution modified Annex IX to Decree No. 998/95 for a series of tariff positions. For some of these, minimum specific duties were progressively reduced. The Resolution called for reductions to take place on five dates between 1 June 1997 and 1 April 1998.

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<sup>6</sup>*Boletín Oficial de la República Argentina*, No. 27.692 of 2 August 1993.

<sup>7</sup>See Argentina's Schedule LXIV, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations done at Marrakesh on 15 April 1994. Members' schedules of concessions are hereafter referred to as their "Schedules".

<sup>8</sup>*Boletín Oficial de la República Argentina*, No. 28.050 of 30 December 1994.

<sup>9</sup>*Boletín Oficial de la República Argentina*, No. 28.301 of 29 December 1995.

<sup>10</sup>*Boletín Oficial de la República Argentina*, No. 28.561 of 10 January 1997.

<sup>11</sup>*Boletín Oficial de la República Argentina*, No. 28.650 of 20 May 1997.



### 3. **MINIMUM SPECIFIC DUTIES ON FOOTWEAR**

2.14 Measures similar to the specific duties applicable to textiles and apparel were applied to imports of footwear. Through Resolution No. 1696/93 of 28 December 1993,<sup>12</sup> the Argentine Ministry of Economy and Public Works and Services instituted minimum specific import duties on certain categories of athletic shoes. Article 5 of the Resolution provided that the specific import duties established by Article 4 were to operate as a minimum of the corresponding *ad valorem* import duty. Article 6 provided that the Resolution was to apply until 31 December 1994, with the possibility of a single, non-renewable extension of six months. As for the minimum specific import duties on textiles and apparel, the specific import duties on footwear were to be levied only in the event that they resulted in the payment of a higher tariff than the relevant *ad valorem* duty.<sup>13</sup> Resolution No. 1696/93 applied only to products from countries outside the Southern Common Market (MERCOSUR) or the Latin American Integration Association (LAIA).<sup>14</sup>

2.15 The minimum specific import duties on footwear were maintained after the entry into force of the Uruguay Round results. As for textiles and apparel, Presidential Decree No. 2275/94 of 23 December 1994 extended the application of the specific duties on footwear until 31 December 1995. Their application was further extended until 31 December 1996 by Article 9 of Presidential Decree No. 998/95. Resolution No. 305/95 of 22 September 1995 increased the specific duties for certain categories of footwear and amended the list of footwear tariff lines to which the minimum specific import duties were applicable.

2.16 Through Resolution No. 103/96 of 6 September 1996, Argentina's Ministry of Economy and Public Works and Services amended the level of specific duties applied on certain footwear categories. Reductions in the rate of duty were to occur in four phases through January 1998.

2.17 The specific duties on footwear HS categories as set forth in Decree No. 998/95 as amended by Resolution No. 103/96 were renewed by Resolution No. 23/97 until 31 August 1997.<sup>15</sup>

2.18 On 14 February 1997, the Argentine Ministry of Economy and Public Works and Services adopted Resolution No. 225/97, revoking all minimum specific import duties on footwear. The same day, the Ministry of Economy and Public Works and Services, through Resolution No. 226/97,<sup>16</sup> initiated a safeguard investigation and imposed provisional safeguard measures. On 21 February 1997, Argentina notified the Committee on Safeguards of the World Trade Organization of the initiation of an investigation and the reasons for it as well as of its intention to adopt provisional safeguard measures.<sup>17</sup> The provisional safeguard duties became effective on 25 February 1997.

### C. **STATISTICAL TAX**

2.19 The statistical tax at issue in this case was regulated by Articles 762 to 766 of the Argentine Customs Code (Law No. 22.415). In 1961, a tax intended to finance a statistical service had been imposed through Decree No. 6123/61. In application of Law No. 23.664, adopted in 1989 and relating to Articles 762 to 766 of the Argentine Customs Code,<sup>18</sup> Argentina imposed, until 1994, a three per cent *ad valorem* tax which related to the collection of statistical information by the Argentine customs service regarding imports and exports. Through Presidential Decree No. 2277/94 adopted on

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<sup>12</sup>Boletín Oficial de la República Argentina, No. 27.797 of 30 December 1993.

<sup>13</sup>See Resolution No. 1696/93, Article 5.

<sup>14</sup>Ibid., Article 7.

<sup>15</sup>Boletín Oficial de la República Argentina No. 28.561 of 10 January 1997.

<sup>16</sup>Boletín Oficial de la República Argentina, No. 28.592 of 24 February 1997.

<sup>17</sup>Document G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, 25 February 1997.

<sup>18</sup>Boletín Oficial de la República Argentina, No. 26.652 of 12 June 1989.

23 December 1994<sup>19</sup> pursuant to Article 764 of the Customs Code, the tax was reduced to zero per cent in order (a) "to remove all those factors that may complicate the process of economic integration and openness";<sup>20</sup> (b) "to eliminate those factors that can make difficult the free circulation of goods";<sup>21</sup> and (c) "to neutralize the effect on foreign trade that the statistical tax [...] in force in [Argentina] may cause".<sup>22</sup> On 22 March 1995, Presidential Decree No. 389/95 set the level of the statistical tax at three per cent. The statistical tax was applied to import transactions with a view to providing a general statistical service. According to Article 762 of the Argentine Customs Code, the tax was to be applied on an *ad valorem* basis. The tax did not apply to goods exported to any destination in suspensive or definitive form for consumption. It applied to all imports except for articles subject to a temporary import regime, articles originating in MERCOSUR Member States, imported goods subject to the MERCOSUR common external tariff rate of zero percent, selected imported capital goods, goods related to data processing and telecommunications and certain other categories under the Common Nomenclature of MERCOSUR. The Ministry of Economy and Public Works and Services was authorized by Decree No. 389/95 to establish the appropriate exceptions in every case.

2.20 The purpose of Argentina's import tax was to recover the cost of the statistical service rendered in respect of Argentine import and export transactions. The first paragraph of the preamble of the Decree stated that "it was necessary to provide for the necessary tax collection to contribute to the financing of customs activities related to the registration, computing and data processing of export and import information, in order to rely upon Foreign Trade statistics in rapid and flexible form".<sup>23</sup> This service was not provided to importers on an individual basis, *i.e.* to the specific importer concerned by the relevant transaction on which the statistical tax was levied, but benefited foreign trade operators in general and foreign trade as an activity in itself. The service consisted in the recording of trade information, subsequent processing and publication, and distribution to the public in general. Argentina's customs administration registered the information relating to prices, quantities, description, quality and classification of the goods in the desegregated form required for purposes of control, valuation and assessment of the taxes. This information was standardized and transmitted to the National Statistical and Census Institute<sup>24</sup> of Argentina for purposes of analysis and subsequent processing, and a compilation of the information was published. At the same time, the basic data were also transmitted to the Departments of Agriculture, Mining, Fuel, Tourism, Transport and Industry and Trade, for analysis and processing. This exercise resulted in publications and statistical material which was made available to foreign trade operators.

2.21 The tax was bound in Argentina's Schedule LXIV under the heading "other duties and charges" at three per cent *ad valorem*.

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<sup>19</sup>*Boletín Oficial de la República Argentina*, No. 28.050 of 30 December 1994.

<sup>20</sup>Decree No. 2277/94 first preambular paragraph. The original in Spanish reads "*remover todos aquellos factores que puedan dificultar dicho proceso de apertura e integración económica*".

<sup>21</sup>*Ibid.*, third preambular paragraph. The original in Spanish reads: "*eliminarse todos aquellos factores que pueden dificultar la libre circulación de bienes*".

<sup>22</sup>*Ibid.*, fourth preambular paragraph. The original in Spanish reads "*neutralizar los efectos que, en el comercio exterior, puede producir la tasa de estadística [...] vigente en [Argentina]*".

<sup>23</sup>Decree No. 389/95, first preambular paragraph. The original in Spanish reads "*prever la recaudación necesaria para contribuir al financiamiento de las actividades aduaneras vinculadas con la registración, computo y sistematización de la información de importación y exportación, con el fin de contar con estadísticas de Comercio Exterior en forma ágil y rápida*".

<sup>24</sup>*Instituto Nacional de Estadísticas y Censos (INDEC)*.

### III. CLAIMS AND MAIN ARGUMENTS

3.1 The **United States** asked the Panel to find that:

- (a) Decree No. 998/95, Resolution No. 299/96, and Resolution No. 22/97, which imposed specific duties on textiles and apparel violated Articles II:1(a) and II:1(b) GATT 1994 and Article 7 ATC;
- (b) Decree No. 389/95, which applied a tax on imports, violated Article VIII GATT 1994 and Article 7 ATC; and
- (c) Decree No. 2275/94, Resolution No. 305/95, Decree No. 998/95, Resolution No. 103/96, and Resolution No. 23/97, which applied specific duties on footwear until February 1997, violated Articles II:1(a) and II:1(b) GATT 1994.

The United States also requested that the Panel include within its review "other measures which impose specific duties on various textile, apparel and footwear items in excess of the bound rate of 35 per cent *ad valorem* provided in Argentina's Schedule LXIV".<sup>25</sup>

3.2 Pursuant to Article 3.8 DSU, the United States further requested the Panel to conclude that the measures identified in (a) and (b) above nullified or impaired benefits accruing to the United States under the WTO Agreement and the measures identified in (c) nullified or impaired such benefits as well.

3.3 The United States requested that the Panel recommend that Argentina bring its measures into conformity with its obligations under GATT 1994 and the ATC.

3.4 **Argentina** asked the Panel to find that:

- (a) As a special preliminary ruling, there were no grounds for it to consider the question raised by the United States in connection with the application of minimum specific import duties to imports of footwear as the duties in question had been eliminated before the Panel was established;
- (b) The application of the specific duties in force, to the extent that they did not exceed the "*ad valorem* equivalent" of Argentina's bound rate of 35 per cent under the WTO Agreement, was not inconsistent with Argentina's obligations under Articles II:1(a) and II:1(b) GATT 1994 and Article 7 ATC;
- (c) The statistical tax applied by Argentina was consistent with Article VIII GATT 1994.

3.5 On the basis of the above, Argentina requested the Panel to reject the claim by the United States that the measures adopted by Argentina nullified or impaired benefits accruing to the United States.

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<sup>25</sup>WT/DS56/5.

**A. REQUESTS FOR PRELIMINARY RULINGS BY THE PANEL****1. REQUEST OF ARGENTINA FOR A SPECIAL PRELIMINARY RULING REGARDING THE INCLUSION OF THE MEASURES ON FOOTWEAR IN THE SUBMISSIONS OF THE UNITED STATES**

3.6 **Argentina** requested the Panel to issue a special preliminary ruling to the effect that there were no grounds for the Panel to examine the claims of the United States regarding an alleged violation of Article II as a result of the application of minimum specific import duties on imports of footwear. According to Argentina, the United States had asked the Panel to find that a measure was inconsistent in spite of the fact that it was no longer in effect at the time when the Panel was established. Argentina asked that its request be examined by the Panel before proceeding to address the question of substance as requested by the United States and continuing with the examination of the case.

**(a) Potentiality of a reintroduction of the DIEM on imports of footwear**

3.7 The **United States** argued that Argentina's revocation of the footwear specific duties during the dispute settlement process should not prevent the Panel from determining that the measures imposing them were contrary to Article II GATT 1994. Previous panels had reviewed the consistency with the GATT of measures no longer in effect.<sup>26</sup> Such review was especially appropriate in this case given that Argentina may impose the footwear specific duties again in the future.<sup>27</sup> The likelihood that Argentina would restore its footwear specific duties was indeed considerable. Argentina had repeatedly renewed them in the past, even after having received repeated objections from its trading partners. Argentina also may restore the footwear minimum specific import duties when the provisional measures that replaced them would have expired.

3.8 The United States added that, alternatively, Argentina might reinstate the footwear specific duties should a subsequent panel rule that its "safeguard" measures were improper. There were significant reasons to believe that such a result would occur. The Argentine "safeguard" rested on a weak foundation. The Argentine Ministry of Economy and Public Works and Services, in its technical report preceding the imposition of safeguard relief, had found that "critical circumstances would only have occurred if the Minimum Specific Duties had been eliminated".<sup>28</sup> Thus, Argentina had triggered the critical circumstances that were a prerequisite to imposing provisional safeguard relief by removing its own purportedly WTO-consistent duties. Not surprisingly, the Ministry of Economy and Public Works and Services further found that "injury might be attributable less to current imports than to consumption trends and industrial reorganization, which was major".<sup>29</sup> In reaching this conclusion, the Ministry had noted that importation of footwear had declined by 9 per cent in 1994, by 24 per cent in 1995 and by 21 per cent in the first six months of 1996.<sup>30</sup> Moreover, an Argentine administrative

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<sup>26</sup>The United States referred to the Panel Reports on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/R, para. 8.1; and *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49.

<sup>27</sup>The United States referred to the Panel Report on *United States - Prohibition on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91, para. 4.3, where the panel found that analysing a measure that had been disinvoked was proper where there was a threat of recurring action.

<sup>28</sup>The United States referred to: Argentina Ministry of Economy and Public Works and Services - National Commission for External Trade: Preliminary Analysis of Evidence of the Existence of Serious Injury and/or Threat of Serious Injury to Domestic Industry Owing to the Increase in Imports of Footwear, in Response to the Application for Safeguard Measures, CNCE Docket No. 75/96. Annexed to Act No. 266, at para. 12.

<sup>29</sup>*Ibid.*, para. 9.

<sup>30</sup>*Ibid.*, para. 8.

law judge had found Argentina's provisional safeguard duties on footwear to be improper and had suspended their operation.<sup>31</sup>

3.9 The United States equally recalled that the EC's third party submission also detailed the numerous inadequacies in the Argentine safeguard investigation. While the United States did not seek any finding by the Panel on the particular issues in the safeguards investigation, these facts were relevant for the purpose of demonstrating the possibility that Argentina could reinstate the footwear specific duties.

3.10 **Argentina** argued that the Panel had to be guided by the following considerations: the minimum specific import duties applied by Argentina pursuant to Resolution No. 1696/93 on certain items of footwear had been explicitly revoked by Resolution No. 225/97 of 14 February 1997. The WTO had been officially notified of the revocation.<sup>32</sup> Thus, the US claim pertained to the illegality of a measure which had been revoked prior to the establishment of this Panel and the adoption of its terms of reference.

3.11 Argentina contended that the United States' arguments related to the likelihood that Argentina would restore its specific duty regime on imports of footwear represented an effort to sustain facts through a reasoning based on a series of speculations. A safeguard investigation was under way. No definitive measures had been adopted. There had been no challenge under the DSU nor had any panel issued recommendations on the matter. Finally, if Argentina's intention had been to reintroduce the specific import duties on footwear, it would have suspended them rather than revoking them.

3.12 Argentina further argued that the decision to eliminate the DIEM applied to footwear imports had been taken in view of the fact that, in October 1996, the domestic industry had formally requested the application of a safeguard measure. The domestic industry also had provided proof and documentary evidence of the existence of injury caused by increased imports and the existence of critical circumstances, in accordance with the requirements of Decree No. 1059/96 establishing the Regulations concerning the WTO Agreement on Safeguards.<sup>33</sup> The National Foreign Trade Commission had made a preliminary determination of injury based on the absence of minimum specific import duties. The Argentine Government had decided to open an investigation and, at the same time, apply a provisional measure because critical circumstance existed and could have caused damage to the industry which could not have been repaired. The minimum specific import duties had been eliminated because it was illogical to apply safeguard measures in accordance with the provisions of the WTO Agreement and at the same time maintain the previous minimum specific import duties.

3.13 Argentina stated that the investigation concerning the application of a safeguard measure with respect to footwear was following its course. The National Commission for Foreign Trade had produced its report on injury which would be notified to the WTO in accordance with the Agreement on Safeguards. At the same time, the provisional safeguard measure had had its effects partially suspended by a precautionary measure ordered by a judge. Consequently, it was highly unlikely that the revoked measure would be reinstated as suggested by the United States.

3.14 Finally, Argentina replied that the order of the administrative judge to which the United States referred, relating to the provisional safeguard measure for footwear, was precautionary, applied to a specific case, was currently being appealed and had no *erga omnes* effect. There was nothing whatsoever to suggest that the DIEM might be reintroduced, even if a definitive safeguard measure was not applied or the precautionary measure ordered by a judge was confirmed by the court of appeal. Thus, the conditions mentioned by the United States itself to justify the analysis of the DIEM on footwear

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<sup>31</sup>The United States referred to case No. 8.447/97 *FILA (Argentina) S.A. et al. v. The National State - Ministry of Economy and Public Works and Utilities - Decree No. 226/97 - About the Proceedings* (suspensive order of the judiciary dated 4 June 1997).

<sup>32</sup>See documents WT/L/204, 25 February 1997 and WT/L/204 Add.1, 18 March 1997.

<sup>33</sup>*Boletín Oficial de la República Argentina*, No. 28.485 of 24 September 1996.

by the Panel did not exist. It would not be possible to reinstate the minimum specific import measures for the very reason given by the United States: if the court of appeal were to reject the provisional measure, it would make it absolutely clear for the Argentine Government and for all individuals that any attempt to reintroduce the specific duties would be automatically challenged in courts.

3.15 According to the **United States**, a review of the Argentine measures imposing footwear specific duties applied until February 1997 also was appropriate because of their close factual connection to the specific duties on textiles and apparel at issue. The footwear duties were part of a broader regime of minimum specific import duties. The measures imposing the footwear as well as the textile and apparel specific duties applied parallel provisions. In some instances, the footwear specific duties and the textile and apparel specific duties had been imposed through the same measure.<sup>34</sup> Moreover, the rationale for all of the specific duties was the same<sup>35</sup>, and the same GATT provisions applied to all. Accordingly, the United States requested the Panel to find that Argentina's specific duties on footwear violated Article II before they were revoked.

3.16 **Argentina** argued that the United States insisted on defining the regime applied to imports of textiles and footwear as a "common legal regime". Such a common legal regime did not exist, since the measures were prepared on the basis of differentiated analyses and formed part of different legal instruments, each one developed according to the characteristics of the market concerned. Even the measures applied, *i.e.* the DIEM, had to be adjusted to the needs of each tariff heading involved.

3.17 The **United States** claimed that Argentina had not attempted to rebut the connection established by the United States and the EC between the footwear specific duties and the almost identical duties established under the safeguard procedures.

3.18 **Argentina** replied that it had clearly shown that these two measures were completely different and separate from each other. The application of a provisional safeguard measure was not the result of an urgent need to give a measure a title in replacement of the DIEM. Even if this had been the case, Argentina would have been legally entitled to do so. In any case, from a legal point of view, it was neither possible nor reasonable to establish a connection between a measure applied under Article II of GATT 1994 and a measure applied under Article XIX, which was by definition an exception to Article II.

3.19 For Argentina, the continuous mention by the United States of the safeguard measure was a way of introducing through the back door a subject which had not been resolved and was not relevant to the context of this Panel. Although it had not gone to the EC's extreme of asking the Panel to rule on the subject, the United States was straying dangerously near to the edge by giving its opinion as to the legality of the safeguard measure while at the same time recognizing that the measure in question was not the subject of this proceeding, thus taking the same contradictory approach as the EC.

3.20 Argentina contended that if the United States had reasons to question the provisional safeguard measure applied by Argentina, it may do so in the appropriate Committee, and had indeed already done so. If the United States felt that any definitive measure that may be adopted would be questionable, it may discuss it in the appropriate forum.

**(b) Similarities of this case with previous cases**

3.21 **Argentina** argued that its request that the Panel determine that there were no grounds for it to examine the issue in question did not represent a new practice in the GATT/WTO system. There

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<sup>34</sup>The United States referred to Argentina's Presidential Decrees No. 2275/94 and No. 998/95.

<sup>35</sup>The United States referred to a letter of the National Director of Industry Affairs explaining the Argentine minimum specific import duties.

were numerous precedents in GATT 1947<sup>36</sup> and in the WTO dispute settlement system<sup>37</sup> in which a party had asked the panel to rule on whether or not an argument with respect to all or certain specific elements of a claim should be examined before considering the substance of the matter. In the case of *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, the request submitted by Brazil had led to a ruling by the panel which had preceded its conclusions, resolving the preliminary objection that had been raised.<sup>38</sup> In its report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, the Appellate Body had determined that:

"Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues".

Further on, the report stated that:

"Given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".<sup>39</sup>

3.22 As regards the precedents mentioned by the United States in support of its position,<sup>40</sup> Argentina contended that they referred to situations that were completely different from the one under consideration. In the first case, *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, the challenged measure was still in effect during the dispute. In fact, it had remained in force until the report was circulated. The present case was completely different in that the minimum specific import duties had already been revoked when the Panel had been established and its terms of reference adopted. As regards the case *United States - Prohibition on Imports of Tuna and Tuna Products from Canada*,<sup>41</sup> while the United States revoked the prohibition, not only did there remain in force a law permitting the reintroduction of the measure, but the United States also had informed Canada that it might be obliged to do so. Finally, in *EEC - Measures on Animal Feed Proteins*<sup>42</sup>, both parties to the dispute knew from the time the panel had been established that the measure was temporary, and indeed raised no objection to the establishment of the panel, knowing it would issue its conclusions when the measure was no longer in force.

3.23 Argentina noted that the report of the panel on *United States - Standards for Reformulated and Conventional Gasoline* had established that:

"The Panel observed that it has not been usual practice of a panel established under the General Agreement to rule on measures that, at the time the Panel's terms of reference were fixed, were not and would not become effective. In the 1978 Animal Feed Protein case, the Panel

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<sup>36</sup>Argentina referred to the Panel Reports on *United States - Measures Affecting Alcoholic and Malt Beverages*, adopted on 19 June 1992, BISD 39S/206 and *United States - Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil*, adopted on 19 June 1992, BISD 39S/128.

<sup>37</sup>Argentina referred to the Panel Reports on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/R, WT/DS10/R, WT/DS11/R, and *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997 WT/DS22/R.

<sup>38</sup>BISD 39S/128, para. 3.1 and para. 6.2.

<sup>39</sup>Appellate Body Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Op. Cit., pp. 18-19.

<sup>40</sup>See *inter alia*, footnotes 26 and 27, para. 3.7 above.

<sup>41</sup>Adopted on 22 February 1982, BISD 29S/91.

<sup>42</sup>Adopted on 14 March 1978, BISD 25S/49.

ruled on a discontinued measure, but one that had terminated after agreement on the Panel's terms of reference. In the 1980 Chile Apples case, the Panel ruled on a measure terminated before agreement on the Panel's terms of reference, however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction. In the present case the Panel's terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 per cent rule was a measure that, although currently not in force, was likely to be renewed [...] . The Panel did not therefore proceed to examine this aspect of the Gasoline Rule under Article I:1 of the General Agreement".<sup>43</sup>

3.24 Argentina stressed that in the case under consideration, there was no evidence whatsoever that the minimum specific import duties on footwear would be reintroduced. On the contrary, it was clear from Resolution No. 225/97 that the measures had been revoked and not temporarily suspended. Even if, hypothetically, it was considered to weigh up the 'probability that the measure would be reintroduced', the application for initiation of the safeguard investigation in the framework of the relevant Agreement had put such a possibility to rest.

3.25 The **United States** reaffirmed that in several instances previous panels had examined measures that were no longer in effect, including the panel reports on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, *EEC - Measures on Animal Feed Proteins*, and *United States - Prohibition on Imports of Tuna and Tuna Products from Canada* cited by Argentina. Argentina attempted to distinguish between these decisions by arguing, for example, that the footwear specific duties were outside the purview of this Panel because, unlike previous matters, the measures had been revoked prior to formation of the Panel. This point of differentiation ignored the fact that the footwear specific duties were in effect during the four rounds of consultations held between the parties in this dispute, and they were in effect at the time the United States made its first panel request. The measures were revoked only after Argentina delayed formation of this Panel for one month.

3.26 **Argentina** contended that, as the measures at issue had been revoked before the composition of the Panel, the fact that the minimum specific import duties on footwear had been discussed during the consultations was irrelevant when it came to deciding whether the Panel should examine a measure which did not exist.

3.27 The **United States** argued that the report of the panel on *United States - Standards for Reformulated and Conventional Gasoline*, on which Argentina principally relied, revealed the weakness of its argument. If that panel decided to refrain from examining a measure no longer in effect, it did so because the measure in question was not included in that panel's terms of reference and there was no chance of its recurrence. However, the passage from the panel report quoted by Argentina,<sup>44</sup> noted that the earlier cases in which panels had examined measures no longer in effect were factually dissimilar. Indeed, that passage stated "in the 1978 Animal Feed Protein case, the Panel ruled on a discontinued measure, but one that had terminated after agreement on the Panel's terms of reference. In the 1980 Chile Apples case, the Panel ruled on the measure terminated before agreement on the Panel's terms of reference, however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction".

3.28 The United States consequently underlined that the facts of this matter were quite similar to those present in the cases on *EEC - Measures on Animal Feed Proteins* and on *EEC - Restrictions on*

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<sup>43</sup>Panel Report on *United States - Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/R, para. 6.19.

<sup>44</sup>*Ibid.*, para. 6.19.



*Imports of Apples from Chile*<sup>45</sup> and unlike those of *United States - Standards for Reformulated and Conventional Gasoline*. The footwear specific import duties were explicitly listed in the Panel's terms of reference, and there was a considerable possibility that the measures would be resurrected.

3.29 The United States further argued that Argentina had sought to distinguish the case on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* by claiming that the United States had not withdrawn the measure until the report was circulated. This was incorrect. The United States withdrew the measure *before* the panel issued the final report to the parties and this fact was noted by the panel:

"We note that the United States [withdrew the measure] in a Federal Register Notice dated 4 December 1996. In the absence of an agreement between the parties to terminate the proceedings, we think that it is appropriate to issue our final report regarding the matter set out in the terms of reference of this Panel in order to comply with our mandate, as referred to in paragraph 1.3 of this report, notwithstanding the withdrawal of the U.S. restraint".<sup>46</sup>

3.30 The United States stressed that, as in this dispute, the panel's terms of reference in the report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India* permitted the panel to "comply with [its] mandate" notwithstanding that the measures had been withdrawn before the panel's decision. Similarly, the terms of reference of the panels in *United States - Prohibition on Imports of Tuna and Tuna Products*, and *EEC - Measures on Animal Feed Proteins* had provided panels with the mandate to rule on measures that had been withdrawn before each panel issued its determination.

3.31 The United States argued that the measures on footwear were part of the terms of reference, as outlined in document WT/DS56/6, dated 11 April 1997. This document referred to the panel request in document WT/DS56/5 which specifically stated that the United States was seeking review of the consistency of Argentina's specific duties on footwear with its WTO obligations. The request of the United States also outlined a number of measures such as Resolutions No. 305/95 and No. 103/96 which applied only to footwear. The United States had indicated in the panel request that the consultations had failed to settle the dispute as it related to Argentina's specific duties, including specific duties relating to footwear. Document WT/DS56/6 provided that the "parties [had] agreed to the standard terms of reference," which by definition incorporated the measures specified in the US panel request. Thus, while Argentina may maintain that the Panel should not review its specific duties on footwear, Argentina could not dispute that the terms of reference, as articulated in document WT/DS56/5, included the footwear specific duties.

3.32 **Argentina** acknowledged that the Panel's terms of reference contained in document WT/DS56/6 explicitly included "specific duties on footwear". The problem was whether the minimum specific import duties on footwear having been included in the terms of reference (as they formed part of the United States request) there was still merit in the Panel's considering them, inasmuch as these specific duties had already definitively ceased to exist at the time the Panel's terms of reference were adopted. There was no point in ruling on a question which, being non-existent, could in no way impair or affect the rights of WTO Members. Argentina did not dispute the content of the Panel's terms of reference, but the nature of the examination which the Panel would be obliged to carry out if it acceded to the United States' request. Indeed, the minimum specific import duties applied to footwear imports, mentioned in the Panel's terms of reference, were those which had been revoked by Resolution No. 225/97.

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<sup>45</sup>Adopted on 10 November 1980, BISD 27S/98.

<sup>46</sup>Panel Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses*, para. 6.2.

3.33 Argentina added that in the case on *United States - Standards for Reformulated and Conventional Gasoline*, the measure questioned had been revoked before the adoption of the terms of reference and there was nothing to indicate that it was to be reintroduced. The same was true of the present case. In *EEC - Measures on Animal Feed Proteins*, it was a question of a measure abolished after the adoption of the terms of reference. In the case on *EEC - Restrictions on Imports of Apples from Chile*, the measure was a seasonal one which might obviously be reintroduced. The present Panel was completely different from the two previous ones mentioned above, since the United States was objecting to a measure which simply did not exist at the time the Panel had been established and its terms of reference defined.

3.34 Argentina noted that the United States had dismissed Argentina's comments on the background to the *EEC - Measures on Animal Feed Proteins*, *United States - Prohibition on Imports of Tuna and Tuna Products* and *EEC - Restrictions on Imports of Apples from Chile* cases claiming that they were technical points with little meaning. The Panel could not regard as a technical point with little meaning a note such as that which the United States had sent Canada in the second case mentioned above threatening to reintroduce the measure if the Canadian Navy were to seize a vessel.<sup>47</sup> Nor could one attribute "little meaning" to the fact that the United States informed the panel in the same case of its readiness to continue collaborating with the panel and, secondly, requested the latter to make a ruling justifying the United States measure on the basis of Article XX(g) of GATT.<sup>48</sup> In this case, Argentina was not trying to justify a particular measure, since there simply *was no measure*.

(c) **Effect of precedent of the request of the United States**

3.35 **Argentina** argued that the US request was not only contrary to the provisions of the WTO, but it also suggested that panels should rule on hypothetical cases, a dangerous evolution for the WTO system. It would encourage panels and the Appellate Body to legislate whereas Article IX:2 of the Marrakesh Agreement Establishing the World Trade Organization ("WTO Agreement"), attributed this task exclusively to the Members of the WTO through the Ministerial Conference and the General Council. This would also be contrary to GATT practice under Article XXV.<sup>49</sup>

3.36 Argentina argued that, pursuant to Article 3.7 DSU, parties should endeavour to reach mutual agreement, failing which the issue could be submitted to a panel which could recommend the withdrawal of the illegal measure. In the case under consideration, there could be no mutual agreement between the parties on the minimum specific import duties applied to footwear since they were no longer in effect, nor could there be any recommendation to withdraw a measure that did not exist. In other words, proceedings could not be initiated without a specific subject of dispute to which they could apply. The WTO Agreement in general, and the dispute settlement system in particular, rested on the principle of considering measures actually in force. Thus, the idea of panels ruling *in abstracto* or merely on the basis of allegations as to what might be expected was entirely inappropriate. That a panel could rule in respect of a hypothetical case when the minimum requirement for a recommendation was that it should pertain to a measure that was in force would leave Article 19.1 DSU meaningless.<sup>50</sup>

3.37 Argentina also noted that the United States had recently expressed its opposition to *in abstracto* rulings by panels or the Appellate Body. On the occasion of the adoption by the DSB of the Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, the United

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<sup>47</sup>BISD 29S/91, para. 2.12.

<sup>48</sup>Ibid., para. 3.25.

<sup>49</sup>Argentina referred to Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System*, Kluwer Law International, (1997), at pp. 75-76: "[u]nlike generally binding authoritative interpretations of GATT rules adopted by the Contracting Parties pursuant to Article XXV, the legally binding effect of dispute settlement rulings [...] is [...] limited".

<sup>50</sup>Argentina noted that Article 19.1 DSU stipulated that "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement" (emphasis supplied by Argentina).

States had declared that the Appellate Body had stated that "we do not consider that Article 3.2 of the DSU is meant to encourage either the panel or the Appellate Body to "make law" by clarifying existing provisions of the WTO Agreements outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".<sup>51</sup>

3.38 Argentina was concerned by the effect on the multilateral trading system of a decision by a panel to receive complaints such as the one lodged by the United States, as Members, if this became an accepted practice, could contemplate the possibility of resorting to the dispute settlement system in order to make sure that laws abolished for a long time would not be reintroduced. A failure to rule adequately on the Argentine request for a preliminary ruling also would open up the possibility of disputes being initiated under the dispute settlement system as a means of obtaining "an anticipatory precautionary measure", that is to say, using the DSU to prevent the implementation of a measure which a Member thought might injure it in the future.

3.39 The **United States** replied that contrary to Argentina's argument, it was not asking the Panel to "legislate" or to address an "abstract" question, but rather to review particular measures that Argentina had maintained until just days before the formation of the Panel, that were specifically included in the Panel's terms of reference and that may well be resurrected in the event Argentina's safeguard measures on footwear were terminated.

3.40 The United States argued that, like Argentina, it believed that panels had to approach the issue of withdrawn measures with caution. The test articulated by the panel in the case on *United States - Standards for Reformulated and Conventional Gasoline* (*i.e.* whether the measure was part of the terms of reference of the panel, and whether there was the possibility of its reintroduction) provided the necessary safeguard.

3.41 For the United States, the Panel had to bear in mind the negative effects on the functioning of the WTO dispute settlement if Members were permitted to evade panel review of WTO-illegal measures by simply withdrawing one type of measure and introducing another. If the test advocated by Argentina, *i.e.* no examination of any withdrawn measure by any panel, was used then Members may be inclined to introduce slightly revised measures to avoid panel review. If the Panel were to agree with Argentina, Members trying to escape WTO review would be able to delay the establishment of a panel indefinitely by withdrawing one measure and imposing another in its place. Pursuant to Argentina's theory, the new measure would mandate additional consultations under Article 4 DSU and the resetting of at least a 90-day period of time before a panel could be established. Argentina's position, therefore, was not only inconsistent with prior practice, it also would subvert the ability of the DSB to solve trade problems. The Panel should advance the objectives of the DSB and take care to refrain from unduly restricting the scope of its review.

3.42 **Argentina** argued that all WTO Members came under pressure from their domestic industries to resort to the dispute settlement system as soon as those industries considered themselves to have a problem. Although it was essential that every Member should be fully entitled to resort to the dispute settlement procedure, it was no less important to emphasize that the *system* had an obligation to close the door against possible abuse. Doing otherwise would give domestic industries an enormous incentive to demand from their authorities the establishment of panels with a view simply to confirming that another Member country or other Member countries would continue to fulfil their obligations as in the past. In other words, a panel could not be required to rule that Argentina should not re-establish specific duties which were not part of its legislation. To take the opposite view would be to question a fundamental principle of international law pursuant to which *pacta sunt servanda*. This would also

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<sup>51</sup>Argentina quoted from the statement by the United States to the Dispute Settlement Body on 23 May 1997 on the occasion of the adoption of the reports in case WT/DS33. See WT/DSB/M/33, p. 11.

raise uncertainty and speculation which, taken to the limit, might result in the collapse of the dispute settlement system.

3.43 Argentina noted that such elements were present in this case and Argentina's legitimate decision to initiate a safeguard investigation for footwear and its application of a provisional measure had led ultimately to the United States initiating a panel concerning the application of specific duties in another sector, that of textiles and clothing. As a way of responding to the complaint of the footwear manufacturers and given the legal impossibility of challenging directly a safeguard in process of investigation, the United States was trying to reach it indirectly. As a result, the Panel was faced with a theoretical case in which it has been clearly shown that there were no actual transactions involved. The question raised by the United States before the Panel masked the real issue: the Argentine decision to revoke the minimum specific import duties on footwear and subsequently to initiate an investigation at the request of the industry in that sector.

3.44 Argentina further contended that the EC's third-party submission and its oral submission were centred almost entirely on the specific footwear duties and even included a request for the Panel to rule on the safeguard measure, which not even the United States had suggested.

3.45 According to Argentina, all this demonstrated the need for the Panel to accede to Argentina's request that it made a special preliminary ruling to the effect that there was no grounds for it to express an opinion on the specific footwear duties since those duties had been definitively revoked before the Panel was established.

3.46 Argentina stated that the assertion that recourse to a safeguard measure today could mean recourse to Article XX or another article tomorrow, was also unacceptable. Not only was this not Argentina's intention, but it could not even be considered as a possibility. This would be tantamount to say that WTO Members could not make use of their rights under the different provisions of GATT 1994 and the WTO Agreement.

3.47 Argentina argued that the Panel was faced with a task that extended far beyond the particular case at issue, since its conclusions could clearly affect the proper functioning of the WTO dispute settlement system. In order to avoid using the DSU abusively, it was essential that the Panel should redirect this case, taking a decision on the special preliminary ruling requested by Argentina at the appropriate time.

## **2. REQUEST BY ARGENTINA FOR A RULING OF THE PANEL REGARDING THE SUBMISSION OF CERTAIN EVIDENCE BY THE UNITED STATES**

3.48 On 21 July 1997, the **United States** submitted to the Panel two exhibits that it intended to present at its second substantive meeting on 23 July 1997. The first exhibit was presented as a summary of a number of industry-supplied examples of export shipments to Argentina which had been assessed duties in excess of 35 per cent *ad valorem*. The second exhibit contained copies of 95 pages of Argentine customs documents which reflected the application of the specific duties summarized in the exhibit previously mentioned. The United States mentioned that these documents had been submitted at that time in order to provide both the Panel and Argentina with the opportunity to review them prior to the second meeting of the Panel.

3.49 **Argentina** requested the Panel to disregard the evidence submitted by the United States as untimely. The United States had resorted to an extemporaneous submission inconsistent with the sequence of time-limits laid down in the DSU and ultimately intended to maintain, at each stage of the Panel procedure, the required balance between the parties.

3.50 The **United States** specified that it had produced new documents to contradict the claims of Argentina. For example, the evidence at issue contradicted Argentina's claims that the United States allegedly had no proof of duties being assessed over 35 per cent *ad valorem*. For the United States, the Panel should encourage the use of formal evidence such as those submitted by the United States as opposed to simply accepting oral denials and mere allegations of facts. The submission of new documents was a natural process in a dispute. Were a panel to prevent the submission of new documents during its second substantive meeting with the parties, this would inhibit the truth-testing process and prohibit a party from contradicting statements made at the last minute by the other party.

## **B. VIOLATION OF ARTICLE II IN RELATION TO THE IMPLEMENTATION OF ARGENTINA'S SCHEDULE LXIV**

### **1. INTRODUCTION**

3.51 The **United States** argued that, during the Uruguay Round, Argentina had agreed to a maximum bound rate of 35 per cent *ad valorem* on imports of textiles, apparel and footwear. However, Argentina imposed minimum specific import duties on hundreds of categories of these products. The specific duties often amounted to more than 35 per cent of the actual value of affected goods. On the eve of formation of a panel in this dispute, Argentina had eliminated its specific duties on footwear, replacing them with specific duties presented as "provisional safeguard" measures. However, Argentina's specific duties on textiles and apparel remained in effect.

3.52 The United States contended that in imposing minimum specific import duties on textiles, apparel and footwear, Argentina had violated Article II of GATT 1994. Even if the specific duties, as applied, did not exceed 35 per cent *ad valorem*, they still violated Article II. Each of Argentina's specific duties had the *potential* to exceed 35 per cent *ad valorem* with respect to some imports. Argentina also violated Article II by exceeding its bound tariff rate and failing to apply only *ad valorem* duties in accordance with its Schedule.

3.53 **Argentina** argued that the application of minimum specific import duties did not and could not violate Article II. The relevant laws in Argentina precluded any effective or potential violation of the 35 per cent *ad valorem* bound rate by the minimum specific import duties. This was so because the payment of a duty could not be taken in isolation from the other rights and obligations accorded under national law to all the parties involved in an import transaction. No-one was obliged to pay more than the 35 per cent bound *ad valorem* rate, since there was a legal remedy available to challenge any amount that the authority may attempt to levy in excess of the legal commitments of Argentina.

3.54 This sub-section firstly addresses the arguments of the parties on the general notion of "predictability" of tariffs. It then includes successively the arguments of the parties regarding the alleged violation of Article II through: the application of minimum specific import duties when Argentina's Schedule allegedly refers only to *ad valorem* duties; the potential effects of the application of minimum specific duties and the situations where the 35 per cent *ad valorem* bound rate is allegedly exceeded. It also addresses the general issue of the burden of proof. The discussion of the arguments of Argentina related to the constitutional ranking of the WTO Agreements in the Argentine legal order and the existence of a *recurso de impugnación* (challenge procedure) is developed in the second part of this sub-section, even though arguments related to these aspects may appear briefly in the first part.

### **2. GENERAL REMARKS ON THE NOTION OF "PREDICTABILITY" OF TARIFFS**

3.55 The **United States** submitted that Article II offered "predictability" to WTO Members and their traders by establishing upper limits on the imposition of tariffs. It did so in two ways. Firstly, Article II:1(b) made clear that bound tariff rates were maximum rates: products described in a Member's

Schedule "shall [...] be exempt from ordinary custom duties in excess of those set forth and provided therein". This provision guaranteed that tariffs levied by WTO Members would be no more than the maximum rate stipulated in the relevant Schedule. Secondly, Article II reinforced this guarantee by stating that "[e]ach contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule". Pursuant to this language, Members were forbidden to manipulate the administration of their duties so as to collect excessive duties through indirect means. Article II's proscription against levying duties in excess of a bound rate was unqualified. It was a guarantee that was not altered by the whims of the market, regardless of fluctuations in trade flows or prices. Through their Schedules, WTO Members in effect provided one another with an assurance that whatever duties were assessed at their borders would not and could not be more than the applicable bound rate. That was the central purpose underlying Article II and that was the "predictability" the article provided.

3.56 In relation to this, the United States referred to previous panel reports. The report of the panel on *European Communities - Import Regime on Bananas* had concluded that:

"in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade".<sup>52</sup>

3.57 It also referred to the report of the *Panel on Newsprint*, which stated that:

"[it] shared the view expressed before it relating to the fundamental importance to the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement".<sup>53</sup>

3.58 For the United States, Argentina's specific duties did not offer such "predictability". By their nature, Argentina's specific duties necessarily had the potential to exceed 35 per cent *ad valorem* for some products, especially low-price items. The United States supported this by making a description of how each of Argentina's more than 600 categories of specific duties had a "Break-Even Price" - i.e., a value below which all items were subject to duties greater than 35 per cent *ad valorem*. Whether an item imported into Argentina was below the "Break-Even Price" turned on market factors - i.e., whether goods of certain values would be imported - which were beyond Argentina's control. Given this situation, Argentina's trading partners had no way of knowing if Argentina would meet the obligations it assumed under its binding. The "unpredictable" nature of this regime was compounded by the fact that the fixed-rate specific duties remained constant while imports and their prices changed. A specific duty for a given article might be within the bound rate at one moment, but exceed it later. Argentina, therefore, was unable to provide fellow WTO Members with the essential assurance that Article II demanded: that its duties would not exceed the relevant bound rate for all covered imports.

3.59 According to the United States, Argentina had conceded that its specific duties - as applied at the border - could exceed 35 per cent in relation to some items. In the view of the United States, Argentina also did not appear to dispute the notion that it had to maintain duties that could not exceed the applicable bound rate. However, the United States recalled that Argentina had explained that it believed its regime was consistent with Article II because it maintained "challenge procedures" to reduce any overcharges. For the United States, this surely could not be the security and "predictability" in tariff rates that other WTO Members thought they had received from Argentina in the Uruguay Round.

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<sup>52</sup>DS38/R, 11 February 1994, unadopted, para. 135.

<sup>53</sup>Adopted on 20 November 1984, BISD 31S/114, para. 52.

Argentina's trading partners had the right to expect that Argentina would impose only those duties which in form and amount were not capable of exceeding 35 per cent *ad valorem*.

3.60 **Argentina** replied that in the case under consideration, the definition of predictability in the context of Article II stemmed from the effective implementation of the tariff concessions negotiated whose value was expressed in the respective national Schedules. It pointed out that what this Panel was examining was not the "unpredictable" nature of the specific duties, which could vary in accordance with the value of the goods, but whether or not the bound *ad valorem* level had been violated.

3.61 Argentina believed that its regime ensured predictability firstly because its Schedule bound the entire tariff. This commitment entered into by the Argentine Government during the Uruguay Round had been ratified by the Argentine Congress and had constitutional status in accordance with Article 75.22 of the Argentine Constitution. This feature of Argentina's constitutional system endowed Schedule LXIV with an absolute level of predictability. Any infringement would open the way, through a summary proceeding, to obtain a judicial decision obliging the Argentine Government to comply with international obligations deriving from WTO agreements, over and above any domestic norms, such as laws, decrees, ministerial resolutions, or others. On the other hand, the tariff applicable was well known and transparent. Furthermore, with very few exceptions, it could not be changed unilaterally by Argentina, any changes having to be agreed with the other members of MERCOSUR. This restricted the freedom of action of each of the parties to that treaty, thereby adding a further safety factor.

### 3. **IMPOSITION OF SPECIFIC DUTIES INSTEAD OF AD VALOREM DUTIES**

3.62 The **United States** considered that Article II of GATT 1994 prohibited WTO Members from exceeding their bound tariff rates and according treatment less favourable than the terms stipulated in Schedules. This conclusion was supported by a consistent line of prior GATT decisions which had found that the imposition of specific duties was impermissible when *ad valorem* duties had been promised. These decisions indicated that such a regime violated Article II:1(a) GATT 1994, which provided that WTO Members had to accord to other Members "treatment no less favourable than that provided for [...] in the appropriate Schedule", and Article II:1(b), which provided that imported goods from WTO Members had to be "exempt from ordinary customs duties in excess of" the applicable bound rate. In this light, prior GATT bodies had found that the imposition of specific duties was impermissible when the pertinent schedule provided for *ad valorem* tariffs.

3.63 For the United States, this was so, at least in part, because use of one form of duty instead of the other carried with it the potential to break a binding. As the panel on *EEC - Import Regime on Bananas* explained:

"The Panel considered that the actual levying of a duty in excess of the bound rate clearly constituted a treatment of bananas less favourable than that provided for in the EEC's Schedule of Concessions. The Panel then proceeded to examine whether also the **mere possibility** that the specific tariff rate applied by the EEC might be higher than the corresponding bound *ad valorem* rate, rendered it inconsistent with Article II. *The Panel recalled the importance of security and predictability in the application of tariffs bindings. It noted that previous panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition.* The CONTRACTING PARTIES had consistently found that a change from a bound specific to an *ad valorem* rate was a modification of the concession [...] *The Panel [...] concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized*

*by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade".*<sup>54</sup>

3.64 The United States added that, for these reasons, it had long been recognized in the GATT that converting bound duties from *ad valorem* to specific, or *vice versa*, violated Article II and that such a change was permissible only through renegotiation under Article XXVIII.<sup>55</sup> As early as 1955, a GATT working party had addressed a regime of minimum specific duties akin to those imposed by Argentina.<sup>56</sup> In that case, Austria's Schedule allowed it to "change the specific into *ad valorem* rates". The Austrian Government, however, "felt that it would not be impairing the value of the concessions if it retained beside the *ad valorem* duty the old specific rate as a minimum rate". The working party disagreed, finding "that such changes would constitute modification of Austria's obligations and that it could not recommend their acceptance as rectifications. Such modifications could only be inserted in a protocol of rectifications and modifications after negotiations authorized by the CONTRACTING PARTIES in accordance with the proper procedures". Austria accepted the decision of the working party.<sup>57</sup>

3.65 In the opinion of the United States, subsequent decisions had found this reasoning compelling. In fact, all GATT bodies that had addressed the question - regardless of whether it was the imposition of specific or *ad valorem* duties that was objected to - had likewise determined that the application of an alternative mode of tariff was impermissible when the other form of duty was bound. Reviewing this history, the *Panel on Newsprint* explained that "under long-standing GATT practice, even purely formal changes in the Schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific duty to an *ad valorem* duty without an increase in the protective effect of the tariff rate in question, had been considered to require negotiations".<sup>58</sup> The *Panel on Newsprint* found that the EC was not permitted to reduce the metric tonnage eligible for duty free treatment under a bound tariff rate quota ("TRQ") to take into account the merger into the EC of three nations that formerly had been the principal beneficiaries of the TRQ. In reaching this conclusion, the panel stated that it "shared the view expressed before it relating to the fundamental importance to *the security and predictability of GATT tariff bindings*, a principle which constitutes a central obligation in the system of the General Agreement".<sup>59</sup>

3.66 **Argentina** noted that the United States had expressed "concern" over the imposition of specific duties, but its main line of argument attacked the right question, namely ensuring that the bound level could not be violated. In this respect, the United States itself recognized that the problem did not lie with the conversion of specific into *ad valorem* duties or *vice versa*. Argentina noted that the United

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<sup>54</sup>DS38/R, Op. Cit., para. 135 (emphasis added by the United States).

<sup>55</sup>The United States referred to the Report of the Ninth Session Working Party on Schedules on *Transposition of Schedule XXXVII (Turkey)*, L/294, adopted on 20 December 1954, BISD 3S/127, which mentioned, at paras. 3-4, that "no provision in the General Agreement [...] authorizes a contracting party to alter the structure of bound rates of duty from a specific to an *ad valorem* basis. [...] The obligations of contracting parties are established by the rates of duty appearing in the schedules and any change in the rate such as a change from a specific to an *ad valorem* duty could in some circumstances adversely affect the value of the concessions to other contracting parties. Consequently, any conversion of specific into *ad valorem* rates of duty can be made only under some procedure for the modification of concessions".

<sup>56</sup>The United States referred to the Working Party Report on *Fourth Protocol of Rectifications and Modifications*, adopted on 3 March 1955, BISD 3S/130. (hereafter also the Working Party on Austria)

<sup>57</sup>The United States referred also to the Working Party Report on *Rectifications and Modifications of Schedules*, adopted on 24 October 1953, BISD 2S/63, para. 8, where the working party reviewed a proposal by Greece to "introduce a minimum *ad valorem* rate for certain specific rates and came to the conclusion that such changes could not be considered rectifications [...] It decided therefore to refer the question to the CONTRACTING PARTIES so that such changes could form the object of consultations and negotiations [...]". In addition, the United States referred to John H. Jackson, *World Trade and the Law of GATT*, Bobbs-Merrill Co. (1969), which mentioned at p. 215 that "the introduction of a minimum specific rate where the Schedule rate is only *ad valorem* is not permitted under GATT without going through these special renegotiation procedures".

<sup>58</sup>Op. Cit., para. 50.

<sup>59</sup>*Ibid.*, para. 52 (emphasis added by the United States).



States had acknowledged that an *ad valorem* tariff could also violate a binding. The question was whether there were any guarantees that, whatever form the tariff took, the bound level would not be exceeded.

3.67 In Argentina's view, it was quite inaccurate to state that *ad valorem* duties were converted into specific duties. No such conversion was possible, since the specific duties were already in effect. Argentina had bound a maximum *ad valorem* "ceiling" of 35 per cent for all tariff headings, including the sector under consideration. Argentina had applied minimum specific duties to textiles and clothing since the adoption of Resolution No. 811/93 of the Ministry of Economy and Public Works and Services, dated 29 July 1993, in other words since before the conclusion of the Uruguay Round. Argentina's Schedule LXIV was approved as part of Law 24.425, which gave effect to all the WTO Agreement in Argentina as from 1 January 1995. Schedule LXIV bound tariffs at a maximum ceiling of 35 per cent *ad valorem*, with the exception of certain tariff headings bound below this level as a result of the Kennedy, Tokyo and Uruguay Rounds. The fact that Argentina continued to apply minimum specific import duties to textiles and clothing was not inconsistent with its commitments under the Uruguay Round in so far as the bound *ad valorem* level was not exceeded. As to how a WTO Member could be aware of Argentina's intention to keep its practice of using specific duties within the maximum *ad valorem* ceiling, Argentina said that it had submitted its tariff to the Committee on Market Access. In addition, it had formally notified the tariff within the context of MERCOSUR, a notification which, in itself, ensured the total transparency of the tariff levels applicable. Moreover, it was well known that during the Uruguay Round negotiations Argentina was applying minimum specific import duties on textiles. In this connection, at the close of the Uruguay Round the United States and the EC bilaterally threatened not to accept the Argentine Schedule if the minimum specific import duties were not removed. In these circumstances, Argentina had replied that the minimum specific import duty regime would not be changed.

3.68 Argentina rejected the argument based on the alleged conversion of *ad valorem* import duties into specific duties because the precedents cited by the United States were not applicable to this case. Firstly, none of the mentioned precedents pointed to a conversion of *ad valorem* duties into specific duties. In the case of the *Working Party on Austria*, Austria wanted to retain the specific duty as a minimum without being able to give an assurance that the specific duty would not exceed the bound *ad valorem* rate. The present case was radically different inasmuch as the Argentine minimum specific import duties operated as a minimum only to the extent that it did not exceed the bound 35 per cent *ad valorem* rate. In the instance addressed by the *Working Party on Austria*, it was a question of binding tariff rates for certain specified tariff headings. By contrast, in the present case it was a question of binding a maximum tariff ceiling of 35 per cent *ad valorem* for the entire universe of goods, with the exception of certain headings bound at lower levels, and the maintenance of pre-existing specific duties for particular sectors calculated so as not to exceed the bound level.

3.69 Argentina also contended that the GATT 1947 practice cited by the United States was not relevant as precedent to the present case for the following reasons. The case on *Transposition of Schedule XXXVII (Turkey)*<sup>60</sup> showed diverging conclusions reached by a working party concerning the transformation of a specific into an *ad valorem* duty. That case was qualitatively different because the working party stated that "a change from a specific to an *ad valorem* duty could in some circumstances [...] affect the value of the concessions [...] Consequently, any conversion [...] can be made only under some procedure for the modification of concessions".<sup>61</sup> The working party's statement mentioned "some circumstances" applicable to the specific case (that of Turkey). No conclusion should therefore be drawn from it and applied *erga omnes* to all cases that may entail the conversion of specific duties to *ad valorem* duties. The working party report did not contain unanimous viewpoints. Quite to the contrary, various members expressed disagreement with the above-cited conclusion. The representative

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<sup>60</sup>This case was referred to by the United States in footnote 55 above.

<sup>61</sup>BISD 3S/127, para. 4.

of Brazil said "the conversion of specific duties to *ad valorem* duties does not affect the value of negotiated concessions and in most cases nothing more is involved than a simple arithmetic calculation. Except in cases where such calculation cannot be made, in its opinion such conversions are merely a matter of form and should not require special authority".<sup>62</sup> On the same occasion Austria stated that "the recommendation which is based on exceptional circumstances could not be considered as a precedent for other proposals relating to the conversion of specific duties into *ad valorem* duties".<sup>63</sup>

3.70 For Argentina, some other precedents mentioned by the United States were no more than incidental to the topic of changing one type of duty into another, considering that the matter in dispute did not concern the possible conversion of *ad valorem* duties into their equivalent specific duty as in the present case. Strictly speaking, they merely addressed the possibility of less-favourable treatment. Hence, in the *Panel on Newsprint*, the complaint by Canada questioned the "unilateral EEC decision to implement a duty-free tariff quota of 500,000 tonnes for 1984, which impaired its GATT binding to open a tariff quota of 1.5 million tonnes".<sup>64</sup> This "tariff quota less than the amount bound in its Schedule invalidated the principle of the security and predictability of access".<sup>65</sup> In this case, the panel had found that "although in the formal sense the EC had not modified its GATT concession, it had in fact changed its GATT commitment unilaterally".<sup>66</sup> This seemingly contradictory line of reasoning refocused the discussion on what was the crux of the matter: the value of the concession and not its form. The panel recognized that while the EC did not fail to comply with a particular formal obligation, its action changed the value of the negotiated concession. This therefore justified the EC "engaging in renegotiations under Article XXVIII".<sup>67</sup> In this case the panel did not object to the formal procedure, but to the change in the value of the concession. It was this *de facto* situation that triggered the negotiating procedure and which the panel believed should be handled through the negotiation process provided for in Article XXVIII. The statement that "even purely formal changes [...] without an increase in the protective effect [...] have been considered to require negotiations" did not in itself represent a finding. This observation had no practical impact on the panel's conclusion, which was based on a substantive consideration as to the value of what had been negotiated. Consequently, the findings of the panel referred to a modification of the value of the concession and not to the legal implications of formal changes in the Schedules. In Argentina's opinion, the statement quoted by the United States "Under long standing [...] require negotiations" was not a finding of the Panel but an *obiter dictum*, an opinion expressed incidently in delivering a judgement which did not constitute one of its essential elements.

3.71 For Argentina, the only case that bore a certain resemblance with the present situation was that on *EEC - Import Regime for Bananas*, but the corresponding report had not been adopted. Moreover, even in the hypothetical case of a transfer (and this did not apply to the case at issue), this would not be enough to constitute a violation of the commitments assumed with respect to bound import duties, since Argentina had a legal mechanism to ensure that the bound level of 35 per cent was not exceeded. This was the challenge procedure laid down in the Argentine Customs Code, the existence of which put at rest the United States assertions with respect to the security and predictability of tariff bindings as well as to potential effect on, or expectations of, market access by trade partners.

3.72 Argentina contended that the case in question was quite similar but certainly not identical, for the following reasons. The United States quoted paragraph 134 of the report of the panel on *EEC - Import Regime for Bananas*, and underlined the general obligation arising from Article II to accord ... "treatment no less favourable than that provided for in the [...] Schedule". The quotation then

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<sup>62</sup>BISD 3S/127, para. 6.

<sup>63</sup>Ibid.

<sup>64</sup>BISD 31S/114, para. 14.

<sup>65</sup>Ibid., para. 17.

<sup>66</sup>Ibid., para. 50.

<sup>67</sup>Ibid., para. 54.

described the panel's analysis of the EC mechanism whereby the effective *ad valorem* duty depended on the value of the bananas, while the specific duties depended on their weight. On that basis and in regard to the two categories of specific duties under consideration, the panel considered that in one case, that of the specific duty of 850 ECUs per ton, they clearly violated the 20 per cent Community binding and in the other (the case of the specific duty of 100 ECUs per ton), the EC had neither argued nor submitted any evidence that this duty could never exceed 20 per cent *ad valorem*. In consequence, the panel found that the specific duties had in fact violated the binding.

3.73 For Argentina, the conclusions revealed significant qualitative differences between the case of the EEC import regime for bananas and the present case. To begin with, the Argentine minimum specific import duties had been calculated so as not to exceed the tariff ceiling of 35 per cent. This was explained in detail by Argentina in its analysis of the theoretical and practical examples of alleged violations of the tariff bindings submitted by the United States to the Panel.<sup>68</sup>

3.74 Argentina pointed out that contrary to the United States assertion, the panel on *EEC - Import Regime for Bananas* did not base its conclusions on the modification of the way in which the tariff was calculated, but on the fact that the EC could not guarantee that this specific duty would never exceed the bound level. This situation was entirely different from the one under consideration. Under Law No. 22.415, by means of the "challenge procedure", Argentine legislation fully guaranteed that the level of the tariff binding could never be exceeded.

3.75 Finally, Argentina formulated two observations regarding the legal value of that case. Firstly, that report was an unadopted panel report. The value of such reports as legal precedents within the GATT/WTO framework was minimal. Indeed, as stated by the panel on *Japan - Taxes on Alcoholic Beverages*, cited by the Appellate Body in the same case, they "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members".<sup>69</sup> Secondly, the possibility that it may provide "useful guidance" was contingent upon whether the precedent was "relevant" to the matter under examination.<sup>70</sup>

3.76 Furthermore, Argentina recalled that the limited scope of panel reports was accepted and unquestioned practice under GATT and had been reaffirmed by the WTO. The doctrine was clear in this regard: "The adoption by the Contracting Parties [...] of a dispute settlement report is regarded in GATT practice as a "ruling" and authoritative determination of existing GATT rights and obligations of the disputants in the instant case".<sup>71</sup> The provisions of the General Agreement, in particular of Article XXIII, may not be used to change the obligations deriving from the Agreement. "Article XXIII [...] should not be used in such a manner as to effectively impose positive obligations on GATT members that are not contained in the Agreement".<sup>72</sup> This was particularly applicable when the conclusions of a panel had been questioned by some of its members and other contracting parties had expressed disagreement at their adoption.

3.77 For the **United States**, the decisions of prior GATT bodies had determined that the imposition of specific duties was impermissible where *ad valorem* tariffs had been promised.<sup>73</sup> Argentina had not and could not find a meaningful basis to distinguish the reasoning underlying these earlier decisions

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<sup>68</sup>See discussion in sub-sections B.4 and 5.

<sup>69</sup>WT/DS8/AB/R, DS10/AB/R, DS11/AD/R, pp. 14-15.

<sup>70</sup>Ibid.

<sup>71</sup>Ernst-Ulrich Petersmann, The GATT/WTO Dispute Settlement System, Kluwer Law International Limited (1997) p.75.

<sup>72</sup>Par Hallstrom, The GATT Panels and the Formation of International Trade Law, Juristförlaget (1994), p. 156 (citing John H. Jackson).

<sup>73</sup>The United States referred in particular to the Panel Reports on *EEC - Import Regime for Bananas* and *Panel on Newsprint*, Op. Cit.

from the present dispute. Argentina essentially had asked the Panel to overlook a firmly established principle of GATT jurisprudence, a tenet that had guided GATT Contracting Parties and WTO Members since the earliest days of the General Agreement.

3.78 The United States argued that Argentina attacked these decisions on alternate grounds. In particular, Argentina pointed out that the report of the panel on *EEC - Import Regime for Bananas* had not been adopted. This was true, but the United States noted that the Appellate Body had indicated that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant".<sup>74</sup>

3.79 **Argentina** contended that Article II:1(b) GATT 1994 did not impose the application of a particular type of tariff but laid down the obligation that "ordinary customs duties" could not exceed "those set forth and provided" in the Schedule. If the text of Article II:1(b) had sought to define the scope of the concept of "customs duties" (limiting the options in terms of the type of tariff to be applied), the contracting parties would have specified this in due course or when negotiating the text of the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.

3.80 Therefore, according to Argentina, one had to determine whether or not there was an obligation deriving from GATT 1994 which prohibited a Member from applying a specific duty rather than an *ad valorem* duty providing it did not exceed the bound rate. The key concept in Article II was *treatment no less favourable*. It made no reference whatsoever to the obligation to introduce a particular type of duty (in this case *ad valorem*), nor did it stipulate that such duty may not subsequently be transformed into a specific duty provided that the final duty effectively paid by the importer to release the goods into the market was not higher than the bound tariff.

3.81 The **United States** replied that it had no objection to specific duties *per se*. In fact, the United States recognized that WTO Members may bind their tariffs using either *ad valorem* tariffs or specific tariffs, or both. The concern of the United States was that Argentina chose to bind itself to an *ad valorem* tariff but nonetheless imposed specific duties. By imposing minimum specific duties despite its purely *ad valorem* binding, Argentina's regime allowed for certain goods to be subject to import duties higher than 35 per cent *ad valorem*. This deprived WTO Members and their traders of the "predictability" that should accompany a maximum bound rate. Article II offered WTO Members a guarantee that their products would not be subject to duties greater than the amount established in the relevant Schedules. They also guaranteed that WTO Members would not manipulate the administration of duties so as to collect excessive tariffs. This was true regardless of the vicissitudes of the marketplace. Trade flows or prices rise or fall should not disturb the sanctity of the commitment made in a tariff concession.

3.82 According to the United States, *ad valorem* and specific duties were quite distinct and had different aims and effects. *Ad valorem* duties garnered greater sums from high-value goods than low-value goods, and the amount assessed varied constantly as prices fluctuated. Such duties offered a hedge against inflation for countries imposing them, since any increase in the price of goods yielded a commensurate increase in the tariff charged. In contrast, specific duties bore no direct relation to the value of imported merchandise but instead were dependent upon quantity. One rate was levied per unit. As a practical matter, though, the flat rate of a specific duty affected low-price merchandise disproportionately in comparison with high-price items. A US\$5 specific duty might be a bargain to the manufacturer of a US\$100 product yet an almost insurmountable obstacle to the producer of a US\$1 article.

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<sup>74</sup>The United States referred to the Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, Op.Cit., p. 15.

3.83 The United States further argued that the fact that the two forms of duties differed was not to say that one was superior to the other or more or less legitimate. Rather, it was to say that the two were unique and thus were not interchangeable. Reliance on *ad valorem* rates rather than specific, or the other way around, necessarily involved the imposition or the threatened imposition of tariffs in contravention of a bound rate. For example, no matter how low or reasonable a specific duty might seem on its face, such a duty had the potential to violate a bound *ad valorem* rate for a sufficiently low-price item.<sup>75</sup>

3.84 For the United States, the problem was one of determining and ensuring equivalency. For instance, a US\$5 specific duty amounted to 500 per cent for a US\$1 item, but only 5 per cent of a US\$100 item. Where tariffs had been bound in *ad valorem* terms, as was the case with Argentina, the imposition of specific duties necessitated the determination of the *ad valorem* equivalent for each item in each category. Even if no goods had entered Argentina subject to duties greater than 35 per cent, the use of minimum specific duties created the possibility that the bound rate would be exceeded. This could not occur if Argentina imposed only *ad valorem* tariffs.

3.85 The United States acknowledged that Argentina was free to bind its duties in a variety of ways, including a combination of specific and *ad valorem*. However, having selected a purely *ad valorem* binding, Argentina could not maintain a regime in which some items would be subject to duties in excess of its bound rate.

3.86 For **Argentina**, the application of minimum specific import duties that did not exceed the 35 per cent bound rate was not a violation of the commitment undertaken, nor did it impair the concession granted in the Uruguay Round. Argentina did not criticize the report of the panel on *EEC - Import Regime for Bananas* Panel because the report was not adopted, but stated that the EC had been found in breach of its obligations because no evidence had been presented that the specific duty to be paid could not exceed the *ad valorem* tariff undertaking. Argentina, on the other hand, submitted concrete proof in this respect.

#### **4. VIOLATION AS A RESULT OF THE POTENTIALITY OF EXCEEDING THE BOUND RATE OF DUTY**

3.87 The **United States** argued that, even if Argentina's minimum specific import duties, as applied, did not exceed 35 per cent *ad valorem*, they still violated Article II because each of Argentina's specific duties had the *potential* to exceed 35 per cent *ad valorem* with respect to some imports. In fact, in all instances, the specific duties had the potential to exceed Argentina's tariff binding. This was especially true with respect to low cost products for which specific duties comprised a greater percentage of value than higher priced merchandise. Thus, by their very nature, the specific duties denied Argentina's trading partners the predictability and security for which they had negotiated a 35 per cent *ad valorem* binding.

3.88 The United States argued that the report of the panel on *EEC - Import Regime for Bananas* had addressed an issue quite similar to the one involved in this dispute. The panel had described the relevant considerations as follows:

"The Panel noted that Article II required that each contracting party 'accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement'. The Panel then considered whether the introduction of a specific tariff for bananas in place of the *ad valorem* tariff provided for in its Schedule constituted 'treatment no

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<sup>75</sup>The United States added that, likewise, the converse was true. An *ad valorem* tariff could exceed a bound specific duty if sufficiently high-price merchandise were imported.

less favourable' in terms of Article II. The Panel observed that while the bound *ad valorem* tariff was related to the value of bananas, the new specific tariff was based on the weight of bananas. Any change in the value of bananas per ton therefore led to a change in the *ad valorem* equivalent of the specific tariff [...] [T]he Panel also noted that the EEC had neither argued nor submitted any evidence that this tariff could never exceed 20 percent *ad valorem*; according to the complainants, the [...] specific tariff had already exceeded the equivalent of the bound 20 per cent *ad valorem* tariff [...] The Panel consequently found that the new specific tariffs led to the levying of a duty on imports of bananas whose *ad valorem* equivalent was, either actually or potentially, higher than 20 percent *ad valorem*".<sup>76</sup>

3.89 The United States added that, based on these facts, the report of the panel on *EEC - Import Regime for Bananas* had determined that complainants needed not prove that specific duties actually exceeded a binding. The mere possibility of a breach sufficed to demonstrate a violation of Article II's requirement that imported products subject to a Schedule received treatment "no less favourable" than what was provided for in that Schedule:

"The Panel considered that the **actual** levying of a duty in excess of the bound rate clearly constituted a treatment of bananas less favourable than that provided for in the EEC's Schedule of Concessions. The Panel then proceeded to examine whether also the **mere possibility** that the specific tariff rate applied by the EEC might be higher than the corresponding bound *ad valorem* rate, rendered it inconsistent with Article II. The Panel recalled the importance of security and predictability in the application of tariffs bindings. It noted that previous panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition. The CONTRACTING PARTIES had consistently found that a change from a bound specific to an *ad valorem* rate was a modification of a concession [...]. The Panel [...] concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade".<sup>77</sup>

The panel on *EEC - Import Regime for Bananas* thus had found that the mere possibility of exceeding a bound rate inherent in converting from *ad valorem* to specific duties was inconsistent with Article II. In reaching this conclusion, the panel followed prior GATT practice regarding conversions between *ad valorem* and specific duties. As that panel explained, such a change undermined the stability and predictability of Schedules, one of the cornerstones of the GATT. Based on these considerations, the *Bananas* panel concluded that the mere possibility of a breach sufficed to demonstrate less favourable treatment for purposes of Article II:1(a). The same reasoning was applicable in this dispute.

3.90 **Argentina** contended that the precedents cited by the United States were not applicable to the present case. In *EEC - Import Regime for Bananas*, the panel considered whether the "mere possibility" that a duty may exceed the bound rate made the said specific duty inconsistent with Article II of GATT 1994. After studying the cases concerning Turkey and newsprint from Canada, the panel concluded that "in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports".<sup>78</sup>

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<sup>76</sup>DS38/R, Op. Cit., para. 134.

<sup>77</sup>Ibid., para. 135 (emphasis in original).

<sup>78</sup>Ibid.

3.91 Argentina argued that the conclusion in para. 135 of the report on *EEC - Import Regime for Bananas* seemed to diverge from the principle well anchored in GATT legal precedent and thinking, whereby GATT rules and GATT jurisprudence are constructed to protect expectations on the competitive relationship between imported and domestic products rather than expectations on export volumes. Where that potential to affect expectations of access was not accompanied by concrete measures that made it possible to verify its trade impact, it had been rejected under panel practice (even in cases where there were legal provisions that contemplated the possibility of adopting such concrete measures).

3.92 Hence, the report of the panel on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*, agreeing with the United States position on a point related to tobacco inspection fees, stated: "that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge".<sup>79</sup>

3.93 Argentina submitted that to determine how these imports could be affected in the future, and whether that determination was relevant in terms of the GATT provisions, it had to be decided in the first place whether or not there was a restrictive measure affecting said imports. Only if such a measure existed and was inconsistent with the General Agreement would expectations of access be affected. It was those expectations of access and not a *quantum* of imports that the rules were designed to safeguard.

3.94 Argentina stated that in order to determine the differences between the case in the panel report on *EEC - Import Regime for Bananas* and the present case, it was first necessary to consider more closely the arguments of the complainants in the *EEC - Import Regime for Bananas* case. The complainants were of the view that Article II "set forth one of the central legal obligations of the General Agreement, namely the undertaking of contracting parties to respect the tariff concessions, thus prohibiting the application of tariffs for a specific product that were higher than those specified in each country's schedule of concessions".<sup>80</sup> The EC having adopted certain restrictive tariff and non-tariff measures, paragraph 1(a) of Article II had been violated insofar as this regime implied less favourable treatment than that established in the concession granted. The complainants further argued that "[...] the new monetary conversion rates yielded *ad valorem* values of the newly introduced specific rates well above the bound rate of 20 per cent for bananas both within and above the quota. The 100 ECUs per ton translated to well over 25 per cent *ad valorem* whereas 850 ECUs per ton were eight to nine times higher than the bound duty".<sup>81</sup>

3.95 According to Argentina, these two paragraphs constituted the central argument of the complainants in the *EEC - Import Regime for Bananas* case. The United States was using this case not to support its arguments with regard to the obligation not to grant less favourable treatment but to salvage the panel's collateral finding (not finally adopted by the contracting parties) to the effect that "the **mere possibility** that the specific tariff rate applied by the EEC might be higher than the corresponding *ad valorem* rate rendered it inconsistent with Article II".<sup>82</sup>

3.96 Argentina considered that it was in this latter point that the two cases differed since the EEC did not argue that its specific duties did not violate the binding, whereas Argentina maintained, since its first submission, that the DIEM were not in excess of the bound *ad valorem* equivalent of 35 per cent. The findings of the panel on *EEC - Import Regime for Bananas* related to "the specific tariff

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<sup>79</sup>Adopted on 4 October 1994, DS44/R, para. 118, *in fine*.

<sup>80</sup>DS38/R, Op. Cit., para. 20.

<sup>81</sup>Ibid., para. 24.

<sup>82</sup>Ibid., para. 135 (emphasis in original).

rate applied by the EEC", which put their scope into perspective. This applied to the case under consideration and to the specific tariffs discussed therein, apart from the fact that the scope ascribed to any precedent should be limited, since otherwise it could be taken out of context. The EEC specific tariff which the panel had analyzed had the following characteristics:

- (a) "the *ad valorem* equivalent of the 850 ECUs per ton specific tariff on bananas exceeded by far 20 per cent *ad valorem*" (para. 134);
- (b) "as to the 100 ECUs per ton specific tariff, the EEC had neither argued nor submitted any evidence that this tariff could never exceed 20 per cent *ad valorem*" (same paragraph).

3.97 Argentina asserted that it was this specific tariff applied by the EEC, with these characteristics, in respect of which the panel examined whether "the mere possibility that the specific tariff rate applied by the EEC might be higher than the corresponding bound *ad valorem* rate rendered it inconsistent with Article II". The panel had not arrived at its finding in a vacuum or with respect to any specific tariff rate but with respect to one which had in fact already violated the bound ceiling (this finding was already part of the panel's conclusions) and with respect to which it also made this second collateral finding.

3.98 Argentina added that, in relation to this specific tariff, the panel had concluded "that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports". It was from this second conclusion that the United States inferred that Argentina's specific duties had the potential to exceed the tariff binding.

3.99 In relation to this, Argentina contended firstly that the panel's conclusion seemed to indicate that it was a question of protecting export volumes rather than expectations of access and it was this which Argentina challenged. Secondly, the potential as such would be an infringement only if trade were affected (as in the case of bananas in which tariff binding was violated). Otherwise, if one were to accept the idea of "potentiality" advanced by the United States, any regulation or provision which allowed for the possibility of an infringement would be potentially in violation of the GATT/WTO commitments. This has been clearly rejected by panels adopted by the contracting parties such as the panel on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*.

3.100 Finally, to bring out the difference between the two cases still more clearly, Argentina argued that even if the concept of "mere possibility" (put forward by a panel whose report was not adopted), which the United States defined as "potential", were accepted as a valid precedent, in the case of Argentina this situation did not arise since the "challenge procedure" guaranteed the tariff binding in Law No. 22.425. Nothing similar was either argued by the EEC or considered by the Panel in the *EEC - Import Regime for Bananas* case.

3.101 The **United States** noted that the parties disagreed regarding the mandatory nature of a measure. According to the report of the panel on *EEC - Import Regime for Bananas*, as long as there were or could be imports that entered a WTO Member subject to duties in excess of a bound rate, those duties violated Article II. This reasoning of the panel on *EEC - Import Regime for Bananas* echoed the analysis of other panels which had determined that WTO Members may not maintain *mandatory* legislation that was inconsistent with GATT obligations, regardless of whether the inconsistency arose at the present or in the future. As the panel on *United States - Taxes on Petroleum and Certain Imported Substances* had stated in another context, the GATT served "to protect expectations of the contracting



parties as to the competitive relationship between their products and those of the other contracting parties".<sup>83</sup> This was

"not only to protect current trade but also to create the predictability needed to plan future trade. That objective could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade".<sup>84</sup>

3.102 The United States recalled that, likewise, the panel on *United States - Measures Affecting Alcoholic and Malt Beverages* had noted that prior panels had consistently found GATT violations where contracting parties imposed mandatory legal measures that were inconsistent with provisions of the General Agreement solely as they related to future trade.<sup>85</sup> This important principle applied here. The measures instituting Argentina's specific duties were mandatory, and they allowed for the imposition of excessive duties in relation to certain products that may be imported into Argentina in the future. The mandatory nature of the measures was made plain by Argentina when it stated that "[t]he national tariff must be applied by the National Customs Administration which, of course, is not competent to change it". Further, the United States demonstrated in its submissions that Argentina's specific duties necessarily had the potential to exceed 35 per cent *ad valorem*. Even assuming that Argentina's minimum specific import duties had been enacted with effect from 1 January 1998, the Panel could, and should, have found that measures requiring the imposition of duties in excess of bound levels violated Article II, even if such measures were not yet in effect. Indeed, the passage cited from the *Superfund* panel report related to a mandatory tax, which was enacted in 1986 but was not to go into effect until three years later. The panel in the *Superfund* case found that because the tax in question was a mandatory tax, it could be challenged, that is to say, it was a matter justiciable by a GATT panel even though it was not yet being imposed.

3.103 The United States noted that Argentina further criticized the report of the panel on *EEC - Import Regime for Bananas* as being inconsistent with the panel report on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco* which had found that the non-application of discretionary measures could not be found to be in violation of GATT 1994. Argentina appeared to confuse the notions of possible future commercial disadvantages of *mandatory* legislation with that of *discretionary* legislation addressed in the report on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*. This report relied on by Argentina dealt with a US discretionary provision on tobacco inspection fees which allowed, but did not *require*, the US authorities to impose a fee.

3.104 The United States argued that, in contrast, the Argentine measures in this case *required* Argentine officials to impose minimum specific duties without regard to the value of imported products. Argentina had admitted that its customs officials had no *discretion* not to apply the specific duties. As the United States had demonstrated, this lack of discretion had led to the imposition of specific duties well in excess of Argentina's bound 35 per cent *ad valorem* rate. Similarly, the report of the panel on *EEC - Import Regime for Bananas* dealt with *required* application of specific duties by the EC, and conducted its discussion of the potential to violate a bound rate in the future in that context.<sup>86</sup>

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<sup>83</sup>Adopted on 17 June 1987, BISD 34S/136, para. 5.2.2., hereafter the "*Superfund*" case.

<sup>84</sup>*Ibid.*

<sup>85</sup>Adopted on 19 June 1992, BISD 39S/206, para. 5.39.

<sup>86</sup>DS38/R, Op. Cit., para. 135. The United States also referred to the Panel Report on *United States - Measures Affecting Alcoholic and Malt Beverages*, Op. Cit., para. 5.39 *in fine* which mentioned that "because Illinois legislation in issue allows a holder of a manufacturer's license to sell beer to retailers, without allowing imported beer to be sold directly to retailers, the legislation mandates governmental action inconsistent with Article III:4".

3.105 In the opinion of the United States, if Argentina's argument that WTO Members may adopt regimes capable of violating a binding so long as they did not do so in application were to be accepted, the security afforded by Article II would be diminished. WTO Members would only be able to enforce their rights under Article II by demonstrating excessive duties on a fact-specific, case-by-case basis, rather than through examination of the implementing measures themselves. Panels in effect would be put in the position of being a kind of final appeals court in each customs dispute. This surely had not been intended by the drafters of Article II, or of the DSU.

3.106 **Argentina** replied that its argument was not based on the fact that the panel report on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco* was different from that of the panel on *EEC - Import Regime for Bananas*. Argentina was not seeking freedom to authorize measures contrary to the WTO obligations, allow them to lapse and then subsequently indicate that they did not apply. Argentina asserted that the mere existence of a measure that might possibly be contrary to WTO obligations was not enough to condemn a country. In other words, any alleged violation of an obligation had to be proved by citing concrete cases and not simply by theoretical statements. It was only in this way that a *prima facie* case of nullification or impairment could be determined.

3.107 Argentina argued that the concept of the binding nature of a rule had to be analyzed in respect of a particular case. In the case of Argentina, both the Resolution imposing the DIEM regime and Law 24.425 incorporating the WTO Agreement in Argentine legislation were binding. The difference in status between the two binding rules was to be found in their place in the hierarchy, because the Law took precedence over the Ministerial Resolution.

3.108 The **United States** argued that, because market prices for textiles, apparel and footwear changed rapidly, especially for certain categories, Argentina's minimum duties based on "average import prices" could not be guaranteed to be equal to or less than the bound rate of 35 per cent *ad valorem*. A specific duty on a certain fabric or an article of clothing might be within the bound rate at one moment and above it the next. The potential to surpass the bound rate was ever present. Given such conditions, Argentina, like the EEC in the case on *EEC - Import Regime for Bananas*, had no way to assure other WTO Members and their traders that the specific duties would remain within the bound rate.

3.109 The United States noted that Argentina had argued that its specific duties were consistent with Article II because they were no more than 35 per cent of the adjusted "average import price" of each relevant HS category. However, inspection of the decrees imposing these duties showed that they simply specified a list of minimum specific duties, not a methodology for valuing imports. Argentina's use of an adjusted "average import price" instead of actual transaction values in setting its specific duties was contrary to Articles II:3 GATT 1994, as well as Article VII GATT 1994 as clarified by Articles 1 to 8 of the Customs Valuation Agreement.<sup>87</sup> These provisions made clear that a WTO Member may not "alter its method of determining dutiable value [...] so as to impair the value of any of [...] concessions",<sup>88</sup> and that WTO Members should rely on actual transaction values rather than "arbitrary or fictitious values".<sup>89</sup> That the specific duties may be no more than 35 per cent of an "average import price" was simply irrelevant for purposes of establishing duties to be imposed on particular imports.

3.110 The United States noted that a table produced by Argentina relating to imports under HS Chapters 51 to 63 showed that some of the minimum specific import duties were, on average, more than 35

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<sup>87</sup>In connection with this, the United States mentioned that Argentina was a signatory to the Customs Valuation Agreement and that, although Argentina had reserved limited rights with respect to the application of certain procedures under the agreement, Argentina had not timely invoked the five-year delay in coverage available to developing nations and could no longer do so. The United States referred to document G/VAL/6, of 10 January 1996.

<sup>88</sup>Article II:3 GATT 1994.

<sup>89</sup>The United States referred to Article 7 of the Customs Valuation Agreement.

per cent *ad valorem*. Argentina had explained that it derived the specific duties by multiplying a "representative international price" for a particular line-item - often an average of US prices - by the bound rate of 35 per cent. The table had four columns. The first represented the line-item; the second listed the "representative international price"; the third showed 35 per cent of the representative price; and the fourth identified the then proposed specific duty (which in almost every instance became the actual duty). The United States had found 32 line-items where the table concerned stated that the specific duty was greater than 35 per cent of the "representative international price". Argentina offered no explanation as to why so many of its specific duties were set at an amount greater than 35 per cent of the "representative international prices" or how it could justify imposing duties at these levels. Argentina similarly was unable to explain why it believed that no goods had entered Argentina with values less than the "international representative price" in categories where the specific duties were greater than or equal to the representative price. Essentially, Argentina was asking the Panel to believe that these *average* or *representative* prices were also *minimum* prices for entire categories of merchandise. In other words, Argentina assumed that international merchants and exporters could not possibly set their prices lower than the set "representative" price. However, as demonstrated, exporters and merchants of textile, apparel and footwear products could and did ship and sell the products for less than Argentina's "set price". The result was that Argentina's specific duties exceeded 35 per cent *ad valorem* for an extensive number of products.

3.111 **Argentina** replied that its Customs applied only the provisions of the Customs Valuation Agreement. Consequently, it could not apply a criterion based on the "world import price" which did not exist in the Argentine legislation. The national tariff had to be applied by the National Customs Administration which was not competent to change it. However, in the unlikely situation of a hypothetical case in which customs were to require the payment of a minimum specific import duty which exceeded 35 per cent *ad valorem*, the importer would have the right to challenge the assessment made by the National Customs Administration. The customs authority would have to initiate a challenge procedure and the importer would automatically be allowed to request the release of the goods into the market after paying only the sum he considered appropriate for those goods and depositing a guarantee.

3.112 Argentina added that, since the establishment of the Panel, the minimum specific import duties had been reduced, through Resolution No. 597/97, to an *ad valorem* equivalent of approximately 25 per cent for textiles and 30 per cent for clothing. The new resolution fixing minimum specific import duties at 5 per cent and 10 per cent below the bound ceiling made it even less likely that there could be import transactions exceeding the 35 per cent ceiling.

3.113 The **United States**, in order to show the problems inherent in the minimum specific import duties applied by Argentina, provided the Panel with an example: for a given category of athletic shoes - for instance, soccer shoes - the *ad valorem* rate might be 20 per cent and the specific duty US\$3.50 per pair. If one pair of soccer shoes were to enter Argentina with an actual transaction value of US\$5.00, the specific duty would be assessed. This was so because the *ad valorem* rate would result in a duty of US\$1.00, far less than the specific duty of US\$3.50. In fact, a pair of athletic shoes in this category would have to be worth more than US\$17.50 for the *ad valorem* rate to apply. This example revealed why Argentina's duties were excessively high. The US\$3.50 specific duty would amount to 70 per cent of the US\$5.00 transaction value of the shoes. This was double Argentina's maximum bound rate of 35 per cent. Each pair of soccer shoes in the category entering Argentina with a transaction value below US\$10.00 would be subject to a duty in excess of 35 per cent *ad valorem*. Thus, by their very nature, Argentina's specific duties had the potential to exceed 35 per cent *ad valorem* in all relevant categories. For each specific duty imposed by Argentina, there were, or at the very least there could be, products with sufficiently low prices such that they would enter Argentina subject to specific duties above the bound rate. This would occur with regard to all shoes worth less than US\$10.00.

3.114 The United States concluded that, given that Argentina's specific duties had the potential to exceed 35 per cent *ad valorem*, the Panel should find that the specific duties were inconsistent with

Article II. Further, Argentina's imposition of minimum specific duties violated Article II because they impaired the value of the concessions Argentina had made during the Uruguay Round. Even if these duties were not excessive for any products that had already entered Argentina, the duties necessarily had the potential to violate its bound rate of 35 per cent *ad valorem* for some covered items in the future. This was a breach of the guarantee Argentina had given to fellow WTO Members in negotiating its Schedule and, thus, it was a violation of Article II.

3.115 With respect to what happened when the transaction value for the good concerned was lower than US\$10, **Argentina** argued that, according to the Argentine law, the specific duty was not payable because US\$3.50 was greater than 35 per cent of the transaction value. On the other hand, the *ad valorem* duty of 35 per cent applied here as a result of the remedies available in Argentine law, essentially the challenge procedure (*recurso de impugnación*).

## 5. IMPOSITION OF DUTIES EFFECTIVELY EXCEEDING THE BOUND RATE

3.116 For the **United States**, one of the fundamental objectives of the GATT 1994 was "the substantial reduction of tariffs".<sup>90</sup> To ensure that tariff concessions, once made, had the full force and effect intended, Article II made plain that the duty rates set forth in bindings were maximum limits that may not be exceeded.<sup>91</sup> The United States argued that Argentina's specific duties were inconsistent with these rules because they exceeded Argentina's bound maximum rate of 35 per cent *ad valorem*. The amount by which Argentina's specific duties surpassed the bound rate in many instances was considerable, often equal to the entire value of imported products or even double or triple the value.

### (a) US examples based on the Argentine methodology for the application of DIEM

3.117 In order to demonstrate that the application of specific minimum import duties exceeded Argentina's bound rate, the **United States** submitted to the Panel an hypothetical example illustrating how, in its opinion, the methodology used for the application of the minimum specific import duties operated. Assuming that the applicable *ad valorem* rate for a category of goods was 20 per cent and the specific duty was US\$3.50 per unit, Argentina would assess the specific duty of US\$3.50 on all goods in the category with an *actual transaction value* of less than US\$17.50 per unit. This would be so because, in those cases, the specific duty would be greater than the *ad valorem* duty (e.g., 20 per cent of US\$10 is US\$2.00, less than the specific duty of US\$3.50). In contrast, goods with an *actual transaction value* of more than US\$17.50 would be subject to the *ad valorem* duty, which resulted in a duty above US\$3.50 (e.g., 20 per cent of US\$20 was US\$4.00, which was more than the specific duty of US\$3.50). While higher priced goods in the category would be subject to proper *ad valorem* duties, items worth less than US\$17.50 would enter Argentina under a specific duty in excess of Argentina's bound rate of 35 per cent.

3.118 The United States, on the basis of data supplied by Argentina, had identified more than 100 HS categories in which Argentina's specific duties, *on average*, were higher than 35 per cent *ad valorem*. This meant that the specific duties constituted more than 35 per cent of the *average of actual transaction prices* of merchandise imported in each category. For example, the average of *actual* import prices for HS category 6303.19 was US\$1.00 per kilogram, while the specific duty was US\$4.80 per kilogram. The specific duty thus equalled 480 per cent of the average value of merchandise in the category, and all merchandise in the category entering Argentina with a value of less than US\$13.71 per kilogram

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<sup>90</sup>GATT 1994, Preamble, para. 3. The United States stated that panels should address issues in light of the underlying purposes of the GATT 1994 and referred to the Panel Report on *United States - Restrictions on Imports of Sugar*, adopted on 22 June 1989, BISD 36S/331, paras. 5.2-5.3.

<sup>91</sup>The United States referred to the *Panel on Newsprint*, Op. Cit., pp. 131-132, which mentioned at para. 52 that "[t]he Panel shared the view expressed before it relating to the fundamental importance of the security and predictability of GATT tariff bindings, a principle which constitutes a central obligation in the system of the General Agreement".

were subject to duties greater than 35 per cent *ad valorem*. This was so because 35 per cent of US\$13.71 was US\$4.80. The Argentine peso was pegged to the US dollar. Thus, dollar figures equalled the same amount in pesos.

3.119 The specific duties often were greater than Argentina's bound rate, because Argentina established them for the very purpose of imposing a duty *higher* than the *ad valorem* duty otherwise to be applied. The intention to raise duties above the bound *ad valorem* rate was clear from Resolution No. 1696/93, which stated that the specific duties served to combat "the harm to the [domestic] athletic footwear industry resulting from these commercial practices [that] cannot be offset through an increase in the *ad valorem* tariff rates currently in effect", and "the specific import duties [...] will operate as a minimum of the corresponding *ad valorem* import duty".

3.120 **Argentina** first stated that the specific duties were not calculated arbitrarily. In determining their amount, the Argentine authorities utilized the following methodology:

- (a) A representative international price was calculated for each category of products and tariff heading. Since there were no standard international prices for textile and clothing products, the prices prevailing in the major markets were used, mainly the United States market. The use of data concerning these markets was determined in general terms by volume and the representative nature of the markets, and also by the degree of reliability of the statistics;
- (b) a specific duty equivalent to a maximum *ad valorem* tariff of 35 per cent was applied to the international prices thus determined, adjusted to put them on a c.i.f. - Buenos Aires port basis.<sup>92</sup>

3.121 In order to explain in practical terms what was implied by the application of specific duties, Argentina analyzed the example cited by the United States above. This example made the mistake of comparing a level of specific duty with an *ad valorem* duty of 20 per cent. This may correspond to the tariff effectively applied to the tariff heading cited, but it did not represent Argentina's WTO obligation, which was not to exceed the bound level of 35 per cent *ad valorem* equivalent. In the example cited, if the specific duty was US\$3.50 for a product with a value of US\$17.50, the *ad valorem* equivalent would be 20 per cent. In this particular case, the 35 per cent level would only be breached if the price of the goods were less than US\$10 and not, as mentioned by the United States, if it were less than US\$17.50.

3.122 Argentina further argued that, on that basis, it might be imagined that the principal issue raised by the United States was the confusion between the tariff applied and the tariff bound by Argentina in the WTO. The *ad valorem* import tariff applicable to the textiles sector ranged from 12 per cent to 20 per cent depending on the product's level of processing, whereas the bound *ad valorem* import tariff remained at a uniform level of 35 per cent for the whole of this sector of goods and for many other sectors in the Argentine customs tariff. When it had been decided to apply minimum specific import duties according to the price of the goods, there had been no intention to utilize the methodology referred to above but to establish a level that did not exceed the 35 per cent bound by Argentina in the WTO.

3.123 For Argentina, the example cited by the United States revealed a conceptual error. A closer study showed that there had not simply been a calculation error, as might be imagined when first reading it (3.50 pesos was not 35 per cent of 17.50 pesos), but that the calculation showed that the methodology used to arrive at the conclusion that Argentina was violating its WTO commitments was flawed. The calculation showed that the United States based its case on the presumption that Argentina had to meet

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<sup>92</sup>Argentina submitted to the Panel a table on the methodology for calculation of minimum specific import duties for HS Chapters 51 through 63.

the *ad valorem* equivalent of the tariff actually applied and not, as was the case, the tariff bound in Schedule LXIV.

3.124 In order to illustrate the procedure, Argentina suggested to assume that the *ad valorem* import duty for a category of goods was 20 per cent and the specific duty was US\$3.50 per unit. Argentina would apply the specific duty of US\$3.50 to imports in this category with a transaction value of less than US\$17.50 because in such cases the specific duty would be greater than the *ad valorem* duty of 20 per cent (*i.e.* 20 per cent of US\$10 was US\$2, less than the specific duty of US\$3.50). On the other hand, goods whose transaction value exceeded US\$17.50 would be subject to the *ad valorem* duty, because it would be higher than the specific duty (*i.e.* 20 per cent of US\$20 was US\$4, which was more than the specific duty of US\$3.50). The example given by the United States did not make clear what happened when the transaction value for a good in this category was lower than US\$10. In such cases, according to the Argentine law, the specific duty was not payable because US\$3.50 was greater than 35 per cent of the transaction value. On the other hand, the *ad valorem* duty of 35 per cent applied here as a result of the remedies available in Argentine law, essentially the challenge procedure (*recurso de impugnación*) described in sub-section B.7.b) below (*i.e.* 35 per cent of US\$5 was US\$1.75, less than the specific duty of US\$3.50).

3.125 To summarize, Argentina stated that, for a category of goods to which an *ad valorem* duty of 20 per cent effectively applied and which were subject to the payment of a specific duty of US\$3.50, the following three possibilities occurred:

<u>Transaction value</u>	<u>Import duty</u>
Over US\$17.50	20 per cent <i>ad valorem</i>
Between US\$17.50 and US\$10	US\$3.50
Less than US\$10	35 per cent <i>ad valorem</i>

3.126 For Argentina, the confusion regarding its WTO obligation to respect the 35 per cent figure, and not the tariff in force, was all the more obvious when considering some of the submissions made by United States exporters in the course of the internal proceedings under Section 301 of the United States Trade Act.<sup>93</sup>

3.127 The **United States** responded by stating that it was not arguing that there was relevance in comparing whether Argentina's specific duty was higher than the otherwise applicable *ad valorem* rate. The United States focused on whether the specific duty went above the bound rate of 35 per cent, in actuality, or at least potentially.

**(b) Obligation for the Argentine customs to assess the full amount of duties**

3.128 The **United States** argued that Argentina had acknowledged that its customs service could only impose the duties as provided for in the relevant resolutions or decrees. It also declared that US traders had reported that the Argentine customs service assessed the full specific duty listed in the governing resolution or decree, even where that duty was in excess of 35 per cent *ad valorem*.

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<sup>93</sup> Argentina referred to the submission from the Association of the Non-Woven Fabrics Industry to the Office of the United States Trade Representative of 5 November 1996 (Docket No. 301-108: Section 302 Investigation of Argentine Specific Duties and Non-Tariff Barriers Affecting Apparel, Textiles and Footwear), where this Association questioned the fact that the corresponding specific duty had an *ad valorem* equivalent that exceeded the applicable tariff of 18 per cent. In the subsequent paragraph, the *ad valorem* equivalent was calculated at 28.56 per cent. Argentina argued that, even though this submission recognized that the said equivalent was lower than 35 per cent, in order to prove the alleged violation it argued that the statistical tax and domestic taxes had to be added, although these elements bore no relation to import duties.

3.129 **Argentina** argued that the *ad valorem* equivalents of the minimum specific import duties assessed by Argentina were lower than the tariff levels in Argentina's Schedule LXIV. Argentina had difficulties in accepting or in considering the United States' argument since, on the one hand, there was no infringement of the commitments made in Argentina's Schedule and, on the other hand, Argentina's legal system constituted a single and inseparable whole which included the procedure for challenging assessments. In these circumstances, the Argentine authorities applied the minimum specific import duties laid down. This was done at the time of assessment of the import duties and other duties and charges which importers had to pay in order to release imported goods for consumption.

3.130 For Argentina, no duties in excess of 35 per cent *ad valorem* had been applied. Argentina had no knowledge of instances of the imposition of specific duties on textile or clothing imports which had resulted in an infringement of the bound tariff of 35 per cent *ad valorem*. Moreover, there had been no cases of imports of textile products and clothing in which importers had raised the question of the application of specific duties in excess of the 35 per cent *ad valorem* bound in the WTO.

3.131 Argentina specified also that in each import operation the Argentine customs administration assessed taxes on the basis of the customs value of the goods. There was no documentation of any kind that indicated the imposition of DIEM in any tariff category in excess of the bound tariff of 35 per cent *ad valorem*. The United States did not offer evidence of the alleged imposition of minimum specific import duties in excess of the tariff bound in the WTO for textiles and clothing imports. In these circumstances, it could only be assumed that such cases did not exist.

**(c) Data regarding the income for Argentina from levying duties above the bound rate**

3.132 The **United States** supplied a chart to the Panel showing the approximate amount that Argentina had allegedly collected as a result of the imposition of the specific import duty in excess of what would have been collected had valuations been conducted based on a 35 per cent *ad valorem* basis in specific HS categories between January and September 1996. This chart showed a break-down of duty collection for sweaters (US\$161,000), fabrics (US\$544,000), carpets (US\$348,000), apparel (US\$450,000), other textiles (US\$291,000) and total (US\$1,634,000). In addition, the United States claimed that the chart was prepared based upon customs data supplied by Argentina.

3.133 With reference to those data, **Argentina** replied that the United States wrongly assumed that Argentina was applying specific duties in excess of 35 per cent equivalent *ad valorem*. There had been no refunds to importers for duties imposed in excess of the bound tariffs inasmuch as no proceedings on these grounds had been brought before the Argentine customs.

3.134 Argentina stated that Resolution No. 597/97, which reduced the minimum specific import duties applicable on a number of textile and apparel products had been adopted as part of the trade policy measures of the Argentine economic authorities. This trade policy was in keeping with the trend to reduce import tariffs and, with this in mind, it had been decided that in the textile product and clothing sector tariffs should not exceed maximum levels of approximately 25 per cent for the former and 30 per cent for the latter. This meant that a large number of tariff headings corresponded to specific duties whose *ad valorem* equivalent was lower than these levels. The reason why it was desirable to take this action at this time was related to the fact that it was precisely in the month of April every year that the foreign trade statistics corresponding to the totals for the previous year became available. The events of 1996 in the textile and clothing sector, as confirmed by the statistics available in April of the current year, formed the basis for the analysis leading to the adoption of this measure. The calculation method employed was based on the import prices of goods entering Argentina. This decision was taken because, from 1996, with total imports of textiles and clothing valued at US\$871 million, the quantities considered were sufficiently representative to be taken into account. In 1993, when the minimum specific import duties were established for the purpose of providing a certain level of tariff protection for the domestic industry, the volumes were not sufficiently representative of Argentine

imports in order to take them into account to set an average import price. In 1990, imports amounted to US\$100 million. Accordingly, in 1993 it was decided to work on the basis of the prices for these goods in representative markets of other countries.

3.135 Argentina contended that the above-mentioned chart submitted by the United States was intended to persuade the Panel that, in actual fact, US\$1,634,000 had been paid over and above the amount which should have been collected on the basis of a 35 per cent tariff, but this was only theoretical, since the mentioned amount was based on a theoretical calculation and not on evidence of a payment actually made.

**(d) Arguments regarding the use by the United States of tables prepared by Argentina**

3.136 The **United States** recalled that, during consultations with the United States, Argentina had produced customs data reflecting c.i.f. values and quantities (in tonnes) of textile and apparel for line-items within HS chapters 51-64 for the period January-September 1996. This document consisted of two tables: a table of total imports for 1995 and 1996<sup>94</sup> and a table on the principal countries of origin of Argentine imports for 1995 and the period January-September 1996.<sup>95</sup> Based upon this *Argentine* data, the United States calculated average *ad valorem* equivalents for each line-item.

3.137 The United States had requested the data in question for the purpose of performing the calculations of *ad valorem* equivalents. This information should be viewed as highly credible and showing Argentina's specific duties to be above its bound rate. The United States elected to rely upon this data, rather than using other information, because it wanted to minimize factual conflicts for the Panel.

3.138 **Argentina** stated that the first list in the above-mentioned document had been prepared for the purpose of analysing price problems concerning certain tariff headings. In the consultation meetings there had been extensive discussion of the considerable differences which had emerged between Argentine import prices and United States export prices for exports to Argentina. These differences suggested the existence of significant underinvoicing in many transactions. This resulted in the information being supplied to the United States as a basis for assessing the magnitude of the problem. The second list in the above-mentioned Argentine document had been provided so that the United States could note its minor importance as a textiles supplier to Argentina, as compared with other exporters such as China. Thus, the information on the origin of imports had been provided to show the United States that the commercial interests alleged to be affected were actually confined to a very few tariff headings. At no time had it been envisaged that the data in question might be used for deducing prices according to the origin of the goods.

3.139 Argentina further specified that, in the second list, the figures related to imports per country of origin were expressed in thousands. Given the low volume of transactions in many tariff headings this yielded an unacceptable margin of error, as shown by the following example. If 160 kg of a particular good were imported for US\$1,495, the price per kilogram would be US\$9.34. However, if the same information was rounded off to the nearest thousand, the import value would be US\$1,000 for 0.2 thousand kg. The average price calculated on the basis of the latter data would be US\$1/0.2 = US\$5. There was a considerable difference between US\$9.34 and US\$5, but both figures were derived from the same information. This was the cause of the error made by the United States in its table identifying 118 cases of imposition of duties above the 35 per cent *ad valorem* bound rate. (see para. 3.141).

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<sup>94</sup>*Importaciones de Productos de los Capítulos 51 a 64 de la Nomenclatura Arancelaria Armonizada (1995 y 1996, en Valor, Cantidades y Precios por Kilogramo)*

<sup>95</sup>*Importaciones de Productos de los Capítulos 51 a 64 de la Nomenclatura Arancelaria Armonizada (1995 y 9 Meses de 1996, en Valor y Cantidades, por País de Origen).*



3.140 The **United States** replied that Argentina's contention that the rounding of certain numbers affected the conclusions to be drawn from the document it had submitted lacked merit. Firstly, Argentina ignored the fact that the January to September 1996 import data in the first list were not rounded to thousands, but rather to tens of dollars. This was reflected by the use of the two-place decimal points in the fifth and seventh columns of the first list. Moreover, even the second list contained a decimal point so the rounding in dollars was only to hundreds. Moreover, to the extent rounding had any impact on the calculations that the United States performed on the basis of these tables, the effect was minimal. Fifty-nine of the 118 categories identified by the United States in the table referred to in para. 3.141 involved imports worth over ten thousand dollars, of which 17 reflected imports amounting to hundreds of thousands and even millions of dollars. The rounding in these categories would be insignificant.

**(e) Evidence of violation on an average basis**

3.141 The **United States** emphasized that, in this dispute, the Panel needed not rely solely on possibilities of binding breaches. Argentina's specific duties not only had the potential to exceed the bound rate, but in fact did. To demonstrate this, the United States had identified in a table gathering Argentina's textiles and apparel imports from the United States subject to *ad valorem* rates higher than 35 per cent 118 HS categories of textiles and apparel in which Argentina's specific duties, *on average*, were greater than 35 per cent *ad valorem*. The data contained in that table represented (a) the value of Argentine imports from the United States for January-September 1996; (b) their volume, (c) the average price for the same period (a/b); (d) the Argentine DIEM in US\$/kg; (e) the break-even price in US\$/kg (*see below*) and; (f) the *ad valorem* equivalent duty for imports for the same period. The listed specific duties constituted more than 35 per cent of the *average of transaction prices* of merchandise imported in each category. This table made plain that, at the least, all merchandise having a lower actual value than the average were subject to duties above 35 per cent *ad valorem*. For example, with respect to HS category 6110.30, the average transaction price was US\$11.39 per kilogram while the applicable specific duty was US\$6.40 per kilogram. This resulted, on average, in duties equivalent to 56 per cent *ad valorem*. All goods with a value *less* than the average of US\$11.39 per kilogram were subject to duties *greater than* 56 per cent. In addition, the calculations of "break-even price" signified that all goods in category 6110.30 worth less than US\$18.29 per kilogram would be subject to duties in excess of 35 per cent *ad valorem*. This column was called the "break-even price" because only goods with a value greater than the amount listed entered Argentina subject to specific duties within the bound rate.

3.142 The United States also adjusted its calculations contained in these table and chart to take into account Resolution No. 597/97, which provided 5 stages of modifications of specific duties in certain categories.<sup>96</sup> The adjusted figures were reflected in a table where the new specific duties were applied to imports for the period January-September 1996. Applying the Argentine data submitted by Argentina during the consultations<sup>97</sup> to the new duties, the United States had found that Argentina still was in excess of 35 per cent, on average, with respect to 72 line-items. The United States had attempted to show how these figures broke-down in terms of product sectors. A chart covering specific sectors reflected how high Argentina's specific duties were with respect to a variety of textile and apparel groupings, ranging on average from 40.9 per cent to 56.2 per cent.

3.143 The United States contended that the table described in para. 3.141 above not only showed that Argentina's minimum specific import duties were excessive for products in the listed categories, but it also revealed how minimum specific import duties - no matter how low or seemingly modest -

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<sup>96</sup>Boletín Oficial de la República Argentina, No. 28.650 of 20 May 1997.

<sup>97</sup>The document submitted by Argentina was entitled *Importaciones de Productos de los Capítulos 51 a 64 de la Nomenclatura Arancelaria Armonizada (1995 y 1996, en Valor, Cantidades y Precios por Kilogramo)* and *Importaciones de Productos de los Capítulos 51 a 64 de la Nomenclatura Arancelaria Armonizada (1995 y 9 Meses de 1996, en Valor y Cantidades, por País de Origen)*. See footnotes 94 and 95 above.

would violate an *ad valorem* bound rate for at least some products in a category. For example, under HS 5514.22, the specific duty for this category was US\$1.20 per kilogram. However, the average of actual transaction values for the category was only US\$2.61 per kilogram, resulting in an average *ad valorem* equivalent of 46 percent. Thus, while a US\$1.20 specific duty may seem reasonable on its face, in application it would exceed the bound rate for some products.

3.144 The United States specified that it had no data on import prices for 1995. The table it had presented in para. 3.141 above, which reflected 118 categories in which Argentina's specific duties exceed 35 per cent *ad valorem*, was based on price data supplied by Argentina for the period January through September 1996. Information on 1995 figures was exclusive within the control of the Argentine authorities. The United States had however applied the 1996 price data previously supplied by Argentina<sup>98</sup> to the specific duties that were in effect under Decree No. 2275/94 through September 1995. The results demonstrated that even the lower duties in place for much of 1995 still were excessive when compared against the Argentine price data for January through September 1996, the most reliable data available. Accordingly, Argentina's specific duties, on average, would have exceeded 35 per cent *ad valorem* with respect to 76 tariff line-items. The averages frequently were quite high, even exceeding 100 per cent *ad valorem*. As excessive as were the duties as calculated above, the specific duties imposed by Resolutions No. 304/95 and No. 305/95 were even higher. Thus, the United States had identified far more categories (118) which on average exceeded 35 per cent *ad valorem*.

3.145 Referring to an evidence provided by the United States with respect to imports under tariff heading HS 6303.19, **Argentina** noted that the United States alleged that the *ad valorem* equivalent of the specific duty applicable was 480 per cent. If certain data were examined closely, however, it could be seen that this information was incorrect. The representative price data used to calculate the minimum specific import duties in 1994 corresponded to values for 1992-1993 and showed a price of US\$48.60 per kg for tariff heading HS 6303.19. The corresponding representative price for the same tariff heading for 1996 amounted to US\$16 per kg. Making a comparison, by way of example, it could be seen that the *ad valorem* equivalent of the minimum specific import duties applicable to this tariff heading (6303.19) remained below 35 per cent, despite the sharp fluctuation in prices. During 1996, imports into Argentina of goods under tariff heading 6303.19 had amounted to 256 kg. for a value of US\$342. This corresponded to five samples and the average price of US\$1.33 was solely due to the cost of freight and insurance. Samples with no commercial value were not subject to payment of import duties in Argentina. Moreover, it was well known that there was no textile product with a commercial value of US\$1.33 per kg. This price did not even come close to the value of international prices for the raw materials.

3.146 Argentina contended that if, for the sole purpose of an academic mathematical exercise, one used another price basis for comparison with the minimum specific import duty rates that appeared in the methodology for the establishment of the DIEM criticized by the United States, the result could be totally different. For example, taking export prices for textiles and apparel from the United States to Argentina, many tariff headings whose *ad valorem* equivalent exceeded 35 per cent in the US examples would be now below this figure.

3.147 Argentina was of the view that it was impossible to ignore the differences between the theoretical prices of the goods on entering Argentina and the prices declared for the same headings by the exporters in the United States. For example, if one took the first four-digit heading (5208) in the United States table described in para. 3.141 above and compared it with the figures declared at exportation for that heading during the same period, according to the United States, the *ad valorem* equivalent of the specific duties for the first six lines of the table would range from 45 per cent to 97 per cent with an average price of US\$7.67 c.i.f. - Port of Buenos Aires - and an average "break-even price" of US\$/kg12.71.

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<sup>98</sup>Ibid. The United States noted that volume data was not provided for 1995 which made the calculation of average duties paid for that period impossible.

If one took the declarations made by the exporters in the United States for the same headings and the same period, one saw that the average export price for Argentina was US\$12.97 f.a.s., i.e., approximately US\$15 c.i.f. Buenos Aires. This was without taking into account the above-mentioned considerations concerning the effect of rounding off to the nearest thousand, together with the weight of the packaging, the non-payment of duty on samples, etc. The conclusions were obvious with respect to both the validity of the above mentioned evidence submitted by the United States and the reason why no importer had been prepared to challenge a transaction. Indeed, it had to be borne in mind that underinvoicing may constitute an offence.

3.148 Argentina argued that, as the other tables submitted by the United States showing infringements of the 35 per cent ceiling on a HS line basis had been produced in the same way, there was really no way of knowing the actual grounds on which the United States was claiming for a right which it did not know to have been infringed. In particular, the charts prepared by the United States on the basis of the table submitted by Argentina used data which presupposed or took it as an accepted fact that the prices and values corresponded to actual import transactions. These were suppositions, not fact, since the data derived from the two tables mentioned by Argentina in paras. 3.138-3.139 above and had all the shortcomings and defects previously noted.

3.149 The most important thing was that the price basis had to be derived from data other than those declared by the alleged importers of textiles and apparel in Argentina. Certainty could only be found in import transactions that actually took place. The only way of knowing whether these import transactions existed and were effectively subject to payment of minimum specific import duties exceeding 35 per cent was to use the full customs documentation corresponding to the transactions, including the receipt for payment of the import duties and taxes.

**(f) The use of net v. gross weight**

3.150 **Argentina** contended that the *ad valorem* equivalents of particular specific duties could be calculated theoretically by taking the average prices of imports. Nevertheless, it could not be claimed that these theoretical calculations constituted a demonstration or proved the real existence of import transactions actually corresponding to the theoretical analysis. One of the reasons for this was that the import figures in kilograms included samples with no commercial value (which did not pay import duties) and the weight of the outer packaging. This packaging was often heavy enough to affect the weight actually used for assessing minimum specific import duties.

3.151 Moreover, Argentina stressed that these specific import duties were calculated on the basis of the gross weight of the goods, *i.e.* without taking into account the packaging of each shipment or the wooden supports for the rolls of cloth, the crates, etc. Thus, the import statistics expressed the weight in kilograms corresponding to the transport documents which the importer presented when registering the importation and not the weight on which the calculation of the specific duty was based. In accordance with the above, the prices indicated in the US table identifying 118 cases of imposition of duties above the 35 per cent *ad valorem* bound rate should not be used even for making theoretical calculations of the *ad valorem* equivalents of the specific duties. Inasmuch as the United States had used data which were not compiled to form the basis for an analysis of the *ad valorem* equivalents of specific duties, the above-mentioned table represented a result which could not be considered useful for drawing conclusions of any kind.

3.152 The **United States** considered that, by arguing that its own data reflected "gross" weight instead of "net" weight, Argentina sought to reduce the kilograms reflected in the tables submitted by the United States. These kilograms were then divided into the value (which Argentina did not seek to change) to achieve a higher average price. The higher the average price, the more likely it would be that the equivalent *ad valorem* figures would be below 35 percent. For the United States, there were compelling reasons to believe that the Argentine data discussed in sub-section B.5.(d) above already

reflected "net", not "gross" weight. The document said "*importaciones de products de capitulos 51 a 64 and their valor, cantidades and precios por kilogramo". Thus the title made it clear that these were the weights of products in these HS items. Further, a handwritten portion said "*posiciones sujetas a derechos especificos 1996: enero - septiembre y valor anualizado". As Argentina asserted that its *derechos especificos* were calculated on the basis of net weight, why would Argentina make any reference to positions "*sujetas a derechos especificos*" if the data could *not* be used to calculate such specific duties? Argentina attempted to show the "difference of prices in Argentina and prices in export market". US export data was reported and collected on a net, not gross, weight basis. Indeed, the tables submitted by Argentina in relation to US and EC exports reflected US export data based on a net weight basis. If the purpose of Argentina when preparing this document were to compare average import prices, it should have compared its import prices to those of the United States, calculated using net weight basis.**

3.153 For the United States, the data Argentina tried to impeach were the data it supplied when the United States had asked for information to perform its calculation of equivalents *ad valorem*. The data formed an important part of the consultations between the parties. Argentina never asserted in the consultations, in the first meeting with the parties, or in its answers to the Panel's or the United States' questions that this data included "gross" weight. Such *post hoc* analysis, without any evidence other than Argentina's bald assertion, could not be a valid basis for Argentina to reject its own statistics which demonstrated its repeated and clear violation of Article II.

3.154 The United States further stressed that, even assuming *arguendo* that Argentina was correct, and that the statistics referred to in sub-section B.5.(d) above did reflect the gross weight figures, the substitution of "net" figures did not change the results significantly. According to a leading US expert on the subject, use of gross weight would result in a distortion in the range of 2 to 5 per cent for textiles and 10-12 per cent for apparel items. In more extreme cases of high-priced apparel items, the packaging could add as much as 33 per cent to the weight. To show the negligible impact, the United States had adjusted the table it had presented in para. 3.141 above to reduce the weight of merchandise in the subject categories by 5 per cent for textiles and 12 per cent for apparel. This adjustment was illustrated in a revised table which reflected that there were still 99 line-items where the specific duties, on average, exceeded 35 per cent *ad valorem*.

3.155 Moreover, the United States recalled that it had submitted a table on imports from the European Communities for certain tariff headings on textiles which reflected calculations of the "equivalents *ad valorem*" and reflected the minimum specific import duty. Argentina had asserted that it calculated specific duties on the net weight of the goods, *i.e.*, not counting the weight of the shipping packaging. Thus, it simply would make no sense for Argentina to calculate the *ad valorem* equivalent duty using the gross weight. Indeed, the purpose of this document appeared to be to show the EC that there were "only" four HS categories in which duties were applied on average in excess of 35 per cent *ad valorem*. Such a demonstration could be made only if the weight reflected on the document was that used to calculate the application of specific duties.

3.156 The United States further argued that Argentina had also stated regarding the use of "gross weight" that "we do not have net weight data", "Argentina cannot do it [collect the data] in any other way [than by gross weight]", and "we have always used gross weight in presenting our import and export data". The United States submitted the 1983 issue of the INDEC statistical yearbook, which described how Argentina presented and collected its export and import data in 1983. This document was the introduction to a much larger sets of Argentine import and export data for 1983. Near the bottom of the second page of the above mentioned document was a note which stated "*comprende las cantidades netas declaradas para cada articulo por los exportadores e importadores, expresadas en la unidad de medida que corresponda". This document made it clear that at least in 1983, the Argentine authorities did collect only net data to report their imports and exports. Argentina had to come forward with *documents* to show that it did not collect data this way.*

3.157 The United States recalled that Argentina also had stated that "Peso bruto could be found in all the individual customs forms [...] submitted by the United States". This was incorrect. In fact, the only *peso* (weight) which was found in all specific shipment documents was *peso neto* (net weight). Argentina gave some examples where it claimed that gross weight was reflected and where it showed that gross weight differed substantially from net weight. However, Argentina ignored the fact that it had only counted one page reflecting one portion of multi-HS shipments. For example, Argentina cited page 2 of the document. However, it ignored pages 3 and 4 where there was no gross weight reflected, but instead there was a reference at the top of the page to "item 1". This item 1 referred back to the first page of the group of documents where the total gross weight for the total shipment was reflected. The grouping of three documents was shown in the US document summarizing the main data mentioned in the customs documents at issue. The same situation existed for other examples mentioned by Argentina. These examples showed that gross weight was *not* computed or reflected in all Argentine customs documents. Only net weight was reflected in all documents.

3.158 The United States added that textile, apparel, and footwear products were shipped in large crates or containers. In most instances, products of different HS categories were shipped together. In order to determine the gross weight, the crate or container was weighed once only. It was the weight of the goods coming out of the crate that had to be weighed to determine the specific duties. This was net weight. The data Argentina had collected and tabulated in its HS annual statistics, was that which it collected, i.e., on a net basis. There was simply no evidence that gross data was collected on an 8 digit line basis, only net data was. Indeed, it would be impossible to collect gross weight on an 8 digit line basis using the import documents at issue.

3.159 In sum, for the United States, the Argentine data represented net weight, not gross weight. As such, this data was a reliable data source to create the documents demonstrating violations of the 35 per cent *ad valorem* rate referred to in paras. 83 *et seq.* above.

3.160 Regarding United States statements on the statistical data concerning imports of products of HS Chapters 51 to 64 in value, quantities and prices per kilograms and by country of origin, in particular on the volume/quantity of imports and their "net" or "gross" value, **Argentina** argued that the conclusions drawn by the United States regarding the alleged *ad valorem* equivalents did not correspond to the actual import transactions to which they supposedly relate. In order to ascertain the true situation, a distinction has to be drawn between gross and net weights and, if this was done, the result of calculating the *ad valorem* equivalent would most likely be different from that submitted by the United States. This statement was confirmed by the information given in the alleged customs documents submitted by the United States. Some of these documents showed the differences between gross and net weights. These differences could not be explained solely, as the United States had done, by stating that the imports in question formed part of shipments that contained other imports. The information supplied by Argentina and submitted by the United States regarding imports of products of HS Chapters 51 to 64 in value, quantities and prices per kilograms and by country of origin had been prepared on the basis of data directly compiled by the Department of Foreign Trade on the basis of tariff headings, and the values corresponding to quantities were gross kilograms. This information could not be compared with the foreign trade statistics published each year by INDEC in its statistical yearbooks. Moreover, it was particularly significant that criticism was directed at Argentina by submitting a copy of the 1983 Yearbook. Not only had 15 years gone by since then, but Argentina's tariff nomenclature had changed, the data collection system was not the same and, since 1991, Argentine Customs (52 offices throughout Argentina) had begun computerizing its operations, a process which affected and modified the collection of data.

(g) **Evidence based on imports from the EC and the rest of the world**

3.161 The **United States** considered that, regardless of any problems Argentina may have with its own data, which formed an important part of the consultations preceding the formation of this Panel, Argentina had separately confirmed that its specific duties, on average, exceeded 35 per cent *ad valorem* in a number of categories. In a table on Argentina's textile and apparel imports from the EC and the rest of the world of selected categories of textiles and apparel subject to *ad valorem* rates higher than 35 per cent (January-July 1996), the United States had listed specific duties for selected categories of textile and apparel items from the European Communities that Argentina had acknowledged were greater than its bound rate. The document consisted of four pages and covered four different types of information: EC imports to Argentina in 1995; EC imports in the first seven months of 1996; all other imports during 1995; and all other imports during the first seven months of 1996. The document identified for each line-item the total kilograms of textiles imported, their total value, the *average c.i.f.* value, the specific duties charged, and the *ad valorem* equivalent. This table also showed categories that Argentina had determined to be in excess of 35 per cent *ad valorem*, on average, with respect to textiles and apparel from sources other than Europe. These numbers were not only based on data supplied by Argentina, but Argentina had actually performed the calculation of *ad valorem* equivalency.

3.162 **Argentina** contended that this table was based on statistical information whose origin remained obscure.<sup>99</sup> Methodologically, the volume and value figures could not be used for calculating an average price for comparing with the Argentine minimum specific import duty and obtaining an *ad valorem* equivalent. The minimum specific import duty applicable to heading 57.04.90 was in fact US\$1.70 during 1996. It was applied to the weight of the imported goods, excluding outer packaging and supports.

3.163 The **United States** replied that the information contained in its document was particularly reliable, since it had been created by Argentine officials who used Argentine customs data to calculate the *ad valorem* equivalency of 35 line-items of textiles. Argentina had given this document to the EC, and the EC had provided it to the United States. Argentina's calculations showed that 4 of the 35 line-items of EC imports during 1995 and 1996 exceeded 35 per cent *ad valorem*. For the rest of the world, 22 of the 35 textile and clothing categories exceeded the bound rate on average in 1996 and 26 of 35 for 1995. Many of the average percentages for the rest of the world for 1995 and 1996 were well-over 50 per cent *ad valorem*. Since the prices of products within each of the 35 HS tariff headings varied, some imports were above and some were below the average prices. Given the large number of HS categories with an average greater than 50 per cent, there *necessarily* were many individual transactions well-above 35 per cent *ad valorem*.

3.164 In the opinion of the United States, Argentina had made no real attempt to attack the validity of the equivalent *ad valorem* calculations its officials had performed for the European Communities. At the consultation between the EC and Argentina, the EC presented and discussed this document extensively. The EC stated at the consultations that Argentine customs officials had presented the document to them in Buenos Aires in the late fall of 1996. Argentine officials at the 12 June 1997 consultation did not dispute this fact. The EC gave the United States a copy of the document at the consultation to which the United States was a joined party. The document was in Spanish, it referred to the DIEM, and it contained import data that *only* the Argentine Government could generate. Accordingly, there could be no doubt that this was a document produced by the Argentine Government. It was simply not sufficient for Argentina to claim that the origins of the document were obscure. Significantly, Argentina did not claim that the statistics and data of the same nature regarding imports of certain textile products from the European Communities, which the United States had submitted separately to the Panel, were inaccurate.

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<sup>99</sup>See para. 3.166, below.

3.165 **Argentina** stated that with respect to the *ad valorem* equivalents mentioned in the above-mentioned table and, in particular, regarding the *ad valorem* equivalent of 49.2 (imports from the EC) or 45.7 per cent (imports from the rest of the world) mentioned for heading 5704.90 (carpets), it should be pointed out that, on the basis of the average prices of imports from the United States in 1996 for heading 5704.90, the minimum specific import duty collected (\$1.66) represented an *ad valorem* equivalent of 35 per cent.

3.166 Argentina added that, generally, the documents submitted by the United States were the result of a compilation of statistical information supplied by Argentina, but for purposes other than those put forward at the time it was requested. The statistics supplied by Argentina in the course of its consultations with the United States had been supplied for other purposes, and their use in the calculations made by the United States had led to a number of problems and inaccuracies in the results obtained. In this respect, the table submitted by the United States regarding Argentina's textiles and apparel imports from the EC and the rest of the world of selected categories subject to *ad valorem* rates higher than 35 per cent for January-July 1996 had not been supplied by Argentina either to the United States or to the European Communities. The documentation in question was not provided by Argentina during formal consultations with the EC in the framework of the DSU. On the occasion on which the United States saw the mentioned document (that is, in association with the Article XXII consultations with the EC), Argentina made it clear that the paper did not come from Argentina and was not subject to discussion.

3.167 The minimum specific import duties on imports of textiles and apparel did not exceed 35 per cent *ad valorem* because the rates had been established on the basis of calculations made prior to application of those specific duties. The calculations made by the United States in order to show that the 35 per cent *ad valorem* equivalent had been exceeded were not correct because they were based on statistics that were inappropriate. A comparison of average prices based on statistics of import volume and value and the minimum specific import duties gave a theoretical *ad valorem* equivalent. This was not the import duty actually paid by importers in each case.

3.168 Noting Argentina's statement that the "best and closest statistics to reality available in this dispute came from the United States export data", the **United States** mentioned that it had refrained from using its export data because it wanted to focus on Argentina-produced data to avoid any assertions of inaccuracy of data. It had some doubts about the accuracy and completeness of its export data. Nevertheless, given the fact that Argentina had made the statements above, the United States felt compelled to provide the Panel with the US export data evidence available. The United States produced a document which listed 104 entire HS categories where the average *ad valorem* equivalent price exceeded 35 per cent. The prices and quantities therein reflected prices and quantities reported from US export data. This was another example that demonstrates that no matter how the Panel examined the data, no matter what the source of the data was, it showed that Argentina's specific duties violated its 35 per cent *ad valorem* bindings.

#### (h) **Examples of individual transactions**

3.169 The **United States** stated that particular shipments also reflected payments in excess of 35 per cent *ad valorem*. It consequently submitted, during the first substantive meeting of the Panel, copies of two commercial invoices as well as part of the customs documentation pertaining to two import transactions, together with a summary table of the information contained in those documents. The documents referred to shipments of 9 May 1996 and 4 April 1996. The example of a shipment on 9 May 1996 of US carpets (style 1) in HS category 5703.20 included a c.i.f. value of US\$56,271.90. Argentine customs documents indicated that specific duties of US\$20,531, or a 36 per cent *ad valorem* equivalent, had been imposed and paid. The other documentation showed imports on 4 April 1996 of three types of US carpets (styles 2, 3 and 4) in HS category 5703.30. These invoices and Argentine

customs documents reflected that the imposition of specific duties had resulted in the payment of duties of respectively 40; 60 and 67 per cent *ad valorem*.

3.170 **Argentina** had doubts concerning the validity and reliability of the invoices for the alleged import transactions regarding shipments dated 9 May 1996 (one category of product under HS 5703.20) and 4 April 1996 (three categories of products under HS 5703.30) submitted by the United States. It could be seen from these two commercial invoices, especially the second one, that not only was there no mention of the importer's name, tax identification number (CUIT), etc., but also that corrections and additions had been made by hand that were incomprehensible. The second of the alleged invoices submitted contained prices per unit of US\$1.97, 2.61 and 3.77 per square metre for styles 2, 3 and 4 respectively. The information on United States textile exports in 1996 provided by Argentina indicated an average export price to Argentina of US\$5.91 per square metre for the same tariff heading, a difference which highlighted the fact that if the invoiced price had been closer to the average levels, once adjusted to c.i.f. it would in none of the cases have exceeded 35 per cent. Thus, the next item of the invoice, which represented double the volume of the three previous items together, with a price per unit of US\$6.92 was not claimed to exceed the 35 per cent limit. It was difficult to understand why the importers had not had recourse to the challenge procedure under those circumstances. Moreover, the invoices showed that samples valued at US\$2,340 entered duty free when the maximum amount that may legally be imported into Argentine customs territory under this heading was US\$100. This raised further doubts regarding the value of this document as evidence. In addition, if the value of the samples was added to the import total, the *ad valorem* equivalent did not exceed 35 per cent. Regarding the other transaction (styles 2, 3 and 4), taking the United States export prices, it could be seen that in no case did they exceed 35 per cent. Taking the prices allegedly declared by the importer on this invoice, however, the total was different. Consequently, it was not clear why the importer did not utilize the challenge procedure to contest the difference.

3.171 The **United States** also provided the Panel with copies of six Argentine customs documents relating to duties charged during 1996, identifying examples where specific duties in excess of 35 per cent *ad valorem* had been imposed and paid by importers. Examples 1-5 had been derived from 2 shipments of different types of footwear produced by a US manufacturer in Indonesia. Example 6 involves woven cotton fabric produced in the United States.

- Example 1 consisted of an Argentine customs form indicating a total c.i.f. value of US\$15,722.53 and a total specific duty of US\$10,560.00. This demonstrated that the specific duties constituted an *ad valorem* equivalent of 67 per cent.
- Example 2 consisted of an Argentine customs form indicating a total c.i.f. value of US\$23,046.20 and a total specific duty of US\$14,476.00. This demonstrated that the specific duties constituted an *ad valorem* equivalent of 63 per cent.
- Example 3 consisted of an Argentine customs form indicating a total c.i.f. value of US\$7,444.33 and a total specific duty of US\$4,809.60. This demonstrated that the specific duties constituted an *ad valorem* equivalent of 65 per cent.
- Example 4 consisted of an Argentine customs form indicating a total c.i.f. value of US\$94,846.13 and a total specific duty of US\$56,909.70. This demonstrated that the specific duties constituted an *ad valorem* equivalent of 60 per cent.
- Example 5 consisted of an Argentine customs form indicating a total c.i.f. value of US\$30,690.17 and a total specific duty of US\$19,576.20. This demonstrated that the specific duties constituted an *ad valorem* equivalent of 64 per cent.



- Example 6 consisted of an Argentine customs form indicating a total c.i.f. value of US\$19,384.01 and a total specific duty of US\$7,087.61. This demonstrated that the specific duties constituted an *ad valorem* equivalent of 37 per cent.

3.172 According to the United States, the calculation of these percentages was easily accomplished by examining the lower portion of each of the six Argentine customs forms presented, and dividing the specific duties (*derecho especifico*) by the total c.i.f. value (*Valor en Aduana en Divisa*).

3.173 With respect to the above-mentioned copies of invoices submitted by the United States involving footwear import transactions, **Argentina** considers them irrelevant since it was not appropriate for the Panel to rule on a measure which had been revoked prior to the adoption of its terms of reference. In any case, it could easily be determined that all these cases corresponded to import operations carried out by a large US manufacturer of athletic shoes.<sup>100</sup> According to the information available, these operations presumably form part of the various actions which that company had brought against the Argentine State. Secondly, the specific operations submitted related to imports of footwear originating in Indonesia and not to textile imports from the United States.

3.174 Finally, Argentina could not give an opinion regarding the copy of invoice submitted by the United States (Example 6 above) which was said to correspond to the importation of a textile product (woven cotton fabric) produced in the United States and according to which the duties collected were 2 per cent in excess of the bound rate. Argentina did not have the name of the importer or the number of the operation, the tariff heading was illegible and, at the same time, there was no stamp or confirmation that this was a document that had been processed by the customs authorities.

3.175 In addition to the above-mentioned examples, the **United States** presented a specific example from October 1995 (a copy of a *despacho de importación*) regarding a shipment of US carpet on which specific duties of US\$1,775.00 on a c.i.f. value of US\$2,811.58 had been assessed. Application of specific duties in this instance resulted in a duty equivalent to 63 per cent *ad valorem*. If further particular examples of how Argentina's specific duties exceeded 35 per cent *ad valorem* were needed, Argentina had provided them by submitting copies of the challenges by importers of Company X (involving footwear) and Company Y (involving textiles) against the imposition of minimum specific duties greater than 35 per cent *ad valorem*.

3.176 **Argentina** replied that the operation of October 1995 referred to by the United States involved only an amount of US\$3,000 and the unit transaction value was US\$1.90 although, in 1995, the year of the transaction, the average price for exports from the United States to Argentina in the same tariff heading gave a f.a.s. unit value of US\$2.79. If this transaction had been carried out at the average value indicated, with the adjustment needed to be regarded as c.i.f.-Port of Buenos Aires, the minimum specific import duty applied (US\$1.09) would have resulted in an *ad valorem* equivalent of less than 35 per cent (average c.i.f. value equalled US\$3.18; *ad valorem* equivalent equalled 34 per cent). Argentina also noted that the duty had not been challenged, even though it was precisely for these specific cases, *i.e.* the operations with a transaction value much lower than the average for the tariff heading, that the challenge procedure was available. Similarly, as the documentation provided by the United States recorded, the operation was carried out under the "Green Channel" procedure, so that the goods were not examined by the Argentine customs administration.

3.177 For Argentina, it was highly significant that the United States could only submit a single transaction among the thousands corresponding to the approximately 580 tariff headings to which minimum specific import duties were applied. Moreover, the transaction value represented approximately 60 per cent of the average price of Argentine imports from the United States in this tariff heading and

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<sup>100</sup>This company is hereafter referred to as "Company X".

the importer chose not to make use of the procedure established by Argentine law for correcting possible excessive duty assessments.

3.178 The **United States** stressed that the best evidence of the excessive nature of Argentina's specific duties were the Argentine customs forms identifying assessed duties. However, these were in the possession of the Argentine Government. For this reason, the United States had requested Argentina to produce all relevant customs forms involving imports in HS line-items 5407.81 (woven synthetic fibre fabric), 5703.20 (carpets), and 6110.30 (manmade fibre sweaters) for the period January-September 1996. The United States had chosen these three categories in part because Argentine customs data showed that the average duty paid for these three groups of imports from the United States was 99, 43 and 56 per cent, respectively, during the period January-July 1996.<sup>101</sup> Argentina had failed to produce these documents.

3.179 The United States also presented additional evidence before the second meeting of the Panel. This evidence consisted of a table and copies of import documents. The copies of import documents reflected the underlying Argentine customs documents that were summarized in the table. The page numbers on the copies of the import documents related to the first column in the table. Like other Argentine customs documents presented by the United States to the Panel, these documents showed examples in which Argentina had applied duties in excess of its 35 per cent *ad valorem* duties. The tables reflected a large number of specific examples where Argentina had applied and enforced specific duties that violated Argentina's 35 per cent *ad valorem* bindings. One of the above-mentioned documents summarized them all: it referenced a total of 11 shipments of hosiery and socks during 1996 and 1997 within the apparel HS categories covered by the Argentine measures at issue in this dispute. Because many of these shipments included products in different HS categories, these 11 shipments involved a total of 20 instances of products in which Argentina had applied duties in excess of 35 per cent *ad valorem*. The same tables also summarized examples regarding footwear shipped during 1996. As with most of the apparel examples, there were more than one product category in each shipment. In 58 separate instances of products within these examples, the specific duties applied resulted in payment in excess of 35 per cent *ad valorem* duties. Thus, in total, the table reflected 78 different instances of shipments in which specific duties had been levied and paid in excess of 35 per cent equivalent *ad valorem*.

3.180 Among the data submitted by the United States, **Argentina** considered the example of the import document in which the export originated in United States customs territory. Apart from the general consideration that it concerned an import transaction for which customs clearance had been carried out manually, this particular case suffered from a number of formal defects which could ultimately invalidate the substantive arguments they were intended to support. Firstly, it represented only part of a larger shipment for which the customs documentation had not been supplied. What the total shipment consisted of was not said, nor was the full assessment of import duties and the amount to be paid by the importer on the basis of that full assessment mentioned. In addition, there was no receipt from the *Banco de la Nación* which represented the last step in the customs clearance procedure for imported goods. Secondly, the legal basis indicated for determining the *ad valorem* duty applied to the mentioned goods was erroneous, since Decree No. 2275/94 was not in force in March 1996, when the transaction took place, as it had been replaced by Decree No. 998/95 on 1 January 1996. Thirdly, the legal basis for determining the specific duty applicable to the tariff heading declared by the importer was apparently Resolution No. 1554/94, which in fact dated back to 1993 and in any event was not in force on the day in March on which the said import allegedly went through clearance procedures upon entry into Argentina. Fourthly, the legal basis on which the three per cent statistical tax was levied was definitely erroneous, since Resolution No. 1031/94 was not in force on the day in March on which the import allegedly went through Argentine customs clearance procedures. Indeed, at that time, the

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<sup>101</sup>The United States specified that these three categories, on average, would remain in excess of 35 per cent *ad valorem* even under Argentina's latest revision of its specific duties on textiles and apparel.

applicable statistical tax had been brought into force by Decree No. 389/95. Fifthly, the values declared by the alleged importer of the goods in question were US\$6.19 per dozen pairs in two cases and US\$8.05 per dozen pairs in the third case. These values were considerably lower than the average export prices of like goods (of the same tariff heading) originating in the United States in 1996. How was it possible for the alleged Argentine importer of the goods to accept to pay a specific duty of US\$12,578 for this import transaction as against the applicable *ad valorem* tariff of US\$3,999 without having recourse to the challenge procedure? Finally, Argentina found it impossible to delve further into all of these matters as the alleged importer's registration number and tax identification number (CUIT) as well as the import registration number, and the name and registration number of the customs agent, had been rubbed out. All of these considerations casted serious doubt on the credibility of this document.

3.181 Argentina believed that it was unacceptable, in the framework of the WTO, to continue addressing trade issues on the basis of anonymity of the actors involved and disputes settled between States on the basis of anonymous challenges. It would have been extremely useful for Argentina to have access to the elements which would have not only made it possible to verify, before the Panel, the credibility of the documentation submitted, but which would also been very useful to the Customs Authorities and the General-Directorate of Taxes in combatting fraud, evasion and smuggling which, to a certain extent, underlaid this discussion.

3.182 Argentina added that, of all of the evidence submitted by the United States there was not a single one that provided evidence of import duties actually paid to the Argentine Customs by importers. Only if such documentation had been included in the presentation would it have been possible to assert that tariffs in excess of 35 per cent *ad valorem* were collected for given textile or clothing imports. Argentina also provided the following documents:

- payment of import duties, Form OM 2132 (electronic registration);
- form OM 686 B (manual registration) (*Banco de la Nación*);
- full set with a sample of an import transaction processed through the so-called "manual system" (as opposed to the MARIA computer system).

3.183 Argentina argued that it could be seen from these documents that the evidence presented by the United States did not include all these different elements involved in the full processing of an import transaction by Argentine customs.

3.184 Argentina also raised the fact that the goods concerned in the evidence submitted by the United States were of Italian origin in all cases but one. Second, all of the transactions occurred in 1997 except one. Third, they involved different types and varieties of the same product, i.e. tights under tariff heading 6115. Fourth, all of the transactions were processed using the "manual system" while theoretically all transactions processed by the Buenos Aires Customs should use the MARIA computer system. The essential difference was that, with the manual system, the clearance form was filled in completely by the customs agent and then submitted to Customs, whereas with the computer system, the agent has direct access to the Customs computer, but may only feed in certain data, the rest of the information coming from the Customs data bank. The clearance forms provided did not signify that the duties were actually paid. The payment voucher, which represented the last step in the customs clearance process, had not been provided either. Finally, at least two of the shipments were partial shipments; in other words, only part of the customs documentation for a complete shipment was provided.

3.185 The **United States** argued that Argentina appeared to claim that the specific examples put forth by the United States that did not reflect imports from the United States were irrelevant. Thus, Argentina appeared to confuse two separate issues. The first issue was whether the United States had initiated a dispute settlement proceeding without any legitimate trade interest. Even assuming such a defense

was valid, Argentina had not asserted it. In any event, there was no doubt that the United States had substantial exports of textiles, apparel and footwear to Argentina. The second issue was entirely separate, *i. e.*, whether Argentina was applying specific duties to textile, apparel, and footwear imports in excess of 35 per cent equivalent *ad valorem*. This was an issue not dependent on the origin of the imported goods. Argentina had admitted that its customs officials had no discretion not to apply the minimum specific import duties, whatever the exporting country. Accordingly, evidence that imports from any WTO Member had been subject to duties in excess of a 35 per cent equivalent *ad valorem* rate in the relevant HS categories was very relevant to demonstrate Argentina's violation of Article II GATT 1994.

3.186 For the United States, Argentina repeatedly claimed that the above-mentioned import documents were not reliable or authentic because they did not include any proof of payment. However, Argentina did not contest that for each of the 78 examples submitted by the United States (see para. 3.179) there was a reflection of the calculation of specific duties in excess of 35 per cent equivalent *ad valorem*.

3.187 With respect to Argentina's argument regarding one of the documents that it quoted the wrong legal texts, the United States submitted that the products in question were socks from the United States found under HS 6115.92.00. Argentina was correct that Resolution No. 2275/94 cited in the lower left hand corner of the document was no longer in effect in March 1996. However, the resolution in effect at the time the products in document 34 were imported - Resolution No. 304/95 - had exactly the same specific duty (US\$7.6) as Resolution No. 2275/94 - and it was the correct US\$7.6 specific duty which was reflected in the import document concerned. Argentina's arguments did not show that the duty had not been paid or that the document was somehow not authentic. Rather, it showed that the importer could not keep track with the constant changes in the Argentine resolutions.

3.188 In response to the arguments of the United States that whether or not the legal measures referred to in this alleged customs document were correct was not important; that the minimum specific import duties rate applicable on the reported date of import (sometime in March 1996) was the same as that indicated; that Argentina did not contest the "assessments of specific duties" and thus acknowledged that they had been paid, **Argentina** reaffirmed the doubts that this alleged customs document raised as to whether it could be accepted as valid and recognized as part of an import transaction that actually took place.

3.189 Argentina also argued that the United States statements concerning the difficulty of obtaining this alleged documentation from Argentine importers, indicating that they did not provide it because they feared reprisals, were extremely surprising. One possible reason for the difficulty encountered by the United States in collecting evidence from Argentine companies could be inferred from the data on export prices from Italy to the United States for the same products that had allegedly been imported into Argentina according to the documentation submitted by the United States. Information on imports into the United States under heading HS 6115 showed that articles entering the United States at a price of US\$51.52/kg were being imported into Argentina at a much lower price.

3.190 Argentina added that these alleged customs documents submitted by the United States related to an alleged import processing through the Buenos Aires Customs under the so-called "manual system". This made it virtually impossible to carry out any verification unless all the elements needed to identify the import and the importer were available. Without the possibility of checking, it was not possible to differentiate between real and fictitious imports.

3.191 The **United States** replied that, with respect to the authenticity of these customs documents and invoices, customs stamps and signatures could be found on many of the documents. Many of these stamps were from Argentine customs agents and were found at the bottom or the top of some forms under *Oficializado - Firma y Sello Despachante de Aduana*. Argentina had admitted in its replies to questions of the United States that "customs agents were considered to be auxiliary customs officials for import operations". Certainly, these official stamps of customs agents constituted a presumption

that the documents were official unless Argentina could present evidence - not just oral assertions - that they were not authentic or constituted forgeries. No such evidence had been presented.

3.192 The United States added that Argentina admitted that its customs officials had no discretion not to apply the specific duties. "Applying" specific duties meant these customs officials had to charge and insist on payment of the duties before customs clearance. Given this lack of discretion, Argentina could not possibly claim that the specific duties reflected on the documents were not paid. There was no other way that the goods could have cleared customs, at least legally. Argentina had presented no evidence that there was no payment of these specific duties. It had presented no evidence that there were huge supplies of goods piling up in customs warehouses where no payment had been made.

3.193 **Argentina** replied that in the present case duties in excess of 35 per cent *ad valorem* had not been applied. Furthermore, there had been no cases of imports of textile products and clothing where the importers had challenged the application of specific duties on the grounds that they exceeded the 35 per cent *ad valorem* bound in the WTO. Under its legislation the commitment not to exceed the bound tariff level of 35 per cent ranked above the domestic laws and regulations. Moreover, the so-called challenge procedure provided for in Law No. 22.415 (Customs Code) fully guaranteed that the bound level could not be exceeded. The existence of this remedy neutralized the potential for exceeding the binding which, according to the United States, was inherent in the minimum specific import duty.

## 6. **BURDEN OF PROOF**

### (a) **Principles applicable to the burden of proof**

3.194 **Argentina** argued that one of the various precedents regarding burden of proof was the report on *EEC - Measure on Animal Feed Proteins*, in which the panel stated that:

"having heard no evidence that either the purchasing obligation, the security deposit [...] discriminated against imports of 'like products' [...] the Panel concluded that the EEC measures were not inconsistent".<sup>102</sup>

3.195 Argentina added that in the case *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, the Appellate Body had specifically elaborated this concept and given its interpretation:

"In addressing this issue, we find it difficult, indeed, to see how any system of judicial settlement could work if it incorporated the proposition that the mere assertion of a claim might amount to proof. It is, thus, hardly surprising that various international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it 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".<sup>103</sup>

3.196 Argentina recalled that this interpretation had been explicitly supported by the United States in its statement to the DSB when the report was adopted. On that occasion, the United States' delegation had stated that it supported adoption of the report mentioning, in particular, several of the points contained therein, in respect of which it asked that its statement be placed on record. The United States stated the following regarding these points:

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<sup>102</sup>Panel Report on *EEC - Measures on Animal Feed Proteins*, Op. Cit., para. 4.21, as cited in the Appellate Body Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Op. Cit., p. 15.

<sup>103</sup>*Ibid.*, p. 14.

"The Appellate Body reaffirmed a general principle of GATT and WTO jurisprudence that 'a party claiming a violation of a provision of the WTO Agreement must assert and prove its claim'. Once the claiming party has satisfied this obligation, the burden then shifts to the responding party to bring forward evidence and argument to disprove the claim".<sup>104</sup>

3.197 Argentina considered that the question raised by the United States before this Panel was a theoretical one. The United States had failed to demonstrate that Argentina levied tariffs exceeding the maximum bound rate of 35 per cent *ad valorem*. Nor had it been able to present argument sufficient to establish a presumption, the prerequisite for shifting the burden of proof to the other party in accordance with the report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.

3.198 The **United States** replied that, in submitting its evidence, it had met its burden of proof as articulated by the Appellate Body in *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*. The Appellate Body had indicated that it was up to the party asserting a violation "to present evidence and argument sufficient to establish a presumption" that the violation has occurred.<sup>105</sup> Once that presumption was established, "the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".<sup>106</sup> The Appellate Body further noted that "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".<sup>107</sup>

3.199 The United States contended that, by any standard, the evidence submitted by the United States was sufficient to establish a presumption of a violation of Article II. In fact, the Panel needed look no further than the face of the Argentine resolutions and decrees imposing the specific duties that were the subject of this dispute. For every line-item in which Argentina applied specific duties, there was a "break-even point" below which lower-priced merchandise entered Argentina in excess of 35 per cent *ad valorem*. Thus, the specific duties necessarily had the potential to exceed 35 per cent *ad valorem*. Previous GATT jurisprudence had made clear that this potential, in and of itself, was a sufficient basis for the Panel to find that Argentina had violated Article II.

3.200 The United States also argued that a panel could condemn Argentina's mandatory minimum specific import duties even if they were not yet being applied. In that case the panel would examine the minimum specific import duties' structure and the manner in which it could be predicted to operate. In the present case the minimum specific import duties provisions were in fact being applied but they could equally be judged by this Panel on the same criteria. The fact that the tariff was being applied did not make it necessary for a complaining party to provide elaborate proofs concerning its application in practice. Examination of the tariff's structure, the basis on which it was charged, and the manner in which it would predictably operate, were sufficient to meet the complaining party's burden of proof. By these criteria, and with the application of simple arithmetic, the Panel could easily conclude that the Argentine tariff mandated the imposition of duties in excess of bound rates.

**(b) Application in the present case**

3.201 The **United States** stressed that there were two factual issues before the Panel: first, whether the United States had established a presumption that the application of Argentina's specific duties violated Argentina's bound *ad valorem* rate of 35 percent; and second, whether Argentina had produced sufficient

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<sup>104</sup>Statement by the United States at the DSB meeting of 23 May 1997, Op. Cit.

<sup>105</sup>Appellate Body Report on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, Op. Cit., pp. 12-17.

<sup>106</sup>*Ibid.*, p. 14.

<sup>107</sup>*Ibid.*

evidence to rebut the presumption. The United States believed that it had presented sufficient evidence to establish a presumption of a violation of Article II and that Argentina had not produced sufficient evidence to rebut it.

3.202 **Argentina** argued that the United States had provided no or insufficient proofs of its affirmations.

3.203 The **United States** contended that it had demonstrated that Argentina imposed specific duties in numerous HS line-items for textiles, apparel and footwear in excess of its 35 per cent *ad valorem* bound rate. The US evidence consisted of: (1) invoices and customs forms for particular textile, apparel and footwear shipments during 1995 and 1996, (2) calculations performed by Argentina showing HS line-items where average duties paid by importers in 1995 and the first 9 months of 1996 exceeded 35 per cent *ad valorem*, and (3) computations based on Argentine import data reflecting 118 textile and apparel line-items which, on average, exceeded 35 per cent *ad valorem*. This information proved that Argentina's specific duties were above its bound rate in violation of Article II.

3.204 For the United States, given the weight of the evidence presented to the Panel, the burden had shifted to Argentina to "adduce sufficient evidence to rebut the presumption" that Article II had been violated. Argentina had not provided any such evidence, let alone evidence sufficiently credible to rebut the proof submitted by the United States. Instead, Argentina had relied on unsubstantiated, categorical denials that Argentine customs authorities had applied, or even could have applied, specific duties in excess of 35 per cent *ad valorem*.

3.205 **Argentina** replied that the evidence supplied by the United States were generally theoretical or not based on proven facts. With respect to the assertion that the minimum specific import duties imposed were 100 to 300 per cent of the value, such an allegation was not acceptable without concrete proof. The allegations made by the United States did not permit an assessment of whether there had been any non-compliance, or its possible extent. The evidence submitted by the United States concerning textile and clothing imports consisting of invoices and customs documents did not suffice to establish a "presumption" with respect to the allegations against Argentina. Indeed, the comparison of average import price statistics with the minimum specific import duty in force to obtain an *ad valorem* equivalent did not signify that the tariffs in question were actually collected from importers in the course of transactions that were actually carried out. These documents did not correspond to the reality of what actually may have been paid to the Customs. Other evidence were out of proportion with Argentina's imports of textiles. In the recourse by Company Y to the challenge procedure, the three transactions at issue represented a value of US\$42,698, when textile imports in Argentina totalled more than US\$1,500 million for the period 1995/1996. Each transaction was important and was subject to WTO regulations, but the amount involved led Argentina to wonder whether the minimum requirements of Article 3.7 of the DSU, which stipulated that a member "shall exercise its judgement as to whether action under these procedures would be fruitful", had been met.

3.206 Argentina further recalled that, in response to the Panel's request to provide concrete cases of violation, the United States had submitted as evidence certain transactions whose shortcomings were sufficiently clear. Argentina noted that all of the textile transactions, with the exception of one, had been carried out by EC exporters. The EC was not a complaining party in this case. It was interesting to note in this connection that the evidence submitted by the United States showing import transactions involving goods of Italian origin corresponded to a tariff heading (HS 6115, tights) that was not included among the examples of violation of Argentina's 35 per cent tariff binding mentioned by the EC itself in its third party submission. All the transactions corresponded to goods of Italian origin and all had taken place in 1997, with one exception. The United States could not have known of these transactions when it requested the establishment of this Panel. Argentina's conclusion regarding the additional series of invoices submitted by the United States before the second meeting of the Panel was that the information on textile exports from and originating in the United States was both unclear and imprecise. This was the best proof that the United States was fighting a case in which it needed to resort to sources

of information outside its own market to try to substantiate its claim that Argentina had violated its obligations. Argentina also questioned the acceptability for a party to present evidence pertaining to alleged transactions of another country after the deadline for rebuttals.

3.207 For Argentina, the above observations clearly demonstrated the lack of argument for establishing a presumption in respect of the allegations contained in the complaint by the United States. Without this presumption, Argentina could not be asked to submit evidence of facts which had not been shown to exist. If the United States was unable to substantiate a presumption that its complaint was legitimate, it could not be claimed that the burden of the proof had shifted to the point where evidence had to be submitted to refute the presumption. If the United States was unable to provide clear and precise examples of import transactions in the textiles and clothing area, it could only be assumed that the United States claim was purely theoretical, since Argentina had not been given reason to believe that its customs authorities collected minimum specific import duties in excess of the 35 per cent WTO binding.

3.208 The **United States** argued that the documents, data and calculations discussed with the Panel identified numerous line-items where Argentina's specific duties on average were greater than 35 per cent *ad valorem*. These documents did not reflect isolated instances in which Argentina had exceeded its bound rate. Argentina did not contest the accuracy of the specific duty rates reflected on its own documents. Argentina did not contest the figures on value, ton, or price per kilogram contained in the documents originally prepared by Argentina and provided to the Panel by the United States. With respect to the specific examples of invoices and customs documents submitted by the United States, Argentina did not contest that the importers actually paid these charges or had to file bonds to cover the amounts in excess of 35 per cent *ad valorem* duties. Argentine documents and Argentine data conclusively demonstrated that Argentina's position was incorrect.

3.209 The United States contended that, in light of the import data provided by Argentina to the United States, production of the relevant documents would have resulted in many other examples of duties in excess of 35 per cent *ad valorem*. The Panel was faced with Argentina's refusal to produce directly relevant evidence in its possession as requested by the United States. Given that Argentina did not produce these documents, the Panel was free to draw an adverse inference that these documents would reflect additional examples of duties imposed and paid in excess of a 35 per cent *ad valorem* duty. Argentina's recalcitrant behaviour should not be used against the United States in an effort to assert that the latter had somehow failed to adequately satisfy its burden of proof with the limited documents in its possession.<sup>108</sup> In fact, the United States has fully met its burden of proof. It had demonstrated that the Argentine duties predictably and mandatorily resulted in imposition of duties in excess of bound levels in a range of situations. In addition, it had provided examples of actual levying of such duties.

3.210 **Argentina** contended that the United States appeared to be trying to obtain from Argentina evidence substantiating the alleged infringement of the bound tariff which it had so far been unable to provide. It was surprising that the attempt to justify the allegations had been based solely on theoretical speculation which did not correspond to the realities of trade and that no concrete evidence had been provided of import operations in which duties in excess of 35 per cent had been assessed. The burden of proof should fall on the party bringing the complaint before the Panel. Argentina also argued that, with respect to evidence relating to imports of footwear, such data were not relevant to the present case since the DIEM on footwear no longer existed and did not exist at the time the Panel was established.

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<sup>108</sup>The United States referred to the judgement of the International Court of Justice of 9 April 1949, in *The Corfu Channel case*, ICJ Reports 1949, p. 4, at p. 32, in which, taking formal note of the refusal by a party to produce documents, the Court stated that it "cannot, however, draw from this refusal to produce the [naval] orders [requested by the Court] any conclusions differing from those to which the actual events gave rise".



3.211 According to the **United States**, Argentina did not respond to United States arguments concerning the document regarding imports into Argentina from the EC and the rest of the world which the United States had produced before the Panel. The Panel was left with Argentina's last-minute attempt to discredit its own documents that it had produced and relied on during consultations with the US and the EC. Indeed, Argentina's "rebuttal" consisted of an assertion that the document did not exist. This document formed an important element of consultations between the EC, Argentina and the United States. Argentina should not be free to rely upon information that it generated for purposes of consultations only to disavow it later in a panel proceeding.

3.212 The United States noted that Argentina also claimed that the specific examples of footwear products were irrelevant. The United States replied that the measures imposing footwear specific duties were part of the Panel's terms of reference. The evidence submitted by the United States, in particular the invoices and customs documents related to specific import transactions submitted before the second substantive meeting of the Panel, established without any doubt that up until the time that Argentina revoked the footwear measures on 14 February 1997, Argentina applied specific duties in violation of its 35 per cent *ad valorem* bindings on those products. Moreover, exactly the same specific duty system existed for footwear products as for textiles and apparel throughout 1996 to this time. The examples relating to footwear were a very good illustration of how the Argentine system functioned in many instances to impose duties in excess of 35 per cent *ad valorem* rates.

## **7. DIRECT EFFECT OF THE WTO AGREEMENT IN THE ARGENTINE LEGAL ORDER AND ROLE OF THE CHALLENGE PROCEDURE**

3.213 The **United States** noted that Argentina had attempted to defend its specific duties by arguing that they were not above 35 per cent *ad valorem* and under no circumstances could they be above the bound rate because they were essentially capped at 35 per cent *ad valorem* for two reasons. Firstly, Argentina maintained that the WTO Agreement, including Argentina's binding, had direct application in Argentine law and was supreme to domestic laws. Secondly, Argentina had procedures under Law No. 22.415 whereby importers had the right to challenge any duties assessed beyond the bound rate which was purportedly a part of Argentine law.

### **(a) Direct effect of the WTO Agreement in the Argentine legal order**

3.214 **Argentina** stated that the stability and predictability of concessions in its Schedule were supported by Article 75.22 of the Argentine Constitution of 1994. These commitments were at the top of the legal hierarchy and, therefore, took precedence over domestic legislation. Any judge in Argentina had the power to declare, at the request of an interested party, the unconstitutionality of any measure adopted in breach of rules contained in an international treaty, such as the WTO Agreement. This feature of the Argentine legal system was absolutely essential to its functioning, which differed fundamentally from that of countries where international treaties were interpreted by domestic legislation. Another fundamental characteristic of the Argentine legal system was that subsequent domestic law could not annul an international treaty, as such law was lower in rank. This constitutional provision provided a high degree of legal certainty. If the procedures envisaged in Articles 1053 to 1079 of Argentina's Customs Code (essentially the challenge procedure referred to in sub-section B.7.(b) below) were not satisfactorily resolved by the authority concerned, the summary proceeding was always available before domestic courts by which importers could obtain a judicial decision obliging the Argentine Government to comply with international obligations deriving from WTO Agreements, over and above any domestic regulations, such as laws, decrees, ministerial resolutions, or others.

3.215 Argentina noted that US traders had reported that the Argentine customs service regularly asked for payment of the full specific duty and did not inform them of a right to pay only those duties that "they consider correct", as it seemed to be possible. Asked by the United States whether it considered it the responsibility of importers to know that they were being asked to pay amounts in excess of 35

per cent *ad valorem* duties, Argentina replied that the legislation in force in the Argentine Republic was assumed to be known to all inhabitants and was public knowledge once published in the Official Journal (*Boletín Oficial*) of the Argentine Republic (Title I of the Civil Code of the Argentine Republic). This was the case with Law No. 24.425, published on 5 January 1995, which approved the WTO Agreement, including as annexes the respective texts of each agreement, and Argentina's Schedule LXIV, which contained the commitment to maintain a tariff ceiling of 35 per cent and details of the corresponding tariff headings. Similarly, it was not considered necessary for the customs authorities expressly to inform importers of the provisions of Law No. 24.425 or of the possibility of resorting to the options provided for in the Customs Code (Law No. 22.415). Importers themselves were responsible for knowing their rights in the event of their being required to pay a minimum specific import duty in excess of 35 per cent of the declared value of the goods. The same would apply if they were required to pay an *ad valorem* duty in excess of that laid down in the Argentine tariff. This was because the importers knew the value of the goods they declared and could make a comparison either immediately or in advance, before presenting their sworn declaration and requesting clearance of the goods.

3.216 With respect to whether it had any regulations or published procedures instructing its customs service to refrain from assessing specific duties that were greater than the equivalent of 35 per cent *ad valorem*, Argentina stated that Law No. 24.425, which approved the WTO Agreement and all its annexes, including Argentina's Schedule LXIV, was mandatory and binding on all national authorities, including the customs authorities, which had to accept and observe the commitments contained therein in their entirety. Argentina also contended, regarding potential regulations or published procedures instructing Argentina's customs service to apprise importers of the applicability of the maximum rate of 35 per cent *ad valorem* on imported products subject to specific duties, that importers and the customs service itself could rely on longstanding publications such as the *Practical Guide for Importers and Exporters*, the *Customs Tariff Directory* and the publications of the *Centro de Despachantes de Aduana*. These publications kept importers continuously up to date and informed of the tariff levels in force. Similarly, importers could always count on the expert advice of the customs agents. Under the law, the latter were considered to be auxiliary customs officers for import operations and were personally responsible for informing importers of the provisions of the legislation in force, including the remedies which Argentine law provided.

3.217 Argentina considered it the responsibility of importers to know that the supremacy accorded to WTO commitments under Argentine law mandated that specific duties on textiles, apparel and footwear had to be no greater than the equivalent of 35 per cent *ad valorem*, even if no Argentine legal measure specifically so provided. The question of the supremacy of the provisions of an international treaty approved by a law of the Argentine Congress over domestic law was specifically dealt with in Article 75.22 of the Constitution, as amended in 1994. The Constitution, like laws and other administrative enactments, was considered to be public knowledge, from the day following its publication in the Official Journal.

3.218 For the **United States**, this argument appeared to rest on a legal fiction. While Argentina's tariff binding may be the "supreme" law in the Argentine constitutional framework, Argentina maintained a series of mandatory legal measures imposing duties inconsistent with its binding. In operation, Argentina systematically undermined the significance of its WTO commitments by requiring its customs officials to collect the full specific duties, even in circumstances where an overcharge was obvious or grossly excessive. If the Panel were to accept the direct application of treaty law and supremacy of the WTO Agreement as a defense, then Members with such legal systems in effect would be immune from dispute settlement proceedings. Argentina in effect was asking this Panel to bestow immunity from WTO review on any Member which treated WTO Agreements as self-executing under their law. These Members always would be able to argue that the provisions of the WTO Agreements were part of their law and thus, by definition, non-conforming domestic laws had been rendered consistent with any relevant WTO provisions. Such an outcome would undermine the vitality of the dispute settlement

understanding. The United States further considered that Argentina's argument regarding direct effect of treaties had no inherent limitation to tariff obligations. Argentina was in effect arguing that it could take *any* action it wished in violation of *any* WTO obligation, and that Argentina could then escape any finding of responsibility under the DSU, because affected private parties could ask the Argentine courts to nullify the Argentine Government's actions as inconsistent with the WTO Agreement. For the United States, the argument of Argentina concerning the mandatory nature of its constitutional law was an argument which Argentina continued to assert based on a legal hierarchy which ignored the actual operation of mandatory laws. It may well be that there was a constitutional ranking of the Argentine laws. However, the fact remained that Argentina had admitted that its customs officials had no discretion not to apply the decrees mandating the use of the minimum specific import duties. In fact, Argentine customs officials were required to violate the Argentine constitutional law.

3.219 **Argentina** considered that the comments of the United States concerning a "non-conforming law consistent with the agreement" did not stand up, since the supremacy of the treaties over the other laws and regulations under the Argentine constitutional system was demonstrated by the copy of the judicial order in case 8.447/97 *FILA (Argentina) S.A. et al.* submitted by the United States,<sup>109</sup> which constituted factual evidence of the full and total incorporation of the WTO Agreement into the Argentine legal system.

**(b) The challenge procedure (*recurso de impugnación*)**

3.220 **Argentina** mentioned that Argentina's legal system constituted a single and inseparable whole which included the procedure for challenging assessments: the challenge procedure (*recurso de impugnación*). In a hypothetical import transaction where the specific duty would exceed 35 per cent *ad valorem*, the importer would have a remedy available which guaranteed that by means of a simple submission the amount to be paid would be limited to the amount resulting from the WTO obligation. The procedure was automatic, free of charge, required neither middlemen nor legal advice of any kind and had predetermined time-limits. The challenge procedure was laid down in Argentina's Customs Code - Law No. 22.415 (Articles 1053 to 1067). Its purpose was to protect the importer in case of discussions about classification, valuation or the level of import duties applicable in a particular instance. The Argentine Customs Code provided that importers may express disagreement if they considered that the valuation of the goods or the import duties levied had been inappropriate. It allowed importers to request the release of the goods into the market after paying only the sum that they considered appropriate under the relevant laws. The National Customs Administration may require the importer to deposit a security to cover the difference between the amount actually paid and the amount claimed. When importers had recourse to this procedure, they had 10 days in which to submit the necessary arguments and information. In the meantime, the importation process continued. As far as specific duties were concerned, it had to be demonstrated that the amount set in a particular case following their application exceeded 35 per cent of the customs value of the goods.

3.221 According to the **United States**, the availability of "challenge procedures" did little to make Argentina's specific duties "predictable". In fact, these procedures only added to the confusion. By assessing the full amount of the applicable specific duties at the border, regardless of their *ad valorem* equivalent, and by requiring importers to employ ancillary procedures involving either an initial overpayment or the posting of a bond, Argentina leaved traders and WTO Members with great uncertainty as to what the actual duties charged would be and when that amount ultimately would be determined.

3.222 **Argentina** stressed that the challenge procedure was not viewed by Argentine law as purely theoretical. On the contrary, and to illustrate how it worked in practice, Argentina referred to two

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<sup>109</sup>See footnote 31 above.

cases concerning textiles and footwear. In the first case, the company representing Company X in Argentina, made a submission to the National Customs Administration,<sup>110</sup> challenging the payment of specific duties on several shipments on the grounds that they exceeded the 35 per cent *ad valorem* equivalent. On the basis of that one submission, several shipments of goods were released into the market with the deposit of a surety to cover the unpaid duties. A second example concerned textile products involving Company Y, relating to the challenge by a textile articles importing firm of the inclusion of packaging in the calculation of specific duties. The example included the document certifying payment of a security covering the difference between the tariff paid and the tariff set by customs and the customs clearance certificate. Both cases clearly showed that the procedure guaranteed in a simple and direct manner the release of numerous shipments of imported goods into the market without payment of duties exceeding the 35 per cent bound rate.

3.223 The **United States** argued that the first time Argentina raised Law No. 22.415 to explain why its specific duties were within its bound rate was in its submissions before the Panel. Argentina had previously taken the position that its specific duties were consistent with its WTO obligations because the duties were no more than 35 per cent of an adjusted average import price for each category. Likewise, the availability of domestic procedures to challenge an assessed duty did not justify the establishment of duties in excess of the bound rate. Argentina seemed to be taking the position that its Schedule may list any duty rate, no matter how high, and it may assess that rate at the border as long as a final appeal adjusted the duty to no more than 35 per cent *ad valorem*. Argentina's argument ignored the extreme uncertainty such practices would create. Importers would be required either to pay the full amount of the specific duties and await a refund from Argentina or pay a partial amount and provide a bond for the rest. Under both scenarios, importers on a regular basis were subject to charges in excess of the bound rate. In reality, they would only know what the duty was after the customs service or the courts had made a final decision. Surely this was not the predictability and security in tariff rates that the GATT and WTO were designed to achieve.

3.224 **Argentina** was not of the opinion that Article II GATT 1994 permitted a WTO Member to assess any duty at its border, no matter how high, so long as that Member provided appeal or challenge procedures to subsequently conform the duty to the bound rate. If there were bound tariffs in the Schedule of a WTO Member, the latter may only require the payment of the maximum tariffs bound. However, below that level it could apply the tariff level it considers most appropriate and assess it on an *ad valorem* or specific basis. Asked by the United States whether it was of the opinion that no impairment of Argentina's tariff concessions existed where importers were assessed duties in excess of the bound rate but were permitted to pay a portion of the duties assessed, post a bond and then wait for appeal or challenge procedures to conclude before receiving a return of their bond, Argentina replied that the United States question was based on a purely hypothetical premise, since Argentina was not infringing the tariffs bound in its Schedule for any product category. Argentina considered that impairment of the concessions granted by a country existed if the latter assessed a tariff in excess of the bound level, thereby adversely affecting imports which should have received the treatment provided in its WTO Schedule. In exceptional situations which might hypothetically arise and in which the tariff applied exceeded the bound tariff level, Argentine legislation provided for the challenge procedure that enabled importers to question the administrative act requiring the payment of a tariff higher than that which had been bound.

3.225 The **United States** contended that the existence of administrative "challenge procedures" did not justify violations of Article II. Argentina had acknowledged that its customs service charged specific duties as set by relevant resolutions and decrees even if such duties amounted to more than 35 per cent *ad valorem*. Argentina defended this practice by stating that, to the extent the specific duties exceeded the bound rate, importers were free to use "challenge procedures" to recover any overpayment.

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<sup>110</sup>Argentine Customs Administration, File No. 404.349.

Argentina explained that such challenges were bound to succeed because, under the Argentine constitution, WTO obligations were self-executing and supreme to domestic law. However, Argentina's argument lacked merit for several reasons. Argentina's invocation of its challenge procedure raised form over substance. The reality of importing textiles, apparel and footwear into Argentina was that the Argentine customs service charged excessive specific duties and expected payment of the full amount. Although Argentina admitted that it could "only require the payment of the maximum bound rate", it had explained that the specific duties were to be applied by the Argentine customs officials who had *no competence to modify the duties*.

3.226 For the United States, the rate Argentina charged at its border had to be the relevant duty for purposes of Article II, not some amount adjusted later on appeal. Argentina has conceded as much when it had recognized that GATT Article II did not "permit a WTO Member to assess any duty at its border, no matter how high, so long as that Member provides appeal or challenge procedures to subsequently conform the duty to the bound rate". This had to be the case, otherwise Argentina or any other WTO Member could charge hundreds and even thousands of dollars for each kilogram of textiles and still meet its WTO obligations since, at some undetermined point in the future, the duty would be reduced to within the bound rate. The fact that Argentina had a mechanism for appealing an initial duty assessment, as did almost all WTO Members in accordance with Article X:2(b) GATT 1994, is simply immaterial.

3.227 The United States also argued that Argentina ignored the extreme uncertainty that resort to the challenge procedures created. Importers were required either to pay the full amount of the specific duties and await a refund from Argentina or pay a partial amount and provide a bond for the rest. Under both scenarios, importers on a regular basis were subject to charges in excess of the bound rate. Importers only learned what the actual duty would be after the customs service or the courts had made a final decision. If the mere availability of challenge procedures was a defense to the imposition of excessive duties at the border, as Argentina seemed to suggest, then one of the fundamental principles underlying Article II, that Members shall be exempt from duties in excess of a bound rate, would lose much of its meaning.

3.228 The United States further contended that, by charging excessive specific duties and requiring importers to take action to recover any balance owed, Argentina had collected far more in duties than what was permissible under Article II. During the January - September 1996 period alone, Argentina had apparently overcharged importers handling relevant types of textiles and apparel from the United States by approximately US\$1,634,000. Based on other evidence of similar overcharging, Argentina had reaped large sums in overcharges in connection with imports from other sources, including Asia and the EC.<sup>111</sup>

3.229 To this, **Argentina** replied that the repeated claim that a sum amounting to US\$1,634,000 had been paid was simply a theoretical calculation using statistical data that were inappropriate for the purpose, since they were not intended for elaborating average prices.<sup>112</sup>

3.230 In the view of the **United States**, administrative and even legal challenges to the initially assessed duties were not simple. Such appeals often were lengthy, complicated and expensive. This system also inherently contained a less favourable treatment aspect as foreign traders received the benefit of a bound rate only after employing ancillary procedures. Contrary to Argentina's suggestion, Company X had not found the procedures simple or painless. In fact, Company X had attempted to use two ways of challenging the assessment of specific duties. In one instance, Company X paid the full specific duties charged and later claimed a refund. To date, Company X had not recovered any of the approximately US\$2.5 million it expected to be returned. Company X also had tried paying a portion

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<sup>111</sup>See sub-section B.5(c) above

<sup>112</sup>Ibid.

of the duties assessed and posting a bond for a rest. With regard to these entries, Company X had been waiting more than 18 months for a decision by the Argentine customs service for a determination as to whether Company X would be held liable for the difference.

3.231 **Argentina** insisted that it had mentioned the example of a submission by the firm representing Company X in Argentina as constituting one of the first of such cases it had identified. In this case, the Argentine customs administration, while recognizing that the challenge was in order, decided to declare it improper because an appeal by the same company on the same issue had been lodged with the Ministry of the Economy which preceded the challenge procedure. However, the point to be stressed was that the challenge procedure was based, among other elements relating to domestic legislation, on the assumption that the resolution imposing the duties was contrary to the law ratifying the WTO Agreement and on the fact that the Constitution stipulated that treaties and concordats are to supersede laws, and therefore the provision in question should not establish a duty which exceeds the said rate (35 per cent) or that constitutes a breach of the provisions of the International Treaty. These arguments were largely in line with those presented by Argentina to show that in the hypothetical case that a minimum specific import duty were applied to a given transaction or shipment in excess of the *ad valorem* equivalent of 35 per cent, the challenge procedure would be applied as a direct means of ensuring that the importer did not have to pay more than the 35 per cent ceiling.

3.232 The **United States** considered that the challenge procedures had offered no genuine relief to importers. Argentina had not refunded any amount of duties to importers of textiles, apparel and footwear under these procedures. Argentina had explained that this was so "because there have not been any restitution proceedings brought before Argentine customs officials" and "no cases exist in the area of imports of textile and apparel products where importers have raised the issue of the imposition of specific duties that exceed the 35 per cent *ad valorem*". However, the total absence of a challenge by *any* textile or apparel importer - a remarkable fact in light of the grievances filed by European, Hungarian and US traders with their respective governments - strongly suggested the inadequacy of Argentina's regime.

3.233 For the United States, the fact that the challenge procedure was seldom if ever used by textile and apparel importers could be attributable to the fact that Argentina did not publicize this remedy, nor did it inform importers when the specific duties, as applied in particular cases, were above 35 per cent *ad valorem*. Indeed, the existence of procedures purportedly guaranteeing that Argentina would not assess duties above its bound rate was not only unknown to traders, but also to the United States. The United States and Argentina had held four rounds of consultations in this matter and at no time had Argentina attempted to justify its regime based on the availability of challenge procedures.

3.234 **Argentina** acknowledged that this remedy had not been discussed until the Panel proceedings began. However, the existence of the challenge procedure was public knowledge and had been part of domestic legislation since 1981. The fact that it was not mentioned in consultations with the United States was irrelevant, both as regards its status as an integral part of Argentina's legal order and as a tool used by importers. The procedure had been applied frequently since its introduction in disputes or issues relating to tariff classification, valuation and other preparatory measures for the assessment of customs duties. Argentina recalled that the total number of current challenge proceedings on all grounds - classification or estimated value - was calculated to be about 12,000. This indicated that importers were perfectly accustomed to using this procedure. Among the 12,000 cases recorded it had not been possible to find a single challenge relating to textile products based on the application of a minimum specific import duty in excess of 35 per cent *ad valorem*. It was understandable that Argentina's trade partners wondered why this challenge procedure had not been used in the past for alleged violations of the 35 per cent bound rate by the minimum specific import duties. The first explanation was that the specific duties applied did not in fact exceed the 35 per cent binding, even on exceptional occasions. However, this may not be the only explanation. First of all, even though the procedure was well known, importers might not have become aware of the fact that it was also available for alleged violations of

the bound rate, as Argentina's obligation to apply a tariff ceiling for textile products only dated back to 1995, with the entry into force of the WTO Agreement. Moreover, only since 1994, with the amendment of the Constitution, had Article 75 thereof stipulated that international treaties maintained a higher position in the constitutional hierarchy than Argentine law. This may have caused a certain delay before the importing firms reached the conclusion that the same challenge procedure that they were probably using to challenge assessments in connection with other types of problems could also be used to challenge the imposition of specific duties exceeding 35 per cent.

3.235 Secondly, according to Argentina, another element could help to explain the lack of recourse to the challenge procedure: the problem of underinvoicing and, in general, the problem of customs control. Under-invoicing was a chronic problem in Argentina. The magnitude of the customs problem, which was not limited to under-invoicing but involved all kinds of illegal operations, had been described during consultations. A series of modifications in the customs system had been made in 1996 to address it, including changes in the way it operated and the establishment of a system of preshipment inspection. The volume of under-invoiced transactions was enormous (it was said that, in the last years, some 27,000 containers had been smuggled across the border causing losses to the Argentine treasury estimated at US\$3,000 million and inestimable damage to the domestic industry). The judicial investigations carried out thus far had shown that large quantities of textile products and clothing were also involved. In this context dominated by the inefficiency of the customs system and the widespread practice of underinvoicing, it was highly unlikely that many importers would resort to the challenge procedure. By doing so, they would have run the risk of drawing the attention of the authorities to the question of the legality of their operations. As from 1996, the investigations conducted by the Argentine Government, the courts and the Congress with respect to import transactions began to make underinvoicing difficult and the decision by the Government to bring the customs body and the Directorate-General of Taxation together under a single authority made it possible, among other things, to carry out electronic cross-checking of information supplied in the import price declarations against domestic tax payments, thereby completely altering the economic equation for those intending to under-invoice: if the domestic tax-collection body was much more efficient and difficult to evade, the risk considerably outweighed profits that might be derived from underinvoicing. This also explained why, in 1996, import prices for textile products and clothing increased in Argentina, a trend which was not reflected in the international market.

3.236 Argentina declared that the challenge procedure, which may have appeared to have been nothing more than "window dressing", now provided a clear and transparent guarantee of compliance with international commitments. Indeed, under the challenge procedure, if an import duty assessment was challenged because it exceeded the 35 per cent limit set by Law No. 24.425, the goods were nonetheless released. In other words, to secure the entry of the imports, the importer may pay the tariff in force and challenge any minimum specific import duties applied in excess of the duty bound within the WTO. The importer, the holder of the clearance documents, was the one legally authorized to file a challenge application. There was no process for the automatic initiation of a challenge procedure by the Argentine customs officials. The process could only be initiated at the request of an individual who showed that his rights had been infringed. As Argentina did not apply specific duties or tariffs in excess of 35 per cent *ad valorem*, it was not deemed necessary to set up notification machinery for purely hypothetical cases. The procedure had to be entered into by the importer within 10 days of the notification of the customs duty assessment.<sup>113</sup> The challenge had the effect of suspending payment of the difference in the duty rates.<sup>114</sup> By paying a security to the customs authorities reflecting the difference between the tariff in force and the minimum specific import duty claimed by customs, the importer may automatically (within three or four days at the most) release the goods into the market. The customs authorities then had 40 days to produce evidence against the importer's claim.<sup>115</sup> If such evidence was produced, the

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<sup>113</sup>Argentine Customs Code, Article 1054.

<sup>114</sup>Ibid., Article 1058.

<sup>115</sup>Ibid., Article 1062.

importer had six days to refute the evidence.<sup>116</sup> Once that time-limit had elapsed, the customs authorities had 60 days to confirm or revoke the challenged administrative measure.<sup>117</sup> Thus, in accordance with these time-limits, the process may last 116 days. If the measure was confirmed (the assessed import duties being below 35 per cent), the importer had to pay the difference between the two amounts. If the measure was revoked, the duties exceeding the 35 per cent *ad valorem* limit, the importer was freed of all obligations. The only form which importers had to complete to obtain the release of their security was form 1190-A which was used for both lodging and releasing the security.

3.237 Argentina specified that if the customs authorities decided against the importer, the importer had two alternatives: either to appeal the decision before the Tax Court or to appeal to the Federal Administrative Tribunal. Title III (Remedies) of the Customs Code (Articles 1132 to 1183) described the procedure for appealing a final decision signed by the head of the local customs department. If the local manager took a final decision unfavourable to the importer, the law allowed the latter 15 working days following the notification of the decision to appeal to the Tax Court. The appeal was presented to the Tax Court together with the evidence, and the records were submitted to the Court by the Proceedings Division of the customs service. If the challenger lost his case, he could appeal the decision of the Tax Court to the National Chamber in the Federal Administrative Litigation Division.

3.238 Regarding the nature of proof (facts, documentation, testimony statements) requested under the challenge procedure, Argentina stated that an importer could initiate a challenge proceeding without having to provide any proof. For the remedy to be available it was sufficient for the importer to indicate to the customs administration his intention to challenge the duty assessment. In the particular case of challenges entered against duties in excess of 35 per cent, the procedure was even simpler since it was only necessary to provide the commercial invoice or an identical copy. The proceeding was substantiated by the documentation in the possession of the customs, the certificate of payment of the duties which, in the opinion of the importer, should be paid and the corresponding bond for the difference in duty.

3.239 The **United States** questioned the meaning of Argentina's statement that the process was "automatic" and "without cost", in particular it asked whether it was its contention that importers challenging such assessments in excess of the 35 per cent *ad valorem* rate had "no costs" imposed on them in terms of time, opportunity costs, costs of security, experts and attorney's fees, and delay and uncertainty in the shipment of goods.

3.240 **Argentina** replied that saying that the process was automatic signified that the importer could enter the goods for consumption by paying only the duties which he considered applicable. Saying that the process was without cost meant that it was not a procedure for which there were charges.

3.241 Regarding legal representation, Argentina mentioned that experts were not needed to calculate 35 per cent of the customs value of the goods. For the purposes of initiating a challenge proceeding, Article 1034 of the Customs Code required legal representation. The relevant documentation was provided by the customs administration itself. Asked whether there were established procedures if any, for refunding attorney's and expert's fees, the costs of obtaining a bond or other security, and the costs of employee time expended in a successful challenge procedure, Argentina replied that the attorney's fees were paid by the importers concerned. The same would apply to the fees of experts who participated in the proceedings at the request of the importer, since customs did not automatically require their participation which, moreover, was non-existent in these cases. The cost of bond insurance was very small, generally consisting in the payment of an annual premium which varies between only 1.8 per cent and 2 per cent depending on the type of activity and the amount of security which, it should not be forgotten, represents only the difference in duty. Finally, if despite the fact that the costs of the

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<sup>116</sup>Ibid., Article 1063.

<sup>117</sup>Ibid., Article 1065.



challenge proceeding were low (bearing in mind that there were no charges) the importer wanted to be reimbursed, he always had the option of suing for reimbursement in the competent court.

3.242 With respect to interests on the money held by Argentina if the full amount of duty exceeding 35 per cent *ad valorem* had been paid, Argentina mentioned that the action for restitution which could be brought against the customs, if won by the importer, would provide for the refunding of the amounts improperly collected plus interest due from the point at which the return of wrongly collected duties had been requested (form 1724-B), that is to say, after payment of the assessment resulting from clearance. Within 10 days of the Valuation Technique Division notifying the importer of the application of specific duties, the latter may opt for the challenge procedure (payment of the duty applicable, without payment of the DIEM, lodging of a deposit or property bond for the difference) or to pay everything the customs required and bring an action for the restitution of the amounts he considers to have been overpaid.

3.243 The **United States** submitted that challenge procedures were not an essentially painless process by which importers may rectify any overcharges. The procedures were not necessarily quick or simple, as was evidenced by the lone instance in which a US manufacturer had attempted to rely on the challenge procedures. Company X had attempted to use two ways of challenging the assessment of specific duties. In one instance, Company X had paid the full specific duties charged and later claimed a refund. To date, Company X had not recovered any of the approximately US\$2.5 million it was expecting to be returned. Company X also had initiated a challenge procedure in April 1996. It had paid a portion of the duties assessed and posted a bond for the remainder. It had used legal counsel who filed a substantial brief and supporting documentation. Despite Company X's experience, Argentina claimed that the maximum length of time for such a proceeding was 116 days. In the case of Company X, it had not been respected. Company X also noted that under Argentine law, if it wanted to appeal any eventual ruling of the Argentine customs service, it would have to pay the full amount of the specific duties. As Company X learned, importers were put at a competitive disadvantage by the delay and uncertainty of having to use these procedures instead of being charged a proper duty at the border. Importers also were forced to bear needless costs in terms of interest on the value of any bond posted.

3.244 According to the United States, this could have easily been avoided if Argentina had imposed only *ad valorem* rates of no more than 35 per cent. There was no reason why Argentina could not do so. Argentina had admitted it collected value and quantity information from which an *ad valorem* duty could be applied in the case of each shipment of imports. It further had admitted that it had spent US\$328 million collecting statistical information in 1996, and it could not deny that it had levied its statistical tax on an *ad valorem* basis. At minimum, Argentina could have instructed its customs officials to refrain from charging specific duties in excess of 35 per cent *ad valorem*.

3.245 For **Argentina**, although the example of Company X was not pertinent since it concerned a question relating to footwear, the United States' criticism of the challenge procedure and its duration, which mentioned the cases of Company X, was not correct. If in a specific case, Company X chose to appeal against the imposition of minimum specific import duties to the Ministry of Economy, the Argentine authorities could not be responsible for the proper choice, in a specific case, of the remedies which the law placed at the importer's disposal. The challenge procedure was not a justification for applying minimum specific duties. The characteristics of the challenge procedure could not be evaluated solely on the basis of the experience of Company X. If this company had decided to utilize other bodies when dealing with the administration, this was beyond the Argentine Government's control. It was a matter for decision at a legal level. This experience did not prove that the challenge procedure was not an appropriate mechanism for the purposes explained in Argentina's submission. It was also important to clarify that Company X was not awaiting a refund as a result of using the challenge procedure. According to this procedure, nothing more than the *ad valorem* rate in effect was paid and a bond was deposited. There could be no refunds because what was paid was the sum considered to be payable. Company X had utilized another appeals procedure known as *repetición* (reimbursement

procedure). The company paid and then requested the refund of the amount that allegedly exceeded the 35 per cent level. The challenge procedure mechanism provided guarantees to reassure operators that they would not be requested to pay an import duty exceeding 35 per cent *ad valorem*.

3.246 According to the **United States**, by citing its challenge procedures, Argentina was essentially asking the Panel to adopt a new rule requiring WTO Members and their traders to exhaust local remedies before bringing a matter to a panel. However, GATT law did not include the "local remedies rule" as it was recognized in public international law.<sup>118</sup> Disputes under the GATT addressed rights and obligations between WTO Members, not individuals, and the doctrine did not apply to disputes solely between nations.<sup>119</sup> Neither the GATT nor the WTO had ever adopted a practice of requiring exhaustion of local remedies before bringing a matter to a dispute settlement panel. To the United States' knowledge, no prior panel or working party had made exhaustion of local remedies a prerequisite to commencing dispute settlement proceedings. Thus, there was nothing within the tradition or practice of the WTO dispute settlement system which supported Argentina's argument and, accordingly, it had to be rejected.

3.247 **Argentina** replied that it was not requesting the Panel to establish a new rule requiring the Members of the WTO and their entities to "exhaust local remedies". Argentina was stating that it was not possible for a country to come before the WTO and utilize the dispute settlement mechanism without sufficient evidence of the facts it wished to prove.

3.248 Argentina recalled that there was a challenge procedure that formed an integral part of the Argentine legal system and to which it was customary to resort. It was difficult to explain how this alleged "legal fiction", which included recourse to the ordinary courts and had generated about 12,000 cases, had not been used by the importers of United States goods.

3.249 For the **United States**, the direct application of the WTO Agreement in Argentine domestic law and the existence of a customs appeals mechanism offered no meaningful relief to aggrieved importers and did not justify the breaking of bindings. Argentina had confirmed that no specific duties on textiles or apparel had been refunded. The United States had described the efforts Company X had been forced to make in attempting to recover overpaid duties, and had furnished the Panel with a statement from Company X that it had had recourse to the "challenge procedures", a fact that Argentina contested. Argentina had to explain why Company X was still waiting for a decision 18 months after it had invoked the *recurso de impugnación* proceedings. Nor did Argentina contest that Company X was forced to pay specific duties far in excess of 35 per cent equivalent *ad valorem*, regardless of the procedures it invoked.

3.250 **Argentina** replied that the constitutional status of the Uruguay Round Agreements did not pretend to be a justification for authorizing measures that violated the commitments undertaken. Consequently, it was not true that the measures adopted by Argentina imposing the minimum specific import duties systematically violated its WTO obligations. Argentina did not seek nor ask for any "immunity" in order to apply measures of any sort that were contrary to its WTO obligations. The legislation in force and the challenge procedure were intended to guarantee to all importers that there would be no uncertainties. The absence of challenges, far from showing that the procedure was not valid, showed that importers had not utilized it specifically to query the minimum specific import duties on textiles.

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<sup>118</sup>The United States referred to Ernst-Ulrich Petersmann, "Settlement of International and National Trade Disputes Through the GATT: The Case of Antidumping Law" in Adjudication of International Trade Disputes in International and National Economic Law, Ernst-Ulrich Petersmann & Gunther Jaenicke, eds, Fribourg University Press, (1992), pp. 126 127.

<sup>119</sup>The United States referred to the judgement of the International Court of Justice of 20 July 1989 in case *Elettronica Siculo (ELSI)*, ICJ Reports, p. 15, and mentioned that, even though governments often brought an issue before the WTO on behalf of private citizens, disputes were fundamentally between States. Consequently, requiring exhaustion of local remedies of States would be futile.

Either importers did not find it necessary to utilize the procedure or they did not do so for reasons known only to them.

### C. THE STATISTICAL TAX

3.251 The **United States** argued that Argentina's three per cent *ad valorem* import tax was a charge on imported products inconsistent with Argentina's obligations under Article VIII GATT 1994. The United States referred in particular to Article VIII:1(a) and Article VIII:4(c) which made clear that fees and charges relating to "statistical services" fell within the scope of Article VIII.

3.252 **Argentina** contended that the statistical tax was a commitment undertaken by agreement between Argentina and the International Monetary Fund (IMF). This commitment obliged Argentina to maintain the statistical tax at a rate of three per cent until it expired in 1998. Any alteration of the rate before completion of the period laid down in the agreement with the IMF would imply non-compliance with the obligations assumed by the Argentine State *vis-à-vis* that organization.

#### I. VIOLATION OF ARTICLE VIII

##### (a) *Ad valorem* tax v. fixed tax

3.253 The **United States** noted that the requirement in Article VIII:1(a) that the charge be "limited in amount to the approximate cost of services rendered" was "actually a dual requirement, because the charge in question had first to involve a 'service' rendered and then the level of the charge had not to exceed the approximate cost of that 'service'".<sup>120</sup>

3.254 The United States argued that, as for the "level of the charge," an *ad valorem* levy with no fixed maximum fee, by its very nature, was not "limited in amount to the approximate cost of services rendered". With respect to a service largely identical, high-price items necessarily bore a much greater tax burden than low-price goods, because any differences that may exist in gathering statistical information with respect to each would not account for the difference in the amount assessed.

3.255 The United States contended that GATT precedent indicated that an unlimited *ad valorem* charge on imported goods violated Article VIII because such a charge was not related to the cost of the service rendered. In the report on *United States - Customs User Fee*, the panel had examined the consistency of 0.22 and 0.17 per cent *ad valorem* customs merchandise processing fees with no upper limits. The complaining parties had argued that an *ad valorem* fee approximating the actual costs of services could be consistent with Article VIII, but such a charge had to have a maximum to ensure that importers of high-value goods did not pay excessive amounts.<sup>121</sup>

3.256 The United States further noted that, confronting the same type of charge as was at issue in the present matter, the report of the working party on *Accession of the Democratic Republic of the Congo* had stated that:

Members of the Working Party pointed out that the statistical tax of 3 per cent *ad valorem* applied by the Congolese authorities on imports was not commensurate with the service rendered and was contrary to the provisions of Article VIII:1(a). The

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<sup>120</sup>The United States referred to the Panel Report on *United States - Customs User Fee*, adopted on 2 February 1988, BISD 35S/245, para. 69.

<sup>121</sup>*Ibid.* para. 86, where the Panel concluded that "the term 'cost of services rendered' [...] in Article VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question, and accordingly that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with, [...] Article VIII:1(a) to the extent that it caused fees to be levied in excess of such costs".

representative of the Congo recognized that this tax exceeded the cost of the service, and explained that the surplus revenue from the tax would be employed toward improving the service. His authorities were prepared to consider the adjustment of the statistical tax, in the light of the provisions of Article VIII as soon as they were in a position to afford it. The Working Party took note of this statement and invited the Government of the Democratic Republic of the Congo to re-examine its present method of application of the statistical tax and to report to the CONTRACTING PARTIES on the possibilities of bringing the tax into line with the provisions of Article VIII:1(a).<sup>122</sup>

3.257 The United States argued that the Argentine tax on imports could not be meaningfully distinguished from the charges at issue in the panel report on *United States - Customs User Fee* or the report on *Accession of the Democratic Republic of the Congo*, nor could it be squared with the reasoning cited above. In fact, the charge examined by the working party on the *Accession of the Congo* was identical to the charge at issue in this dispute and the working party had found the charge to be inconsistent with Article VIII. Argentina's tax was levied on an *ad valorem* basis with no ceiling. The tax as assessed on many goods was not in proportion to the cost of any service rendered.

3.258 **Argentina** contended that, as far as the *Working Party on the Accession of the Democratic Republic of the Congo* was concerned, it had been required to examine a fiscal charge different in nature from the statistical tax applied by Argentina. The purpose of this charge had nothing to do with the rendering of services and the report on the accession of the Congo, which involved simply a fiscal charge without the supply of any service, did not therefore apply.

3.259 Argentina added that the drafting history of Article VIII showed that the alternatives involving the use of a systematic method such as a uniform duty did not rule out the possibility of using *ad valorem* duties for the purpose.<sup>123</sup> Any approach that was selected for administering the service may have advantages or disadvantages. The trend towards automation of customs transactions required methods of calculation which served to facilitate the procedure, with the aim of processing as many transactions as possible with a limited stock of customs resources. Calculating the cost of each transaction would have created a trade barrier and establishing a schedule of transaction fees would have caused trade distortions, with the risk of transactions being manipulated in order to minimize the impact of such fees.

3.260 Argentina argued that one of the advantages of the *ad valorem* tax was its minimal impact on low-value imports and the lack of a protective effect. In addition, the *ad valorem* method had seldom been placed in doubt as a mechanism for recovering the approximate costs of the services rendered. In the proceedings of the Working Party reviewing Venezuela's accession to GATT, the representative of that country had indicated that:

"recent experience had shown that the application of any system other than an *ad valorem* fee would be extremely complex and bring in an element of administrative discretion which might lead to undesirable delays or obstacles to imports. Moreover, the administrative cost of operating a transaction-based fee would be very high".<sup>124</sup>

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<sup>122</sup>Adopted on 29 June 1971, BISD 18S/89, para. 5 (emphasis added by the United States).

<sup>123</sup>Argentina referred to the Panel Report on *United States - Customs User Fee*, Op. Cit., paras. 87-94 which stated, at para. 94, that "[W]hether considered individually or as a whole, the events which constitute that history simply do not demonstrate any such understanding".

<sup>124</sup>Working Party Report on the *Accession of Venezuela*, adopted on 11 July 1990, BISD 37S/43, para. 22.

It was noteworthy that the Working Party had reached the conclusion that "subject to the satisfactory conclusion of the relevant tariff negotiations, Venezuela be invited to accede".<sup>125</sup>

3.261 Argentina further noted that, at the time of Tunisia's accession, although objections were raised to a customs levy of five per cent on the grounds of incompatibility with GATT, this did not prevent approval of Tunisia's accession.<sup>126</sup>

3.262 The **United States** replied that Argentina's argument that an *ad valorem* fee was more equitable and efficient than any alternative had been found wanting by the panel on *United States - Customs User Fee* and Argentina had not made any effort to disprove that some importers, perhaps even most, would be assessed a tax that was disproportionate to the cost of any service rendered to them.

**(b) Services and costs covered by the tax**

3.263 Regarding the nature of the service to be covered by the tax, the **United States** argued that the term "services rendered" in Article VIII meant "services rendered to the individual importer in question".<sup>127</sup> The type of services that may benefit an individual importer had been expansively construed. "Services" included "government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic licence accorded to taxing authorities, be called a 'service' to the importer in question".<sup>128</sup> Despite the breadth of this interpretation, some charges had been found to be too remotely connected to any service benefitting imported goods to allow for imposition of the charge (*e.g.*, charges for processing passengers, charges covering lost revenue from goods exempt from the same fee, and charges for services performed on behalf of goods previously imported).<sup>129</sup> The government imposing the fee had the burden of demonstrating that a service was in fact performed for the benefit of the importer.<sup>130</sup>

3.264 The United States submitted that the leading decision in this area, the report of the panel on *United States - Customs User Fee*, made clear that the term "services rendered" in Article VIII:1(a) meant "services rendered to the individual importer in question". The panel recognized that a flat rate might have a greater impact on low price merchandise, but nonetheless concluded that Article VIII required covered charges to be tailored to the individual services provided. The panel concluded that an unlimited *ad valorem* charge violated Article VIII because such charges exceeded "the cost of [...] processing [...] the individual entry in question". Despite the clear findings of this decision, Argentina in its submission asked this Panel to reach an outcome that was directly contradictory to the report on *United States - Customs User Fee*, that its three per cent *ad valorem* tax on imports was proper even though (a) the charge was not connected to a service to any individual importer but to international trade generally and (b) the charge covered the cost of statistical services for exported goods as well as imported goods. Decree No. 389/95 stated that the tax was intended to raise revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports. While the gathering of statistical information concerning imports may benefit importers, Article VIII bared the levying of any tax or charge on importers to support activities relating to *exports*. GATT precedent indicated that charges on imported products may not be used to finance services benefitting other interests. In a complaint brought against France in 1952, the United States had maintained that the French "statistical and customs control" taxes violated Article VIII:1 since the proceeds of this tax were also used for funding social security benefits to farmers.

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<sup>125</sup>Ibid., para. 91.

<sup>126</sup>Working Party Report on the *Accession of Tunisia*, adopted on 12 December 1990, BISD 37S/30, para. 38.

<sup>127</sup>*United States - Customs User Fee*, Op. Cit., para. 80.

<sup>128</sup>Ibid., para. 77.

<sup>129</sup>Ibid., paras. 96-112.

<sup>130</sup>Ibid.

France acknowledged the infringement and subsequently abolished the tax.<sup>131</sup> That the charge was in fact no more than a taxation of imported merchandise was confirmed by Argentina's representation that it imposed the tax to raise revenue to meet IMF obligations.

3.265 According to **Argentina**, the purpose of the statistical tax was to cover the cost of supplying the corresponding statistical service intended to provide a reliable basis for foreign trade operations. In this connection, it was important to note that the service was not rendered to the individual importer, the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity *per se*. Therefore, as the services rendered in this case and in the case on *United States - Customs User Fee* were different, the precedent in the *United States - Customs User Fee* case did not apply.

3.266 Regarding the costs to be covered by the tax, Argentina stated that there was no dispute about the fact that the sums collected by applying the rate in force for the statistical tax should not exceed the approximate costs necessary to maintain the service. Despite the interpretation of the panel on *United States - Customs User Fee*, the cost of the services to which Article VIII of the GATT 1994 referred should include not only the services rendered to the individual importer but also the total cost of the service.

3.267 Argentina stressed that the cost of the services rendered through the statistical tax was not calculated for each individual transaction, nor was such an approach required under Article VIII, which made no provision for aligning the cost of the service rendered with the level of the tax applied for each transaction. Article VIII did not require Members to set fees on a level commensurate with the cost of each shipment, on a case-by-case basis.

3.268 Argentina argued that the cost of a service - in accounting or trade terms - consisted of a direct cost and an indirect cost, both costs incurred by the organization providing the service whenever it was provided. This was even more obvious in the case of the Argentine customs territory, since 52 customs posts and offices had to be kept open permanently. If for any reason the customs services were to exclude indirect costs from the basic criteria used to calculate the cost of the service they provide, those costs would end up being met from within overall tax receipts. As the service provided had direct and indirect costs, it would be difficult to recover those costs by applying a flat fee per individual import operation. If it were necessary to consider the possibility of applying a flat fee per import operation, that fee ought not to be calculated exclusively as a function of the service rendered in connection with each import operation in particular. The calculation of any flat fee or levy would have to take into account the existing indirect costs and not only the expenses directly related with each particular operation.

3.269 The **United States** argued that Argentina had ignored the report on *United States - Customs User Fee*, which rejected the argument that Article VIII's requirements were met if the total revenues generated by a charge approximated the total cost of the government services. The panel in that matter had recognized that a flat rate might have a greater impact on low price merchandise, but nonetheless concluded that Article VIII required covered charges to be tailored to the individual services provided. The panel concluded that an unlimited *ad valorem* charge violated Article VIII because such charges exceeded "the cost of [...] processing [...] the individual entry in question".

3.270 The United States added that, even if one were to reject the reasoning in the *United States - Customs User Fee* report and adopt a *fees collected must approximate actual costs* approach, Argentina's answers to US questions showed it would fail this test as well. Argentina stated that the funds collected from this tax ranged from US\$534 million in 1992 up to US\$1.143 billion in 1993, again increasing

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<sup>131</sup>See para. 98 document SR.9/28.

to US\$1.2 billion in 1994, down to US\$215 million in 1995 and up to US\$328.8 million in 1996. Certainly, the costs of collecting statistical information, to which these collected funds had to directly relate, could not possibly have shifted so dramatically during the space of five years. Moreover, Argentina had not provided requested documentation to confirm the direct relationship between its *collections* and costs.

3.271 **Argentina** replied that the revenue collected prior to 1995 did not reflect the cost of the services. In 1995 and 1996, the charge collected was therefore reduced and was approximately equivalent to the cost of the services rendered. With respect to the rationale for eliminating the statistical tax in December 1994 as outlined in Decree No. 2777/94, and the rationale and explanation for reinstating it on 22 March 1995, Argentina mentioned that the fiscal situation in December 1994 justified the decision that a statistical service for foreign trade in general could be provided without relying on the revenue derived from levying a statistical tax on imports. The crisis related to the devaluation of the Mexican peso led to special internal policy adjustment measures discussed with the IMF, the World Bank and the BIS, as well as by the private banks. In order to confront this fiscal problem, it was decided to sign an agreement with the IMF. In order to be able to continue providing statistical services for foreign trade in general it was necessary to reinstate the statistical tax on imports. Otherwise it would not have been possible to provide the service or it would have been necessary to obtain funds from other sources which at the time did not exist.

3.272 The **United States** concluded from the above that Argentina had essentially admitted that the purpose of the statistical tax was a "taxation of imports [...] for fiscal purposes" in contravention of Article VIII. Argentina stated that it levied the charge pursuant to requirements imposed by a "grave fiscal problem" caused by the Mexican peso crisis. Argentina further stated that the statistical tax, along with other fiscal enhancing taxes in the IMF package, was necessary "to confront the fiscal problem and to assure the availability of funds necessary to counteract the outflow of funds from our country, and to avoid the consequent damage and cessation of activities of many national financial institutions". By any objective criteria, these rationales for the statistical tax were for "fiscal purposes" as that term was used in Article VIII:1(a).

3.273 Furthermore, the United States noted that Argentina had asserted that the approximate cost of the provision of statistical services totalled US\$326 million in 1996. Argentina has simply stated, without any proof - as requested by the Panel and the United States - that its receipts for 1995 and 1996 were roughly equivalent to the cost of the services. This was simply not an adequate response. Argentina had been requested to provide specific evidence and had not produced its own documents.

### (c) **Inclusion of the tax in Argentina's Schedule**

3.274 **Argentina** argued that, in Schedule LXIV presented by Argentina at the outcome of the Uruguay Round negotiations, the three per cent statistical tax had been bound under the heading of "other duties or charges". In a separate column attached to the Schedule, the three per cent rate was established for each of the HS headings under which import duties were bound. It thus rejected the claim by the United States that the statistical tax constituted indirect protection for domestic products. At the very least, this assertion required supporting evidence to substantiate trade distortion.<sup>132</sup>

3.275 The **United States** contended that Argentina's reference to the tax in its Schedule comported with the Understanding on the Interpretation of GATT Article II:1(b) which, in order to ensure transparency, required that such charges be recorded in Schedules. The Understanding, though, made

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<sup>132</sup>Argentina referred to the Panel Report on *United States - Customs User Fee*, Op. Cit., para.120, which provided that "[i]t was not necessary for the Panel to decide whether the 'indirect protection' criterion actually involved a requirement of no adverse trade effects. The Panel concluded that, even if it did, it had not been demonstrated that these *ad valorem* charges had had a trade distorting effect".

clear that including a charge in a Schedule in no way immunized that charge from WTO scrutiny or from being declared in violation of an applicable GATT rule. The Understanding stated that "such recording did not change the legal character of 'other duties or charges'" and "[a]ll Members retain the right to challenge, at any time, the consistency of any 'other duties or charges' with such [GATT 1994] obligations". This was consistent with prior GATT jurisprudence.<sup>133</sup>

## 2. **IMF COMMITMENTS AND CROSS-CONDITIONALITIES**

3.276 **Argentina** argued that the statistical tax was part of a commitment undertaken by agreement between Argentina and the International Monetary Fund. This commitment obliged Argentina to maintain the statistical tax at a rate of three per cent until it expired in 1998.

3.277 Argentina stressed that the statistical tax was a commitment entered into by Argentina *vis-à-vis* the IMF. At the same time, Argentina had equivalent obligations as a Member of the WTO primarily under Article VIII GATT 1994 and Article V:1 of the WTO Agreement. If the assertions of the United States regarding a violation of Article VIII were true, Argentina would find itself involved in a conflict of cross-conditionalities, since Argentina might find itself in a situation where it would be prevented from fulfilling its IMF commitments if it were obliged to fulfil its WTO commitments. Conversely, the continued implementation of its IMF commitments could place it in a position incompatible with its obligation under the WTO.

### (a) **Mandatory nature of the statistical tax under Argentina's agreement with the IMF**

3.278 **Argentina** contended that its commitment with the IMF to maintain that tax at its current level until the end of 1998 was recorded in the Memorandum of Understanding signed in 1995 and formed part of Argentina's public sector financing package. The United States allegation created a conflict of cross-conditionalities which weakened the basic institutions responsible for establishing exchange and trade disciplines. The obligation Argentina assumed in that Memorandum of Understanding involved achieving a specified level of fiscal revenue and not exceeding a certain level of fiscal expenditure in order to reduce the deficit to a specified amount, also defined in the Memorandum, and adopting or maintaining a series of measures, including the statistical tax, in order to attain these fiscal objectives. This commitment meant that in calculating revenue a certain amount was allocated to the statistical tax while in calculating expenditure a certain amount was included for services rendered in connection with foreign trade statistics. If the amount obtained from the collection of statistical tax were not sufficient to pay for the services rendered in connection with statistics for foreign trade operators and it was therefore necessary to use funds from elsewhere in the budget, there would be problems for the entire financing plan to which Argentina was committed. Failure to obtain the revenue envisaged from the application of the statistical tax would lead to the non-fulfilment of the undertaking given to the IMF. The measures included in the Memorandum of Understanding were the product not of an IMF requirement but of the agreement reached with that institution on the basis of fiscal and other measures which the IMF had approved and therefore considered that the Government should adopt in order to be able to achieve the agreed fiscal objectives. The measures of this type listed in the

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<sup>133</sup>The United States referred to the report of the panel on *United States - Restrictions on Imports of Sugar*, adopted on 22 June 1989, BISD 36S/331, para. 5.7, which stated that "the Panel found that Article II:1(b) does not permit contracting parties to qualify their obligations under other provisions of the General Agreement and that the provisions in the United States GATT Schedule of Concessions can consequently not justify the maintenance of quantitative restrictions on the importation of certain sugars inconsistent with the application of Article XI:1". The United States also referred to the Report of the working Party on *Other Barriers to Trade*, adopted on 3 March 1955, BISD 3S/222, para. 14, which provided that "there was nothing to prevent contracting parties, when they negotiate for the binding or reduction of tariffs, from negotiating on matters [...] which might affect the practical effects of tariff concessions and from incorporating in the appropriate schedule annexed to the Agreement the results of such negotiations; *provided that the results of such negotiations should not conflict with other provisions of the Agreement*" (emphasis added by the United States).



Memorandum of Understanding constituted the IMF's so-called "conditionality" for allowing access to the facilities at the disposal of member countries.

3.279 The **United States** noted that Argentina had acknowledged that the Memorandum of Understanding it had signed with the IMF in 1995 was merely directed towards obtaining a general level of revenue and that it devised the tax as a mechanism for reaching the fiscal target. The United States recalled that Argentina had claimed that two years after the reintroduction of the tax in March 1995, revenues for meeting these fiscal goals remained "scarce". However, Argentina had not stated that the IMF actually required the use of the statistical tax.

3.280 In reply to this, **Argentina** emphasized that the conditions imposed by the IMF were the subject of a "letter of intent" between Argentina and the IMF which referred to the adoption of national economic rationalization plans. Legal writers considered these agreements as "simplified international agreements". In the case of Argentina, these agreements had become valid upon signature, without the need for subsequent legislative approval. The Memorandum of Understanding was binding on Argentina. This did not mean that the IMF requested application of the statistical tax. The point was that Argentina's commitment to the IMF included the statistical tax. It added that the margin of manoeuvre for achieving the fiscal goal agreed with the IMF was limited. At the time of negotiating the Memorandum of Understanding it would not have been possible for Argentina to increase the fuel tax, because of its recessionary effects, or to increase further the rate of VAT. Even supposing that the initiative to re-establish the statistical tax at three per cent had originated with Argentina, the IMF had to give its approval. From that moment, it became a legal obligation of the Argentine Government towards the IMF, to which it had made commitments equivalent to those it had made as a Member of the WTO.

3.281 The **United States** argued that there was no evidence that the statistical tax had been approved by the IMF, which would be required under the Articles of Agreement of the IMF. Moreover, Article VIII:3 of the Articles of Agreement of the IMF specifically prohibited exchange measures which discriminated and the statistical tax was not levied on imports from MERCOSUR countries. These factors strongly suggested that the IMF had not specifically approved the statistical tax. Indeed, the understanding of the United States was that the IMF recently has urged Argentina to eliminate the statistical tax. The United States invited the Panel to consult with the IMF regarding its position on the Argentine tax.

3.282 Regarding the statement that the IMF had urged Argentina to eliminate the tax, **Argentina** noted that what was being discussed was a revision of the source of fiscal revenue with a view to renewing the agreement on the facilities in 1998. This could in no way be interpreted as implying that the IMF had suggested to Argentina that it should not meet the commitment agreed with the Fund.

**(b) Relevance of the declarations annexed to the WTO Agreement and of the WTO agreement with the IMF**

3.283 According to **Argentina**, the conflict between WTO and IMF obligations was one of the factors that had motivated the *Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking* ("Declaration on Coherence").<sup>134</sup> At the signing of the cooperation agreement with the IMF, the Director-General of the WTO had acknowledged the possibility of the occurrence of such conflicts.

3.284 Argentina added that compliance with an obligation assumed *vis-à-vis* the IMF and fulfilment of an obligation arising from GATT 1994 should, according to the Declaration on Coherence, avoid

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<sup>134</sup>Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking, in *The Results of the Uruguay Round - The Legal Texts*, GATT Secretariat (1994), p.442.

"the imposition on governments of cross-conditionality or additional conditions".<sup>135</sup> Ministers had also recognized:

"difficulties the origins of which lie outside the trade field cannot be redressed through measures taken in the trade field alone. This underscore the importance of efforts to improve other elements of global economic policymaking to complement the effective implementation of the results achieved in the Uruguay Round. [...] The interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies".<sup>136</sup>

3.285 Moreover, Argentina added that the *Declaration on the Relationship of the World Trade Organization with the International Monetary Fund*,<sup>137</sup> noted the close relationship between the CONTRACTING PARTIES to the GATT 1947 and the International Monetary Fund, and the provisions of the GATT 1947 governing that relationship, in particular Article XV of the GATT 1947.

3.286 Argentina submitted that these texts and the precedents under Article XV<sup>138</sup> covered, on the one hand, the handling of the balance-of-payments problems which constituted the traditional area of cooperation between the WTO and the IMF and, on the other hand, the obligations arising from Article V:1 of the WTO Agreement and the Declaration on Coherence, which were meant to cover the area of future cooperation. They had to be analyzed from the standpoint of GATT/WTO obligations, inasmuch as they were an integral part of the Uruguay Round Agreements.

3.287 For Argentina, the Declaration on Coherence was one of the agreements in question and had to be considered for the purpose of interpreting the scope of obligations under Article VIII GATT 1994 in relation to Argentina's agreement with the IMF and its impact on fulfilment of the obligations under the WTO. This implied that the Declaration on Coherence constituted an "instrument" agreed between the parties in connection with the conclusion of a treaty, within the meaning of the general rule of interpretation contained in Article 31.2(b) of the Vienna Convention on the Law of Treaties (1969).<sup>139</sup>

3.288 Argentina emphasized that the subsequent practice of the CONTRACTING PARTIES had confirmed this interpretation inasmuch as, in the light, *inter alia*, of the above-mentioned Article V:1 of the WTO Agreement, the General Council had approved, at its meeting of 7, 8 and 13 November 1996, the Agreement between the International Monetary Fund and the World Trade Organization ("IMF Agreement").<sup>140</sup> Paragraph 10 of the IMF Agreement specifically accepted and acknowledged the possibility of inconsistency between measures adopted by the parties in the light of one or the other agreement. Argentina therefore concluded that any evaluation that was made of the alleged inconsistency of the Argentine statistical tax had to take into account the existence of a potential conflict of rules which went beyond the framework of a possible bilateral trade dispute.

3.289 The **United States** considered that Argentina was asking the Panel to create a new exception not found anywhere in the body of the GATT or the WTO Agreement and in direct contravention of Article 3 DSU, which provided that decisions of the DSB could not add to or diminish the rights or obligations of WTO Members.

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<sup>135</sup>Ibid., p. 443, para. 5.

<sup>136</sup>Ibid., p. 443, paras. 4-5.

<sup>137</sup>Declaration on the Relationship of the World Trade Organization with the International Monetary Fund, in The Results of the Uruguay Round - The Legal Texts, GATT Secretariat (1994), p.447.

<sup>138</sup>See paras. 3.297-3.305 below.

<sup>139</sup>UN Document A/CONF.39/27 (1969), hereafter the "Vienna Convention".

<sup>140</sup>Document WT/L/195, Annex I, approved by a decision adopted by the General Council at its meeting on 7,8 and 13 November 1996, document WT/L/194, 18 November 1996.

3.290 The United States argued that the several WTO declarations calling for greater cooperation or coordination between the WTO and the IMF, which Argentina cited in support to its arguments may be laudable goals. However, the declarations hardly established concrete exceptions to fixed WTO rules. These declarations imposed no binding obligations on Members, and they certainly did not address the specific issue before the Panel in this matter.

3.291 According to the United States, Argentina had not demonstrated that imposition of the three per cent tax was required or even requested by the IMF. As it appeared that Argentina itself chose to levy the tax as a means to achieving fiscal goals established by the IMF, the United States declared that Members should not be permitted to voluntarily adopt WTO-inconsistent practices to meet IMF commitments of a general nature. To the extent Argentina had done so, its tax was adopted for "fiscal purposes" in direct contravention of Article VIII.

3.292 The United States maintained that the question of whether amendments or exemptions should be made under the WTO Agreement to provide for better cooperation with the IMF was reserved for the WTO Members, not a dispute settlement panel.

3.293 **Argentina** was totally in agreement that amendments or exemptions should be reserved for WTO Members, but it was the United States which has brought this question before the Panel while Argentina was requesting the Panel to rule, in this specific case, on the existence of cross-obligations responsible for a situation which, in the view of the United States, represented the non-fulfilment of obligations *vis-à-vis* the WTO. In other words, it was the responsibility of the Panel to determine whether Argentina should act, as proposed by the United States, and fail to fulfil an obligation to the IMF, on the grounds that the statistical tax was unrelated to the approximate cost of the service. Argentina rejected the possibility that no such relationship existed and also rejected the precedent of not complying with its legitimate international obligations.

3.294 For Argentina, the "*empirical*" method of solving problems as they arise which a special subgroup of the *Working Party on Quantitative Restrictions* had suggested with respect to the interpretation of Article XV<sup>141</sup> meant relying on "practice". In GATT terms, practice had consisted, firstly, in holding consultations with the IMF, consultations which Argentina considered pertinent and indeed requested. Secondly, any response by the IMF should be examined and evaluated in the light of the particular characteristics of the case.

3.295 Argentina further considered that, accordingly, the Panel should consider the subsequent legislative developments. The Declaration on Coherence was an integral part of an international treaty: the WTO Agreement. In the process of converting the provisions of the WTO Agreement, which were "programmatic", into "operational" rules, Argentina had worked together with the other WTO Members on preparing the Agreements between the WTO and the IMF and the World Bank, approved by the General Council at its meeting on 7, 8 and 13 November 1996.

3.296 The case of the Argentine statistical tax constituted an example of cross obligations between the two institutions. The existence of this and other examples was what had inspired the Declaration on Coherence.

**(c) Scope of Article XV**

3.297 In relation to the declarations and agreements regarding the relationship between the WTO and the IMF, **Argentina** recalled that Article XV:1 of the General Agreement provided that "the CONTRACTING PARTIES shall seek cooperation with the International Monetary Fund [...] with

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<sup>141</sup>See para. 3.299 below.

regard to exchange questions within the jurisdiction of the Fund [...] and other trade measures within the jurisdiction of the CONTRACTING PARTIES".

3.298 Argentina noted that, on the basis of this connection between the rules governing the GATT/IMF relationship, which found concrete expression in specific provisions authorizing, for example, the use of exchange controls in accordance with the Articles of Agreement of the International Monetary Fund (Article XV, paragraph 9(a)), the possibility was envisaged of situations where conflicts could arise in respect of legal obligations.

3.299 Thus, According to Argentina, a working party sub-group which looked into whether Article XV, paragraph 9(a) provided exemption from compliance with obligations under GATT, "agreed that it would be preferable not to try to lay down general principles on the relationship between paragraphs 4 and 9 but to leave this question over for empirical consideration if and when particular points arose which had a bearing on it".<sup>142</sup>

3.300 Argentina stressed that the practical upshot of all this was that, for example, when faced with a complaint by Italy against Turkey concerning the establishment of an equalization fund which was financed by the sale of import permits (allegedly in breach of Article II:1(b) GATT), "the Fund had stated that it did not object to the temporary continuance of these practices and would remain in consultation with Turkey on these practices. The complaint was referred to the Panel on Complaints but was withdrawn later".<sup>143</sup> The purpose of this inter-agency collaboration was to encourage the member governments of both organizations to develop coordinated action in their economic policymaking.

3.301 Argentina further argued that, in relation to the scope and application of Article XV, the following had been noted in the Tokyo Declaration of 1973 which launched the Tokyo Round of multilateral trade negotiations:

"the policy of liberalizing world trade cannot be carried out successfully in the absence of parallel efforts to set up a monetary system which shields the world economy from the shocks and imbalances which have previously occurred. The Ministers will not lose sight of the fact that the efforts which are to be made in the trade field imply continuing efforts to maintain orderly conditions and to establish a durable and equitable monetary system".

The Ministers recognize equally that the new phase in the liberalization of trade which it is their intention to undertake should facilitate the orderly functioning of the monetary system".<sup>144</sup>

3.302 For the **United States**, Article XV did not speak to the imposition of a statistical tax. Instead, Article XV was concerned with exchange arrangements. It was inapplicable to this dispute because the tax in question was not an exchange control measure and bore no direct relationship to exchange issues. Rather, as acknowledged by Argentina, the tax was a charge on imports for the gathering of statistical data regarding Argentina's international trade. To whatever degree exchange controls approved by the IMF may be allowed under Article XV, Argentina's tax clearly was outside the scope of that provision. While Article XV did generally call for cooperation between GATT contracting parties and the IMF, Article XV:4 was careful to state that "[c]ontracting parties shall not, by exchange action,

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<sup>142</sup>Argentina referred to the *Working Party on Quantitative Restrictions Relations between the GATT and the International Monetary Fund* Report of the Special Sub-Group, BISD 3S/170, p. 195, para. 8.

<sup>143</sup>Argentina referred to document SR.9/7, as mentioned in *GATT, Analytical Index: Guide to GATT Law and Practice, Updated 6th Edition* (1995), p. 439.

<sup>144</sup>MIN(73)1, Declaration of Ministers approved at Tokyo on 14 September 1973, BISD 20S/19, p. 22, para. 7.

frustrate the intent of the provisions of this Agreement".<sup>145</sup> Argentina's tax, though, did just that. Therefore, to suggest that the latitude accorded to Members under Article XV to meet commitments to the IMF in relation to exchange controls extended so far as to permit the imposition of a tax in violation of Article VIII, would necessarily expand the scope of Article XV far beyond what its drafters intended.

3.303 **Argentina** replied that the practice relating to Article XV should not be overlooked or excluded because that Article referred to measures relating to exchange controls. Argentina did not dispute the subject matter of this Article, but considered it to form part of the historical relationship between GATT and the IMF.

3.304 The negotiating effort made by the WTO Members to make "operational" the Declaration on Coherence and the fact that the Argentine case was specifically mentioned during the process constituted palpable evidence that it was not solely a question of "laudable goals". The history of Article XV and the Declaration on Coherence were specifically applicable to the Argentine case, since it was a question of a precedent which had led to the signing of the Agreement between the WTO and the IMF. Argentina had mentioned Article XV as a basis for the Declaration on Coherence, which as mentioned above, it considered applicable in this case as an "instrument" agreed between the parties in connection with the conclusion of a treaty.

3.305 Argentina did not wish to extend the scope of Article XV to this case, but cited the history of the problems relating to the exchange agreements as a stage in the process of WTO/IMF cooperation. If there had not been problems over and above those relating to exchange rates, there would, firstly, have been no need to negotiate the text of the Declaration on Coherence and, secondly, no need to negotiate the subsequent agreements between the WTO and the IMF and the World Bank in order to be able to deal with precisely such situations as the one at issue. Likewise, mention of Article XV of the GATT 1994 when referring to the question of "WTO-IMF relations", did not mean that Argentina intended to make an assimilation between the statistical tax and an exchange measure or some similar measure. Neither did it imply that the statistical tax was a measure which "frustrate[d] the intent" of the Agreement.

#### **D. ARTICLE 7 ATC**

3.306 The **United States** considered that, as they applied to textiles and apparel, Argentina's specific duties and tax on imports were contrary to Article 7 ATC. Article 7 ATC imposed a sweeping obligation on signatories to take whatever steps were necessary to bring their regimes into compliance with GATT obligations as they affected textiles and apparel, and thereby to improve market access for these products. ATC signatories had recognized the acute importance of greater market access for covered merchandise and, through Article 7, had accepted an affirmative obligation to eliminate improper methods of protection. At a minimum, a violation of a provision of the GATT that affected textiles and apparel also constituted a violation of Article 7 ATC. The broad language of Article 7 ATC suggested an even more expansive application. However, given what appeared to be clear GATT violations in this case, the Panel needed only find that such violations, as they related to textiles and apparel, also contravened Article 7 ATC. In agreeing to the ATC as part of the WTO Agreement, Argentina had agreed to "achieve improved access" to its textile and apparel market through lower tariffs and reduced non-tariff barriers.

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<sup>145</sup>The United States added that *ad Article XV* addressed the word "frustrate" in Article XV:4 by permitting infringements of the letter of any Article by "exchange action" so long as "there is no appreciable departure from the intent of the Article". However, in this instance, there was no exchange action. Even if Argentina's statistical tax could be considered as such, the imposition of the three per cent statistical tax was an "appreciable departure" from the requirements of Article VIII. Moreover, the examples in the Ad Note only related to exchange measures consistent with the Articles of Agreement of the IMF.

By imposing its specific duties in violation of GATT Articles II and VII, as well as its tax on imports in violation of GATT Article VIII, Argentina had not only violated the GATT but also the ATC.

3.307 **Argentina** was of the view that the purpose of the ATC was to eliminate existing quantitative restrictions with a view to integrating this sector into the rules of the multilateral trading system. Article 7.1(a) ATC referred to compliance with bound tariff rates and the lifting of the quantitative barriers maintained by some countries which Member countries may have notified to the Textile Monitoring Body ("TMB") in accordance with Article 7.2. When the WTO Agreement, including the ATC, entered into force, Argentina was not applying quantitative restrictions under the MFA or any bilateral agreements. Argentina did not maintain quantitative restrictions or non-tariff measures such as customs, administrative and licensing formalities that might give rise to a roll-back obligation, nor had it done so in the past.

3.308 For Argentina, the interpretation seeking to define Article 7 ATC as imposing a legal obligation to open up markets beyond the level of bound tariffs had been rejected by both the General Council and the WTO Ministerial Conference of Singapore.<sup>146</sup> The fact that Article 7 provided that "Members shall take such actions as may be necessary to abide by GATT 1994 rules and disciplines" presupposed the implementation of tariff bindings. The United States' invocation of Article 7 ATC was neither legally nor economically justifiable. The growth of Argentine imports of textiles and apparel during the period 1991-1996 unambiguously demonstrated the openness of the Argentine market and the lack of barriers or obstacles to the entry of those products. Imports of textiles had risen by 800 per cent between 1991 and 1996. During the same period United States textile imports had risen by a maximum of 50 per cent and those of the EC by 41 per cent.

3.309 The **United States** noted that Argentina appeared to agree with the United States that if its practices violated GATT obligations, then they also violated Article 7 ATC. However, the United States considered that attempts to narrow this provision's application were inconsistent with its language, history and underlying purpose. India, as a third party to this dispute, had advocated a very narrow interpretation of Article 7 ATC. India had suggested that Article 7 implicated only a limited category of measures, i.e., tariff concessions and quantitative restrictions listed in a Member's schedule which related to textiles and clothing.<sup>147</sup> Applying India's theory, violations of GATT 1994 provisions such as Article I:1 and III:2 would not violate Article 7 ATC, even if they negatively impacted market access for textiles and clothing, so long as they did not relate to a particular tariff or quantitative restriction listed in a particular Member's Schedule.

3.310 The United States argued that India's interpretation ignored Article 31 of the Vienna Convention and was inconsistent with the text, context, and object and purpose of Article 7 ATC. The proper interpretation of the phrase "the specific commitments undertaken by the Members" was *all* GATT 1994 rules and disciplines which negatively impacted improved market access for clothing and textiles. India's reading of the word "commitments" to mean only specific scheduled concessions was far too limited. The text did not read "specific commitments undertaken by *a* Member", but rather "the specific commitments undertaken by *the* Members". This meant all commitments undertaken by all WTO Members in the single undertaking, at least as they regarded the provisions of GATT 1994. This interpretation was confirmed by the immediate context of the "specific commitments" phrase in Article 7, which stated that "all Members shall take such actions as may be *necessary to abide by GATT 1994 rules and disciplines* so as to: (a) achieve improved access to markets for textile and clothing products through such measures as tariff reductions and bindings, *reduction or elimination of non-tariff barriers*, and facilitation of customs, administrative and licensing formalities".<sup>148</sup> If Article 7 were limited to only "scheduled" tariff and quantitative restriction concessions as India argued, then the non-tariff and

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<sup>146</sup>Argentina referred to document WT/MIN(96)/2, 26 November 1996, Section IV.

<sup>147</sup>India's arguments are contained in section IV.C below (Third Parties Submissions).

<sup>148</sup>Emphasis added by the United States.

non-quantitative references in Article 7.1(a) to (c) would be rendered a nullity.<sup>149</sup> The "schedules" of Members simply did not include references to non-tariff barriers, facilitation of customs, administrative, and licensing formalities, dumping and subsidies, or intellectual property rights. Moreover, the fact that Article 7.2 anticipated that Members' actions already may have "been notified to other WTO bodies" other than the TMB suggested a far broader context for GATT 1994 provisions than textiles and apparel.

3.311 The United States contended that, on the contrary, the interpretation of Article 7 ATC advocated by the United States and the EC was consistent with its object and purpose of achieving improved market access for textile and clothing products. While the ATC generally dealt with quantitative textile and apparel restrictions, Article 7 ensured that non-quantitative restrictions such as tariffs, non-tariff barriers, licensing provisions, intellectual property provisions were not used in a manner which undermined market access for all WTO members. An overly-restrictive reading of Article 7 ATC such as proposed by India and Argentina would limit the ability of the TMB (pursuant to notifications received under Article 7.2) to pursue its mandate of collecting and reporting on non-tariff measures having a negative impact on market access for textile and apparel products.

3.312 Finally, the United States contested India's reference to alleged negotiating history of Article 7 ATC, based on meetings of which no minutes were taken. Article 32 of the Vienna Convention limited the use of preparatory work of a treaty "in order to confirm the meaning" of the text. Since India was not using this "preparatory work" to confirm a particular meaning of the text, nor to demonstrate that the meaning of the text was ambiguous or obscure or that it would lead to a result which would be manifestly unreasonable, there was no basis for the Panel to review or rely on such work.

3.313 **Argentina** considered that the arguments of the United States had been adequately queried by India in its third-party statement, which it fully supported. Also, in relation to the value of preparatory work as a method of interpretation, Argentina stated that preparatory work should serve to confirm the interpretation of a text as such and not to confirm the unilateral interpretation made by a party.

#### IV. THIRD PARTIES SUBMISSIONS

##### A. THE EUROPEAN COMMUNITIES

4.1 The **European Communities** noted that Argentina's regime of minimum specific duties on textiles, apparel and footwear had been frequently renewed and amended. The measures applying to footwear had been placed on a different legal basis to those concerning textiles and apparel since 14 February 1997, the date on which Argentina opened a safeguard investigation and decided to impose "provisional" minimum specific duties on footwear. Generally, these decisions in no way altered the nature of the regime of minimum specific duties for textile and apparel products nor the fact that by their nature they could exceed the bound duties. They served to underline however that the complaint had to be considered as directed at the regime, not the individual legal acts imposing the duties which were susceptible to constant change.

4.2 The EC also noted that the new "safeguard" duties were identical in form to the duties they replaced. The safeguard measures were expressly stated in Article 2 of Resolution No. 226/97 to be "provisional minimum specific duties", that is they had exactly the same nature as their predecessors since they applied where the amount of the *ad valorem* duty was less than the specified "minimum

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<sup>149</sup>The United States referred to the Appellate Body Report on *United States - Standards for Reformulated and Conventional Gasoline*, Op. Cit., p. 23, where the Appellate Body stated that an interpreter was not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.

duty". Not even their "provisional" nature allowed them to be distinguished since they were no more "provisional" than the previous duties.

4.3 The EC argued that the Panel should not accept the request by Argentina for a preliminary ruling to dismiss the complaint insofar as it related to the footwear duties on the grounds that the duties complained against no longer existed. The provisional safeguard measures which had been adopted soon after the duties on footwear had been repealed operated in exactly the same way as the previously existing duties. The provisional safeguard measures were also clearly intended to replace the previous duties as was evidenced by the reference in the preamble of each of the repealing and safeguard Resolutions to the other Resolution and the simultaneity of their entry into force. The US complaint should be taken to be directed against the regime of minimum specific duties and not against specific legal acts. The reference to specific Argentine legal acts in the US request for the panel only served to describe the features of the measures complained of. If the approach of Argentina were to be followed, then the US complaint against the specific duties on textiles and apparel could also be considered to be inadmissible, since the Argentine measures imposing it had also changed. The fact that the minimum specific duties on footwear were now based on the Argentine legislation on safeguards constituted an attempt to justify the measures as safeguard measures and this justification needed to be examined.

4.4 The EC shared the view of the United States that in imposing its regime of minimum specific duties on textiles, apparel and footwear, Argentina had violated Article II GATT 1994 by allowing duties to be imposed which exceeded its bound tariff rate of 35 per cent *ad valorem*.

4.5 For the EC, any such system created a possibility for duty rates to exceed the bound rate with the probability of this happening increasing as the customs value of the imported product decreased. Argentina effectively admitted this when it insisted on the availability of the challenge procedure in its Customs Code to avoid the payment of excess duty. Such an effect was particularly likely in the present case in view of the method used by Argentina to establish the minimum specific import duty. As this was explained by Argentina itself in bilateral exchanges and during these proceedings, the reason for the existence of the system was that certain shipments of the goods were considered to be imported at particularly low prices which caused injury to the Argentine industry.

4.6 According to the EC, since the prices of products within a tariff heading varied and the price used to calculate the corresponding minimum specific duty was an average or representative price, it was obvious that some imports would be above and some below these prices. Since the duty was calculated at 35 per cent of the "average" or "representative" price, all those products imported at below the "average" or "representative" price bore a duty of more than 35 per cent *ad valorem*.

4.7 The EC argued that the explanation of the calculation of the duties supplied by Argentina in the form of a table including a list of tariff heading for textile and clothing, average prices used as a basis for the calculation and the DIEM proposed showed some proposed minimum specific duties which were above the amount calculated to be 35 per cent of the "representative price", sometimes by very high margins. The EC referred the Panel to HS tariff lines 5209.52.00, 5309.11.00, 5513.12.00, 5513.22.00, 5514.12.00, 5513.13.00, 5516.22.00, 5516.42.00, 5516.91.00, 5516.93.00, 5606.00.00, 5607.21.00, 5607.50.11, 5607.90.10, 5702.10.00, 5702.20.00, 5702.49.00, 5702.92.00, 5705.00.00, 6102.30.00, 6104.29.00, 6107.92.00, 6116.92.00, 6204.13.00, 6204.19.00, 6207.22.00, 6210.10.00, 6302.92.00, 6306.41.00, 6306.91.00, 6306.99.00, 6310.10.00. For HS Chapter 56 the proposed duties were sometimes over 10 times the 35 per cent limit and therefore equivalent to 300 per cent duties (see, e.g., tariff line 5607.90.10). Even the weighted average duty for the whole of Chapter 56 was above 35 per cent of the "representative prices". A comparison with the latest version of the minimum



specific duties imposed by Resolution No. 597/97<sup>150</sup> of 14 May 1997 showed that some of these minimum specific duties of over 35 per cent *ad valorem* of the "representative prices" were still being applied by Argentina.

4.8 The EC agreed with Argentina that the United States bore the burden of proof. However, it could be demonstrated that applied duties would exceed 35 per cent *ad valorem* simply by considering the way in which the duties were calculated. The United States had also given specific examples of tariff positions where the duties exceeded 35 per cent. The EC further considered that Argentina had admitted that some of the examples provided by the United States demonstrated an applied duty in excess of 35 per cent. If further specific examples of how applied duties may exceed the binding under this system were needed, they had been provided by Argentina itself. The examples of administrative appeals by the importer of Company X and by Company Y related to the imposition of minimum specific duties exceeding 35 per cent *ad valorem*.

4.9 The EC agreed with Argentina that Article II GATT 1994 did not impose an obligation on a WTO Member to apply a specific type of duty but only to grant tariff treatment "no less favourable" than that provided in its Schedule. Thus, to the extent that the applied tariffs were lower (e.g., 20 per cent *ad valorem*) than the tariff binding of 35 per cent *ad valorem*, there was some scope for Argentina to apply duties higher than the applicable *ad valorem* rate so long as the applied duties did not in any case exceed the bound rate of 35 per cent *ad valorem*.

4.10 The EC could therefore share the conclusion expressed by Argentina that, for a category of goods with an *ad valorem* applied duty of 20 per cent and subject to the payment of a specific duty of US\$3.50, the three following possibilities existed:

CUSTOMS VALUE		CUSTOMS DUTY
more than	\$17.50	20 per cent <i>ad valorem</i>
between	\$17.50 and US\$10	\$3.50
less than	\$10	35 per cent <i>ad valorem</i>

4.11 The EC had understood Argentina as admitting that Article II GATT 1994 required that the customs duty imposed on any good subject to the regime of minimum specific duties could not in any case exceed 35 per cent *ad valorem*. The EC thus considered the argument by Argentina that a "mere potentiality" of a WTO incompatibility was not sufficient to found a violation, was misleading and unfounded.

4.12 The EC noted that Argentina had referred to GATT case-law according to which there was no violation if the national measure merely provided for the possibility of a measure being incompatible with WTO rules. Argentina equated "possibility" with "potentiality" and argued that this principle applied in the present case. This parallel was misleading and incorrect. The principle was that laws and regulations of WTO Members which *allowed* taking measures which would be incompatible with the WTO were not themselves violations. The violation only occurred when the authorities of the WTO Member actually used the possibility given to it and took a measure contrary to the WTO. The situation in the present case was different. The customs authorities of Argentina were obliged to impose minimum specific duties even when they exceeded 35 per cent *ad valorem*. Argentina's legislation did not allow them a discretion in the matter. The potentiality invoked by Argentina was merely the fact that the minimum specific duties would not always exceed 35 per cent *ad valorem* but would only do so when the customs value of the good was below a certain level. Since the "potentiality" of a violation of Article II GATT 1994 depended on the *price* of the product, *not on any action by Argentina*, the principle established by the GATT case-law invoked by Argentina was not applicable.

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<sup>150</sup>Boletín Oficial de la República Argentina, No. 28.650 of 20 May 1997.

4.13 The EC noted that the Argentine Customs Code (Law No. 22.415) contained an administrative procedure by which an importer could challenge, *inter alia*, the amount of customs duty it was asked to pay. In addition, Article 75.22 of the Constitution of the Argentine Republic of 1994 provided that treaties were hierarchically superior to and therefore prevailed over domestic Argentine laws. Any Argentine judge was able to declare unconstitutional any provision of Argentine law which violated the provisions of an international treaty such as the WTO Agreement which had been ratified by Argentine Law No. 24.425. The implication seemed to be that Argentina's regime of minimum specific duties was contrary to its Constitution. The EC therefore wondered why Argentina had not abolished its system of minimum specific duties or at least introduced a ceiling of 35 per cent *ad valorem* to ensure that it respected the WTO Agreement and Argentina's Constitution.

4.14 For the EC, the challenge procedure described by Argentina, even in conjunction with the principle of the hierarchy of norms, was not such as to bring the system of minimum specific duties into conformity with Article II GATT 1994. Argentina claimed that the importer was entitled, if he introduced a "challenge procedure" to have his goods cleared through customs and placed in free circulation with only the payment of the amount which he considers due, provided that the importer submits a guarantee of payment of the difference, pending the adjudication of his challenge. Argentina further claimed that the procedure was automatic, free and required no legal representation. The examples provided by Argentina demonstrated that this was not the case. According to the EC, the challenges mentioned by Argentina were long and complicated. Argentina had given only two examples but there certainly existed thousands of potential cases. Finally, no indication was given as to the outcome of these challenge procedures. They had been introduced in February and November 1996 and were apparently still pending.

4.15 The EC further argued that, even if it were the case, that a challenge procedure would "simply and automatically" lead to the duty not exceeding 35 per cent *ad valorem* (and this had not been demonstrated), the system would still not be compatible with Article II GATT 1994. The higher duty was imposed by law and the importer was forced to follow a procedure to avoid it. In the meantime he had to bear the costs of the challenge and the provision of a guarantee.

4.16 The EC stated that the transformation of the minimum specific duties imposed on footwear into "provisional minimum specific duties" on 25 February 1997 (date of entry into force) and the initiation of a safeguard investigation constituted a mere change of legal basis and the measures themselves remained the same. The EC therefore considered this change of legal basis to be an attempt by Argentina to justify its measures under the WTO. The safeguard investigation had not been opened, and the provisional measures not imposed, in conformity with WTO Agreement. Accordingly, Argentina's system of minimum specific duties on footwear still violated Article II GATT 1994 just as it did before 25 February 1997.

4.17 The EC's information concerning Argentina's safeguard investigation and provisional measures derived from Argentina's Resolution No. 226/97 opening the proceeding and imposing provisional measures, WTO notification documents G/SG/N/6/ARG/1 - G/SG/N/7/ARG/1 (including Corr. 1) and G/SG/N/6/ARG/1/Suppl.1 - G/SG/N/7/ARG/1/Suppl.1, and the replies by Argentina to questions put by the EC in the course of consultations held under Article 12.4 of the Agreement on Safeguards on 2 May 1997.

4.18 The EC noted that Article 6 of the Agreement on Safeguards set out two preconditions which needed to be met before safeguard measures may be imposed: (i) critical circumstances where delay would cause damage which it would be difficult to repair; and (ii) a preliminary determination that there was clear evidence that increased imports had caused or were threatening to cause serious injury. In addition, Article 2 (Conditions) of the Agreement on Safeguards, which applied to all measures taken under this Agreement, provided in paragraph 1 that safeguards may only be imposed if products

were being imported "in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury".

4.19 The EC recalled that Article 2.1 of the Agreement on Safeguards required that products be imported in *increased quantities*. This was not an alternative to the *conditions* of import and therefore had to be satisfied in every case. Argentina's Resolution No. 226/97 and the Argentine notifications to the WTO referred to by the EC in paragraph 4.17 above demonstrated that imports into Argentina of footwear had *decreased* between 1994 and 1995 in both absolute and relative terms. Argentina did not deny this but claimed during consultations with the EC that there had been an increase in imports between 1991 and 1995. Safeguard measures were intended to protect against emergencies and unforeseen circumstances.<sup>151</sup> The EC considered that an increase in imports between 1991 and 1995 could not justify safeguard measures imposed in 1997 where there was a decrease in imports in the most recent period for which data was available (1994 and 1995). Even if it may be justified to provide (as in Article 8 and Annex I of Argentina's Decree No. 1059/96), that information on import data "must be supplied for the last five (5) full years", this was to provide a background against which trends could be established, not in order to measure the injury. The EC considered that Article 5.1 of the Agreement on Safeguards foresaw as a reference period for calculating quantitative restrictions a period of the last three representative years.

4.20 The EC argued that, as regards the second element in Article 2.1, *i.e.* the *conditions* under which the products were imported, the requirement that imports had to have an effect on domestic prices through price-undercutting, price-suppression or price-depression was clearly established. Since Argentina had not conducted this analysis (the notification documents did not present any information on prices), an essential and separate condition for the application of safeguards had not been met. The EC could not accept as an excuse the statement of Argentina during the consultations under Article 12.4 of the Agreement on Safeguards, that price analysis was "difficult" due to the variety of products under consideration, since it would have been possible to restrict the scope of the measures to those products for which it was possible to determine whether this requirement was fulfilled.

4.21 The EC also insisted that there was no clear evidence of serious injury. According to Article 6 of the Agreement on safeguards, there had to be clear evidence of *serious injury* or a threat of injury. The notification under Article 12.1(a) of the Agreement on Safeguards (initiation of investigatory process)<sup>152</sup> did not contain any evidence of serious injury. The data in the notification under Article 12.4 (imposition of provisional measures)<sup>153</sup> referred only to *critical circumstances*. It was furthermore insufficient to provide "clear evidence" for the existence of serious injury because it only referred to the change in the condition of the domestic industry from 1991 to 1995 which was, in particular because of the duration of the period, irrelevant for assessing the situation of the industry. The notification contained no data on profitability of the domestic industry even though this was required by Article 4.2(a) of the Agreement on Safeguards. In its response to the EC's questions raised during the consultations under Article 12.4 of the Agreement, Argentina admitted that the investigation lacked information on profitability in the sector being investigated. The notification documents did not present any information on productivity of the Argentine industry.

4.22 The EC noted that another element of serious injury for which *clear evidence* would be required was the existence of a *causal link* between the imports and the injury so that injury caused by factors other than increased imports would not be attributed to imports (Article 4.2.(b) of the Agreement on Safeguards). It was stated in Argentina's notification document<sup>154</sup> that the situation of the domestic

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<sup>151</sup>See Article XIX GATT 1994.

<sup>152</sup>Document G/SG/N6/ARG/1; G/SG/N7/ARG/1, 25 February 1997.

<sup>153</sup>Document G/SG/N6/ARG/1/Suppl. 1; G/SG/N7/ARG/1/Suppl. 1, 18 March 1997.

<sup>154</sup>Ibid.

industry was only *partly* a result of import trends.<sup>155</sup> In its response to the Community's questions during the consultations under Article 12.4 of the Agreement on Safeguards, Argentina had admitted the existence of other factors for the condition of the domestic industry such as the apparent contraction of the Argentine footwear market and a general economic crisis in 1995. Additionally, although only imports from non-MERCOSUR countries were subject to the measure, imports from MERCOSUR countries were included in the injury assessment. Imports from non-MERCOSUR countries had, according to a document dated 25 April 1997 submitted by the importer's association CAPCICA to the safeguards investigation, dropped continuously since 1992 to only 4.69 per cent in 1996. This demonstrated that imports from non-MERCOSUR countries could not be the cause of any injury that may exist.

4.23 The EC also criticized the absence of *critical circumstances*. According to Article 6 of the Agreement on Safeguards, the imposition of provisional measures required the existence of critical circumstances where delay could cause damage which would be difficult to repair. The EC considered that this was an additional requirement and the data provided on the condition of the domestic industry alone could not be sufficient to justify the need to impose measures immediately. There was no reference to an imminent danger of severe damage in Argentina's notification documents except the fact that the "mere absence of Minimum Specific Duties would recreate the critical circumstances required for the adoption of provisional measures".<sup>156</sup> The EC considered that a WTO Member could not rely on its own acts, such as the removal of the previous minimum specific import duties to establish *critical circumstances* and justify provisional safeguard measures.

4.24 In conclusion, the EC considered that the imposition of a provisional safeguard measure in this case was manifestly unjustified and the regime of minimum specific duties on footwear measures remained contrary to Article II GATT 1994.

4.25 With respect to the alleged violation of Article 7 ATC, the EC shared the view of the United States that, as they applied to textiles and apparel, Argentina's specific duties on imports were contrary to Article 7.1 ATC. There was no basis in that provision for the claim by Argentina that the obligations it created were limited to those matters which Members had notified pursuant to Article 7.2 ATC. On the contrary, Article 7.2 required notification to the Textiles Monitoring Body of all actions taken under Article 7.1 which had a bearing on the implementation of the ATC. Argentina had also violated Article 7.2 ATC by not notifying its measures as required by that provision.

4.26 The EC concluded that the Panel should find that Argentina's system of minimum specific duties for footwear, textiles and apparel, violate Article II:1(a) and II:1(b) of GATT 1994 and those relating to textiles and apparel also violate Article 7, paragraphs 1 and 2 ATC and recommend that Argentina bring its measures into conformity with its obligations under GATT 1994 and the ATC.

## B. HUNGARY

4.27 **Hungary** considered that Argentina's minimum specific import duties often had amounted to more than 35 per cent of the actual value of the affected products, as it was the declared purpose of Argentina when establishing them to impose a duty higher than the *ad valorem* duty otherwise to be applied. Hungary provided data regarding the evolution for the six most affected Hungarian exports:

### Specific duties in dollar per kilogram

Product	1993	1994	from 1995
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<sup>155</sup>Ibid., p. 2, para. 5.

<sup>156</sup>Ibid.

6201.11.00	-	6.0	16.3
6202.11.00	-	3.9	16.3
6203.11.00	-	16.5	26.2
6203.31.00	-	13.7	26.2
6203.41.00	-	14.0	14.0
6204.31.00	-	13.2	26.2

4.28 Hungary stated that, due to the introduction and later the drastic increase of level of specific duties, the Hungarian textiles and apparels exports to Argentina had practically ceased to exist.

4.29 Hungary recalled that Article II of GATT 1994 prohibited Members of the WTO from exceeding their bound tariff rates and according treatment less favourable than the terms stipulated in Schedules. In imposing specific duties on textiles and apparel, Argentina had violated Article II by exceeding or having the potential to exceed its bound tariff rate and failing to apply only *ad valorem* duties in accordance with its Schedule.

4.30 Hungary underlined that Argentina had also violated its WTO obligations by imposing a three per cent *ad valorem* statistical tax. Article VIII of GATT 1994 provided that all fees and charges on imports other than tariffs imposed by WTO Members "shall be limited to the approximate cost of services rendered". Argentina's statistical tax violated Article VIII because it bore no relation to the cost of any service rendered to importers.

4.31 Hungary added that by imposing its specific duties on textiles and apparel, as well as its statistical tax on imports, Argentina had also violated Article 7 ATC. Under this provision, Argentina had agreed to "take such action as may be necessary to abide by GATT 1994 rules and disciplines so as to (a) achieve improved access to markets for textile and clothing products through such measures as tariff reductions and bindings, reduction or elimination of non-tariff barriers". Hungary claimed that, as a consequence of the referred measures, the value of the Hungarian textiles and apparel exports had decreased drastically: from US\$1.6 million in 1994 to US\$0.07 million in 1996.

4.32 In conclusion, Hungary requested the Panel to find that Decree No. 998/95 and Resolution No. 22/97 which imposed specific duties on textiles and apparel, violated Article II of GATT 1994 and Article 7 ATC; that Decree No. 389/95, which applied a statistical tax on imports, violated Article VIII of GATT 1994 and Article 7 ATC. Finally, Hungary requested that the Panel recommend that Argentina bring its measures into conformity with its obligations under GATT 1994 and the ATC.

## C. INDIA

4.33 India limited its submission to the interpretation of Article 7 ATC advocated by the United States. In India's opinion, this interpretation could neither be justified on the basis of the language of Article 7, nor with reference to the negotiation history of this provision. The most crucial element in Article 7.1 was the phrase "with reference to the specific commitments undertaken by the Members as a result of the Uruguay Round". In view of this phrase, a Member's obligations with regard to tariff reductions and bindings, reduction or elimination of non-tariff barriers had to be interpreted with reference to the specific commitments undertaken by that Member as a result of the Uruguay Round. Therefore, India totally disagreed with the statement of the United States that "Article 7 imposed a sweeping obligation on signatories to take whatever steps are necessary to bring their regimes into compliance with GATT obligations as they affect textiles and apparel, and thereby improve market access for these products". The United States could not legitimately argue that through Article 7, Members of the WTO accepted any "affirmative obligation". The obligation in Article 7.1 ATC was limited in scope in the sense that the obligation was with reference to the specific commitments undertaken by the Members. The argument of the United States according to which violation of a

provision of GATT that affected textiles and apparel *ipso facto* constituted a violation of Article 7 ATC was not correct. If a WTO Member violated a GATT provision without going back on any specific commitments undertaken by that Member in its Uruguay Round Schedule, in so far as these commitments related to market access in respect of textiles and clothing products covered by the ATC, that Member could be deemed to be violating GATT but not necessarily Article 7 ATC.

4.34 India recalled that Article 7 ATC had been negotiated in the very last hours of the Uruguay Round between the United States, the European Communities, India, Pakistan and Hong Kong. It was no secret that the United States and the EC did not want Article 7 ATC to be interpreted as imposing more obligations on them than what they had accepted through the back-loaded integration process envisaged in the ATC. The phrase "as part of the integration process" appearing in Article 7.1 ATC was supposed to imply that there was no additional obligation for the United States and the EC to remove the MFA-inherited quotas faster than what was envisaged through the back-loaded integration process outlined in Article 2.6 and 2.8 ATC. The phrase "with reference to the specific commitments undertaken by the Members as a result of the Uruguay Round" implied that Article 7 would not be used to make additional demands in respect of tariff reductions, tariff bindings, etc. on countries like India, Pakistan, Argentina, etc. over and above what they had committed themselves to in their Uruguay Round Schedules. In that context, India expressed its surprise that the United States was trying to impose on Argentina an obligation with regard to improved access to textiles and apparel market without linking it in any manner to the obligations undertaken by Argentina in its Schedule. India agreed with the view expressed by Argentina that the central purpose of the ATC was to put an end to the discriminatory quota regime which had dominated the textile and clothing sector for so long and to bring it under the discipline of the multilateral trading system. India also supported the point made by Argentina to the effect that the interpretation which sought to define the wording of Article 7 ATC as a legal obligation to open up markets beyond the level of bound tariffs had never been accepted by the WTO Membership.

## V. INTERIM REVIEW

5.1 On 7 October 1997, Argentina and the United States requested the Panel to review, in accordance with Article 15.2 of the DSU, the interim report that had been issued to the parties on 30 September 1997. We carefully reviewed the arguments presented by Argentina and the United States and revised paragraphs 3.15, 3.140 and 3.234 of the Descriptive Part in the light of the comments made by the parties. In response to their comments, we have clarified the wording of paragraphs 6.41, 6.53, 6.67 and 6.71 of the report. We have also made small modifications on other paragraphs.

5.2 Regarding Argentina's argument that it informed the Committee on Market Access that it was not going to change its minimum specific duties, as applied before the Uruguay Round (see paragraph 6.21), we have referred to the relevant argument submitted by Argentina in paragraph 3.67 of the Descriptive Part.

5.3 Argentina also contested that, in paragraph 6.79 of the panel report, the Panel did not address the wider and more fundamental issue of the existence of cross-conditionalities and conflicting obligations that could exist between a Members's commitments to the IMF and under the WTO Agreement. We see no reason to address this wider issue since, in the situation before the Panel, there is no evidence that Argentina was requested by the International Monetary Fund ("IMF") to impose an import tax that would violate the provisions of the WTO Agreement. Moreover, we see nothing in the Agreement Between the IMF and the WTO<sup>157</sup>, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking that suggests that we should change our approach.

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<sup>157</sup>Annex I to WT/L/195, adopted by the General Council on 7, 8 and 13 November 1996.

5.4 The United States has requested that, since we have decided not to reach any conclusion on its claim that Argentina also violated Article 7 of the Agreement on Textiles and Clothing ("ATC"), we limit our discussion on the matter. We have, consequently, adjusted our findings in paragraph 6.87.

## **VI. FINDINGS**

6.1 The United States claims that Argentina's tariffs on imports of textiles, apparel and footwear items violate, generally and in specific cases, the provisions of Article II of the General Agreement on Tariffs and Trade 1994 ("GATT"). The United States also claims that the statistical tax of three per cent *ad valorem* collected by Argentina on imports<sup>158</sup> is in violation of the provisions of Article VIII of GATT. Finally, the United States claims that these violations give rise to an infringement of the provisions of Article 7 of the Agreement on Textiles and Clothing ("ATC").

6.2 Argentina raises a preliminary objection of a procedural nature on the jurisdiction of the Panel to address part of the US claim, challenges the evidence submitted by the United States and asks the Panel to reject the US claims as unfounded.

6.3 This dispute raises, therefore, various legal issues which we have identified and grouped as follows:

A. Argentina's preliminary objection. Should the Panel consider a measure relating to tariffs applied on footwear which was revoked prior to the establishment of the Panel?

B. Article II of GATT. Does the imposition of minimum specific duties by Argentina, which has bound the tariffs at issue at an *ad valorem* rate, constitute a violation of Article II? Does Argentina's tariff system have the potential to violate Article II and is this potential sufficient to constitute an infringement thereof? Has Argentina imposed duties in excess of its bound rate of 35 per cent *ad valorem*? How should we treat the issues raised by the parties with regard to proof and evidence submitted to the Panel?

C. The domestic challenge procedure. Do the constitutional supremacy of international law under the Argentine Constitution and the existence of a domestic procedure to challenge duties imposed in excess of Argentina's bound rates constitute a defense to the claimed violation of Article II of GATT?

D. Article VIII of GATT. What are the criteria for application of Article VIII's limits on charges and fees imposed in connection with importation? Is the statistical tax of three per cent *ad valorem* collected by Argentina on imports in violation of Article VIII of GATT?

E. Article 7 of the ATC. Does a violation of any provision of the WTO Agreement in the textile and apparel sector constitute a violation of Article 7 of the ATC? Has Argentina violated the provisions of Article 7 of the ATC?

### **A. PRELIMINARY OBJECTION BY ARGENTINA**

6.4 In its request for establishment of a panel, dated 9 January 1997, the United States claims that the tariffs imposed by Argentina on textiles, apparel and footwear violate the provisions of Article II of GATT. The Panel was established on 25 February 1997. On 14 February 1997, i.e., after the

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<sup>158</sup>See paras. 2.19-2.21 of the Descriptive Part.

circulation of the US request for the establishment of a panel but before the Panel was established by the DSB, Argentina revoked the specific duties that it had been imposing on footwear.

6.5 On the day that it revoked the challenged footwear duties, Argentina imposed a provisional safeguard measure in the form of specific duties (G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, dated 25 February 1997 and G/SG/N/6/ARG/1 Supp.1, G/SG/N/7/ARG/1 Supp.1 dated 18 March 1997) on footwear and initiated a safeguard investigation.

6.6 In its first written submission, Argentina claims that the Panel does not have jurisdiction to address the specific duties on footwear which were withdrawn before the Panel was established. At the first meeting of the Panel with the parties, Argentina requested a decision on this issue before proceeding to the substantive questions.

6.7 We decided that we would not render a preliminary decision on this issue and invited both parties to submit evidence and arguments on all aspects of the US claims.

6.8 Argentina essentially argues that the specific duties on footwear were revoked before the Panel was established so that, even if the revoked measure is still contained in the terms of reference of this Panel, that claim has become "abstract", pertaining to the illegality of a measure that no longer exists. For Argentina, WTO proceedings cannot be initiated without a specific subject of dispute to which they can apply. In support of its claim, Argentina refers the Panel to Article 19.1 of the DSU, which provides that "where a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". Argentina stresses that the present tense is used. Moreover, for Argentina, making hypothetical assessments of expired measures would distort the dispute settlement mechanism and amount to making interpretations of the WTO agreements, contrary to the specific provisions of the WTO Agreement.

6.9 The United States argues that the Panel should rule on Argentina's specific duties on footwear since they are contained in the terms of reference of the Panel. In addition, the provisional safeguard duties are essentially the same as those applied as specific duties which were part of the same "regime" of specific duties imposed on textiles, apparel and footwear. In the US view, the safeguard duties have in any case a close factual connection with the duties still in force, in that they apply parallel provisions. Finally, the United States argues that measures similar to those revoked may be reinstated at the expiry of the safeguard measures or should Argentina lose a panel proceeding on such safeguard measures.

6.10 We note first that the terms of reference of this Panel include the specific duties on footwear since the terms of reference simply refer to the US request for establishment of a panel. That request specifically mentioned:

"Resolution 304/95, 305/95, 103/96, 299/96, Decree 998/95 and other measures which impose specific duties on various textile, apparel or footwear items in excess of the bound rate of 35 per cent ad valorem provided in Argentina's schedule LXIV".

6.11 Panels and their terms of reference are established by the DSB and panels are not authorized to amend unilaterally their mandate. On the other hand, panels have often been required to determine their jurisdiction over a matter (See for instance *United States - Standards for Reformulated and Conventional Gasoline*,<sup>159</sup> *Japan - Taxes on Alcoholic Beverages*,<sup>160</sup> *Brazil - Measures Affecting*

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<sup>159</sup>Panel and Appellate Body Reports adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

<sup>160</sup>Panel and Appellate Body Reports adopted on 1 November 1996, WT/DS/8, 10, 11/R and WT/DS8, 10, 11/AB/R.



*Desiccated Coconut*,<sup>161</sup> and *EC - Regime for the Importation, Sale and Distribution of Bananas*<sup>162</sup> ("*Bananas III*"). As stated by the Appellate Body in *Bananas III*, in another context:

"142. We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda.<sup>163</sup> As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".

6.12 On several occasions, panels have considered measures that were no longer in force.<sup>164</sup> It appears that in each of those cases, however, there was no objection raised by either party to the panel's consideration of the expired measure. In a recent case, an objection was raised by the respondent to panel consideration of a measure no longer in effect. In that case, the panel stated:

"6.19 The Panel observed that it has not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the Panel's terms of reference were fixed, were not and would not become effective. In the 1978 Animal Feed Protein case, the Panel ruled on a discontinued measure, but one that had terminated after agreement on the Panel's terms of reference. In the 1980 Chile Apples case, the Panel ruled on a measure terminated before agreement on the Panel's terms of reference; however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction. In the present case the Panel's terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 per cent rule was a measure that, although currently not in force, was likely to be renewed [...] . The Panel did not therefore proceed to examine this aspect of the Gasoline under Article I:1 of the General Agreement".<sup>165</sup>

6.13 As noted earlier, the Argentine measure under consideration was revoked before the Panel was established and its terms of reference set, i.e. before the Panel started its adjudication process. The *Gasoline* panel report would argue in favour of not considering the Argentine specific duties on footwear. Moreover, as noted by the Appellate Body in the *Shirts and Blouses*<sup>166</sup> case, the aim of dispute settlement is not

"to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".

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<sup>161</sup>Panel and Appellate Body Reports adopted on 20 March 1997, WT/DS22/R and WT/DS22/AB/R.

<sup>162</sup>Panel and Appellate Body Reports adopted on 25 September 1997, WT/DS27/R and WT/DS27/AB/R.

<sup>163</sup>DSU, Article 6.1.

<sup>164</sup>See for instance, the *Gasoline* Panel Report at para.6.19; Panel and Appellate Body Reports on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/R and WT/DS33/AB/R; Panel Report on *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49; and Panel Report on *United States - Prohibition on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91.

<sup>165</sup>Panel Report on *Gasoline* .

<sup>166</sup>See Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p. 19.

6.14 However, the United States claims that there is a serious threat of recurrence since Argentina could easily reintroduce the previous import measures, and the United States suggests that Argentina is likely to do so because there is only a weak justification for its safeguard measure on footwear. We cannot evaluate the justification or likely duration of that safeguard measure. Moreover, in the absence of clear evidence to the contrary, we cannot assume that Argentina will withdraw the safeguard measure and reintroduce the specific duties measure in an attempt to evade panel consideration of its measures. We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law<sup>167</sup>. We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced.

6.15 Consequently, we will not review the WTO compatibility of the specific duties which used to be imposed on footwear and which have, since the establishment of this Panel, been revoked. However, since these specific duties on footwear were in force for a long period until 14 February 1997, and for our understanding of the type of duties used by Argentina, we may, when reviewing the import regime applied to textiles and apparel, refer to some examples of transactions involving footwear because the type of duties used at the time by Argentina for textiles, apparel and footwear was the same.

## **B. ARTICLE II OF GATT**

6.16 The United States claims that Argentina violates the provisions of Article II of GATT in two ways:

- a) Argentina's application of minimum specific duties to products in respect of which it bound *ad valorem* duties violates Argentina's obligation to maintain *ad valorem* tariffs pursuant to Article II; and
- b) The specific duties applied by Argentina will inevitably lead and have in fact led to the imposition of duties in excess of the 35 per cent *ad valorem* tariff rate bound by Argentina pursuant to Article II.

6.17 Argentina argues that an allegation of a "potential" violation of Article II is not sufficient, and that in any case its tariffs do not have the potential and indeed have never exceeded the bound rate of 35 per cent *ad valorem*. It also responds that as long as its applied tariffs do not exceed the equivalent of 35 per cent *ad valorem*, it is free to use any type of duties, including specific duties. Argentina also adds that in its Constitution, international law prevails over domestic law and that it is therefore unconstitutional in Argentina to violate WTO rules. In this context, Argentina further argues that it maintains a domestic mechanism whereby Argentine importers, should they be required to pay duties above Argentina's bindings, can ask any judge to declare such duties to be illegal and unconstitutional, which, it notes, has never happened in the sector of textiles, apparel and footwear.

6.18 Argentina states that the specific duties were determined according to the following methodology<sup>168</sup>:

- (a) A representative international price was calculated for each category of product and tariff heading. Since there are no standard international prices for textile and clothing products, the prices prevailing in the major markets were used, mainly the United States market. The use of data concerning these markets was determined in general terms by volume and the representative nature of the markets, and also by the degree of reliability of the statistics.

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<sup>167</sup>See Article 3.10 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties (*Pacta Sunt Servanda*).

<sup>168</sup>See para. 3.120 of the Descriptive Part.

- (b) A specific duty was applied to the representative international prices thus determined, adjusted to put them on a c.i.f. - Buenos Aires basis.

6.19 The various *resoluciones* (hereafter translated as "resolutions") establishing the minimum specific duty system for textiles, apparel and footwear function the same way: they impose minimum specific duties to be used as equivalents to applied *ad valorem* duties<sup>169</sup>. The duty collected is the greater of the applicable specific duty or *ad valorem* duty. For example, this is clear from the first resolution (No. 811/93) assigning specific import duties to textile and apparel imports submitted by the United States<sup>170</sup>:

*"Aclárase que los derechos de importación específicos que se establecen por el artículo 1 de la presente resolución, operarán como mínimo del correspondiente derecho de importación ad valorem".*<sup>171</sup>

The Annex 1 to this resolution lists the *Derecho Especifico Minimo* (Minimum Specific Import Duty) for a list of *Posición NCE* (Foreign Trade Nomenclature (NCE) Heading). We note that all the following resolutions regarding the minimum specific duty regime imposed on the textile, apparel and footwear sector, were similar. The levels of the minimum specific duties have been adjusted from time to time, but they always have been calculated as described.

6.20 A description of how the DIEM, used by Argentina operates was further explained in a letter sent by Argentina to the United States and submitted by the United States<sup>172</sup>:

*"El funcionamiento del nuevo sistema de derechos aduaneros (v.g. DIEM), se explica de la siguiente manera. Una vez arribado el producto a zona aduanera, y determinado su precio C.I.F. por unidad (en este caso particular, cada unidad está constituida por un par de calzados), se compara el valor del DIEM vigente con el monto resultante de aplicar del Derecho de Importación Extrazona vigente al producto en cuestión, correspondiendo para la nacionalización del mismo (despacho a plaza) la aplicación del mayor de los montos cotejados. A continuación se gráfica el funcionamiento con dos ejemplos hipotéticos".*<sup>173</sup>

6.21 In its first submission, Argentina states that it has not changed its type of duties but rather that it has simply continued to use specific duties as it did before the Uruguay Round. All that it did in the Uruguay Round, was to bind certain tariffs at 35 per cent *ad valorem*. We asked Argentina whether, in its Schedule, it had reserved its right to continue to impose minimum specific duties up to a maximum *ad valorem* duty of 35 per cent. Argentina responded that it declared the situation to the Market Access Committee but did not refer to any minutes of meetings.<sup>174</sup> No further evidence of any such specifications in the bindings was brought to our attention.

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<sup>169</sup>They are referred to in paras. 2.4 and 2.7-2.21 of the Descriptive Part.

<sup>170</sup>See para. 3.15 of the Descriptive Part.

<sup>171</sup>Resolution No. 811/93, 29 July 1993, Article 3. The English translation for this piece of legislation reads as follows: "It is hereby expressly stated that the specific import duties established by Article 1 of this decision shall operate as a minimum of the corresponding *ad valorem* import duty".

<sup>172</sup>See para. 3.15 of the Descriptive Part.

<sup>173</sup>Letter of the National Director of Industry Affairs explaining the Argentine minimum specific import duties. The English translation of this letter reads as follows: "This new customs system, i.e., DIEM, operates as follows. Once the product has arrived in the customs area and its c.i.f. price has been determined per unit (in this particular case, each unit consists of one pair of shoes), the current value of the DIEM is compared against the amount obtained by applying the current extra-zone import duty to the product in question, and the higher of the two amounts compared will be applied for purposes of inward customs clearance. The two hypothetical examples given below will illustrate how this works".

<sup>174</sup>See para. 3.67 of the Descriptive Part.

6.22 Article II(1)(a) of GATT reads as follows:

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

The issue for the Panel is, therefore, to decide what are the obligations covered by the "treatment no less favourable than that provided for in the appropriate [...] Schedule".

### 1. THE TYPE OF DUTIES USED

6.23 The United States claims that the type of duties applied by a WTO Member - even below any bound rate - must conform to that specified in the Schedule of such Member. Since Argentina has bound its tariffs at 35 per cent *ad valorem* in its Schedule of Concessions (hereafter called "Schedule"), the United States argues that Argentina may only impose *ad valorem* duties. Argentina responds that as long as the duties it imposes are below the equivalent of 35 per cent *ad valorem*, it can use any type of duties. Therefore, we have to decide whether the imposition of minimum specific duties by Argentina, which has bound the tariffs at issue at an *ad valorem* rate, constitutes a violation of Article II.

6.24 The wording of Article II does not seem to address explicitly whether WTO Members have an obligation to use a particular type of duty. However, the wording of Article II must be interpreted in the light of past GATT practice, as mentioned in Article XVI:1 of the WTO Agreement and paragraph 1(b)(iv) of Annex 1A incorporating the GATT 1994 into the WTO Agreement, and indicated by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*.<sup>175</sup> Issues similar to those presented in this case have arisen on a number of occasions.<sup>176</sup>

6.25 In this connection, the Working Party Report on *Rectifications and Modifications of Schedules*<sup>177</sup> stated in 1953:

"The Working Party also concerned itself with the proposal of the Greek Government to introduce a minimum *ad valorem* rate for certain specific rates and came to the conclusion that such changes could not be considered rectifications to be dealt with by the Working Party, [...] [I]t decided therefore to refer the question to the CONTRACTING PARTIES so that such changes could form the object of consultations and negotiations with the parties having an interest in these items".

6.26 In 1954, the Working Party Report on *Transposition of Schedule XXXVII - Turkey*<sup>178</sup> stated:

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<sup>175</sup>Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 -- and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. [Footnote 30: It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.] In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*". See Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8, 10, 11/AB/R, p.14.

<sup>176</sup>See also John H. Jackson, *World Trade and the Law of the GATT*, Bobbs-Merrill Co. (1969), p. 215.

<sup>177</sup>Adopted on 24 October 1953, BISD 2S/63.

<sup>178</sup>Adopted on 20 December 1954, BISD 3S/127.

"3. The Working Party has also examined the proposal to change the specific duties in the Turkish Schedule to *ad valorem* duties, in cases where such a change is not expressly provided for in the Schedule, in order that the new tariff as regards bound items will conform with the Government's obligations under the General Agreement. A comparison by the secretariat of the proposed *ad valorem* rates with rates which would have resulted, if the conversion had been carried out on certain other bases which were suggested, has indicated that for a considerable proportion of the items the method employed by the Turkish Government has resulted in lower rates than would have been the case if one of those other bases had been used. The Working Party considered the proposals in relation to the provisions of the Agreement and to the practices of the CONTRACTING PARTIES which deal with the modification of schedules. *It was found that there is no provision in the General Agreement which authorizes a contracting party to alter the structure of bound rates of duty from a specific to an ad valorem basis.* (Emphasis added)

4. The obligations of contracting parties are established by the rates of duty appearing in the schedules and any change in the rate such as a change from a specific to an *ad valorem* duty could in some circumstances adversely affect the value of the concessions to other contracting parties. Consequently, any conversion of specific into *ad valorem* rates of duty can be made only under some procedure for the modification of concessions".

6.27 The Working Party Report on the *Fourth Protocol of Rectifications and Modifications*<sup>179</sup> reached similar conclusions in 1955 :

"1. One question could not be solved by the interested parties and was referred to the Working Party. Among the rectifications requested by the Austrian Government were those relating to Items 140 to 144 of the Austrian Tariff which were being made under the authority of the Note to these items included in the Austrian Schedule XXXII which granted the Austrian Government freedom to change the specific into *ad valorem* rates. The Austrian Government felt that it would not be impairing the value of the concessions if it retained beside the *ad valorem* duty the old specific rate as a minimum rate.

2. *The Working Party took the view that such changes would constitute modifications of Austria's obligations and that it could not recommend their acceptance as rectifications.* Such modifications could only be inserted in a protocol of rectifications and modifications after negotiations authorized by the CONTRACTING PARTIES in accordance with the proper procedures. The Austrian delegation, therefore, did not further insist on the insertion in the Fourth Protocol of Rectifications and Modifications of the specific minimum rates in Items 140 to 144". (Emphasis added)

6.28 In 1984, the report of the *Panel on Newsprint*<sup>180</sup> described GATT practice as follows:

"50. [...] [U]nder longstanding GATT practice, *even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific duty to an ad valorem duty without an increase in the protective effect of the tariff rate in question, have been considered to require negotiations.*" (Emphasis added)

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<sup>179</sup>Adopted on 3 March 1955, BISD 3S/130.

<sup>180</sup>Adopted on 20 November 1984, BISD 31S/114.

6.29 The most recent panel report to consider this issue, *Bananas II*,<sup>181</sup> concluded as follows:

“134. [...]The Panel then considered whether the introduction of a specific tariff for bananas in place of the *ad valorem* tariff provided for in its Schedule constituted 'treatment no less favourable' in terms of Article II. The Panel observed that while the bound *ad valorem* tariff was related to the value of bananas, the new specific tariff was based on the weight of bananas. Any change in the value of bananas per ton therefore led to a change in the *ad valorem* equivalent of the specific tariff. Since the value of bananas was unpredictable, the *ad valorem* equivalent of the specific tariff could also not be foreseen. The Panel noted in this context that the *ad valorem* equivalent of the 850 ECUs per ton specific tariff on bananas presently exceeded by far 20 per cent *ad valorem*. As to the 100 ECUs per ton specific tariff, the Panel also noted that the EEC had neither argued nor submitted any evidence that this tariff could never exceed 20 per cent *ad valorem*; according to the complainants, the 100 ECUs per ton specific tariff had already exceeded the equivalent of the bound 20 per cent *ad valorem* tariff after 1 July 1993. The Panel consequently found that the new specific tariffs led to the levying of a duty on imports of bananas whose *ad valorem* equivalent was, either actually or potentially, higher than 20 per cent *ad valorem*.

135. The Panel considered that the actual levying of a duty in excess of the bound rate clearly constituted a treatment of bananas less favourable than that provided for in the EEC's Schedule of Concessions. The Panel then proceeded to examine whether also the mere possibility that the specific tariff rate applied by the EEC might be higher than the corresponding bound *ad valorem* rate, rendered it inconsistent with Article II. *The Panel recalled the importance of security and predictability in the application of tariffs bindings. It noted that previous panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition. The CONTRACTING PARTIES had consistently found that a change from a bound specific to an ad valorem rate was a modification of the concession [...].* The Panel [...] concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. *This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade".* (Emphasis added)

6.30 The *Bananas II* panel report clearly recognizes the past GATT practice and can be read as concluding that the imposition of specific duties when only *ad valorem* duties are bound is sufficient to establish a violation of Article II.

6.31 We note that the past GATT practice is clear: a situation whereby a contracting party applies one type of duties while its Schedule refers to bindings of another type of duties constitutes a violation of Article II of GATT, without any obligation for the complaining party to submit further evidence that such variance leads to an effective breach of bindings. The fact that Argentina claims that it is simply following its past practice of using specific duties would not seem to be relevant, since it made

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<sup>181</sup>Panel Report on *EEC - Import Regime for Bananas*, DS/38/R, 11 February 1994, not adopted (*Bananas II*). Although the Panel Report on *Bananas II* was never adopted, the Appellate Body stated clearly, in its Report on *Japan - Taxes on Alcoholic Beverages* at p.15, that although they have no legal status, the reasoning of an unadopted panel report can provide useful guidance to a panel and be, therefore, relevant. In this context we consider the reasoning of the panel in *Bananas II* to be relevant and useful to the present dispute.

*ad valorem* tariff concessions on the products in question and thus created an obligation for itself to impose such type of duties. As a guarantee for predictability and to ensure the full respect of the negotiations under Article II, GATT practice has generally required that once a Member has indicated the type(s) of duties in specifying its bound rate, it must apply such type(s) of duties. Accordingly, faced with such a variance in the type duties applied by Argentina from that reflected in its Schedule, we consider that we do not have to examine the effects of that variance on possible future imports. Indeed, such a variance undermines the stability and predictability of Members' Schedules.

6.32 We, therefore, find that Argentina, in using a system of specific minimum tariffs although it has bound its tariffs at *ad valorem* rates only, is violating the provisions of Article II of GATT and that the United States does not have to provide further evidence that the resultant duties exceed the bound tariff rate. Such a variance between Argentina's Schedule and its applied tariffs constitutes a less favourable treatment to the commerce of the other Members than that provided for in Argentina's Schedule, contrary to the provisions of Article II of GATT.

## **2. THE APPLICATION BY ARGENTINA OF SPECIFIC MINIMUM DUTIES**

6.33 The United States also claims that the system of minimum specific duties applied by Argentina will necessarily lead to, and in fact has led to, the imposition of duties in excess of the tariff rate of 35 per cent *ad valorem* bound by Argentina pursuant to Article II of GATT. The US submission on those claims can be divided into three parts:

- First, the United States argues that the way the minimum specific duty system is implemented necessarily leads to breaches of Argentina's bindings.
- Second, the United States submits a series of tables and charts to demonstrate that, based on the average transaction value of imports and the average level of duties collected, duties well above the 35 per cent *ad valorem* of the import price have been collected by Argentina on many items.
- Third, the United States submits a series of customs documents identifying examples where, it submits, specific duties in excess of 35 per cent *ad valorem* were imposed and paid by importers.

Argentina contests the authenticity and the relevance of the evidence, and the arguments submitted by the United States.

### **(a) Burden of proof and nature of the evidence required**

6.34 Before we look at the parties' arguments and evidence, we address the issue of the burden of proof and the nature of the evidence required in GATT/WTO panel proceedings. As noted above, Argentina has objected to much of the evidence submitted by the United States.

6.35 Concerning the issue of what one may call the "burden of proof", the Appellate Body has confirmed the GATT practice whereby

- a) it is for the complaining party to establish the violation it alleges;
- b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met; and
- c) it is for the party asserting a fact to prove it.

6.36 In the *Shirts and Blouses*<sup>182</sup> case, the Appellate Body stated:

“We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption”.

6.37 We consider that when the Appellate Body refers to the obligation of the complainant party to provide sufficient evidence to establish a "presumption", it refers to two aspects: the procedural aspect, i.e., the obligation for the complainant to present the evidence first, but also to the nature of evidence needed. In the present case, we consider that it was for the United States to raise a presumption that Argentina did violate the provisions of Article II of GATT. Then, it is for Argentina to provide sufficient evidence to rebut the said presumption. When, however, Argentina is claiming a specific affirmative defense, such that its national challenge procedure can be used to correct any alleged violation of GATT rules, it is for Argentina to raise first a presumption that such system operates in a way that there is, in effect, no infringement of GATT/WTO rules.

6.38 The concept of "presumption" may need some elaboration. A presumption is an inference in favour of a particular fact and would also refer to a conclusion reached in the absence of direct evidence.<sup>183</sup>

6.39 For international disputes it seems normal that tribunals, in evaluating claims, are given considerable flexibility. Inference (or judicial presumption) is a useful means at the disposal of international tribunals for evaluating claims. In situations where direct evidence is not available, relying on inferences drawn from relevant facts of each case facilitates the duty of international tribunals in determining whether or not the burden of proof has been met. It would therefore appear to be the prerogative of an international tribunal, in each given case, to determine whether applicable and un rebutted inferences are sufficient for satisfying the burden of proof. In this respect, the International Court of Justice, in some cases, found it difficult to assert stringent rules of evidence.<sup>184</sup>

6.40 Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case. It should be stressed, however, that "'discovery' of documents, in its common-law system sense, is not available in international procedures".<sup>185</sup> We shall, therefore, follow these general rules when addressing, for instance, the request of the United States to Argentina for production of documents and the fact that Argentina did not do so.

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<sup>182</sup>Appellate Body Report, p. 13.

<sup>183</sup>This would appear to be in conformity with the ordinary meaning of the words. See Black's Law Dictionary, 6th Edition, West Publishing (1991); Raymond Guillien and Jean Vincent, Lexique de termes juridiques, Dalloz (1981); and other similar dictionaries.

<sup>184</sup>See Keith Highet, "Evidence and Proof of Facts" in The International Court of Justice at a Crossroads, Transnational Publishers, Inc. (1987), p. 355 and Mojtaba Kazazi, Burden of Proof and Related Issues, Kluwer (1996).

<sup>185</sup>See Mojtaba Kazazi, Op. Cit. and, for further discussions on the rule of collaboration, George Scelle, Yearbook of International Law Commission (1950), vol.II, p.134 and other references in footnote 184 above.



**(b) Minimum specific duties necessarily lead to breaches of Argentina's bindings**

6.41 The United States submits that the way the minimum specific duties were initially determined by Argentina, i.e. on a "representative international price" based essentially on the US market price, will always lead to breaches of the bound tariff rate of 35 per cent for those exports which are priced sufficiently below such average price. The United States submits the example of soccer shoes which are subject to a specific minimum duty of US\$3.50 and an applied *ad valorem* duty of 20 per cent. For shoes imported at a value of US\$5.00, the minimum specific duty assessed of US\$3.50 represents a duty of 70 per cent *ad valorem*. Indeed, all shoes imported at a value below US\$10.00 would be subject to an *ad valorem* duty above 35 per cent<sup>186</sup>. In other words, every time a good is imported at a price below the "representative international price", the specific duty - which is set on the basis of what Argentina thought the "price should be" and, as argued by Argentina, to counteract the problem of underpriced imports - would be superior to the normally applicable *ad valorem* duty, and possibly above the bound rate of 35 per cent *ad valorem*. For the United States, the purpose of such minimum specific duty scheme is to impose duties in excess of the 35 per cent *ad valorem* collected on the effective import price because, allegedly, goods are often imported into Argentina at prices below the representative international price so that the bound rate of 35 per cent was not sufficient. The United States further argues that for at least 32 HS headings, the specific duty was set at a rate even greater than 35 per cent of the so-called "representative international price" and referred the Panel to its chart showing on the basis of calculations made by Argentina, the above mentioned instances of violations<sup>187</sup>. Later the United States submitted an additional list of 104 categories of HS lines which demonstrated that the *ad valorem* equivalents of the specific duties, even when applied on US export prices, were above 35 per cent.<sup>188</sup>

6.42 Argentina's response is three-fold. First, it argues that the minimum specific duty was always set so as to be below 35 per cent *ad valorem* of the representative international price of any such item. Thus, if imports were priced at the representative international price, there would be no problems. Second, for Argentina, the US allegations are too general, hypothetical and theoretical and, therefore, not relevant and that the Panel should not consider such "hypothetical" situations without evidence of specific transactions where breaches occurred, since otherwise the dispute settlement system would be abused with frivolous claims. For Argentina, a potential violation would constitute an infringement only if trade was affected and refers the Panel to the *Tobacco*<sup>189</sup> case where, according to Argentina, the panel refused to sanction mere possibility of violations. Third, Argentina argues that, because of its Constitution under which international law is supreme and overrides any domestic law, in the hypothetical case in which a customs official would make a mistake and require the payment of a duty above 35 per cent, the importer has access to a domestic mechanism to challenge such customs determination. We shall return to this last defense raised by Argentina in Section 3 below.

6.43 We understand that the specific duties were set based on representative international prices. In these circumstances, when the specific duties are set so as to be equivalent to a 35 per cent *ad valorem* rate, it is certain that every time a good is imported at a transaction value below the representative international price, the specific duty level will be more than 35 per cent *ad valorem* of the transaction value. In the case of specific duties set so as to be equivalent to a tariff rate of less than 35 per cent, if a good is imported at a transaction value sufficiently below the representative international price used to set the duty, the bound rate of 35 per cent *ad valorem* will also be exceeded. For example, if the representative international price of a product is US\$100.00 and the specific duty is set at US\$20.00 to reflect an *ad valorem* equivalent of 20 per cent, if the product is imported at a price below US\$57.00,

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<sup>186</sup>See paras. 3.113 and 3.117 of the Descriptive Part.

<sup>187</sup>See para. 3.110 of the Descriptive Part.

<sup>188</sup>See para. 3.168 of the Descriptive Part.

<sup>189</sup>Panel Report on *United States - Measures Affecting the Importation and Internal Sale of Tobacco*, adopted on 4 October 1994, DS44/R.

the effective *ad valorem* rate will always exceed 35 per cent. Thus, in many cases, it seems clear that the specific duties at issue will necessarily result in a duty in excess of the 35 per cent bound rate when the customs value of a product is below the representative international price for such product.

6.44 We note that customs duties are normally to be imposed on the transaction value of imported goods as defined in the Agreement on the Implementation of Article VII of GATT 1994 ("Customs Valuation Agreement"). The transaction value is defined as "the price actually paid or payable for the goods when sold for export to the country of importation". Obviously, if the customs value declared by the importer does not represent the price actually paid, the Argentine authorities may take action to counteract a false declaration through, for example, revisions of the customs value declared in specific cases and even criminal prosecutions. However, neither the Customs Valuation Agreement nor any other provision of the WTO Agreement allows the breach of tariff bindings made under Article II of GATT on the grounds of a general suspicion that declared customs values are sometimes understated. We note, therefore, that mechanisms to counteract alleged underpricing<sup>190</sup> practices are not justifications for Article II violation.

6.45 In respect of the Argentine argument that the US claim should not be considered because it addresses only a potential violation - in support of which it refers to the *Tobacco* panel report - we note that the Argentine measures, the specific duties, are mandatory measures. Argentina admits that its customs officials are obligated to collect the specific duties on all imports. GATT/WTO case law is clear in that a mandatory measure can be brought before a panel, even if such an adopted measure is not yet in effect, and independently of the absence of trade effect of such measure for the complaining party:

"[T]he very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence".<sup>191</sup>

We are also of the view that the *Tobacco* panel report merely confirms this principle.

6.46 Moreover, in *Bananas III*<sup>192</sup>, the Appellate Body confirmed that the principles developed in *Superfund*<sup>193</sup> were still much applicable to WTO disputes and that any measure which changes the competitive relationship of Members nullifies any such Members' benefits under the WTO Agreement.

"Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement".<sup>194</sup>

We consider that this principle is also appropriate when dealing with the application of the obligations contained in Article II of GATT which requires a "treatment no less favourable than that" provided in a Member's Schedule. In the present dispute we consider that the competitive relationship of the

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<sup>190</sup>Throughout the panel process, the terms "underpricing" and "underinvoicing" have been used interchangeably. In the present Panel Report we shall refer to "underpricing" without prejudice to the parties' rights and obligations and without addressing any legal distinctions between the two terms.

<sup>191</sup>Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

<sup>192</sup>*Bananas III*, Appellate Body Report, Op. Cit., p. 106, para. 252.

<sup>193</sup>*Superfund*, Op.Cit., para 5.1.9

<sup>194</sup>*Ibid.*

parties was changed unilaterally by Argentina because its mandatory measure clearly has the potential to violate its bindings, thus undermining the security and the predictability of the WTO system.

6.47 We find, therefore, that the United States has established a presumption that the very nature of the minimum specific duty system maintained by Argentina violates the provisions of Article II of GATT and that, as shown above, this presumption has not been rebutted by Argentina.

**(c) Evidence based on average calculations**

6.48 The United States filed various charts and tables in an effort to prove that based on the average import price of certain products in relation with the total amount of duties collected, one can only conclude that, on many occasions, duties above 35 per cent *ad valorem* must have had been collected. More specifically, the United States submitted:

a) A first set of two charts which identify 118 HS categories of textiles and apparel in which Argentina's specific duties, on average, are greater than 35 per cent *ad valorem*. The United States mentions that it requested from Argentina the data on which the charts are based for the purpose of performing those calculations. The listed specific duties constitute more than 35 per cent of the average of transaction prices of merchandise imported in each category. The United States submits that the exhibit makes plain that, at the least, all merchandise having a lower actual value than the average are subject to duties above 35 per cent *ad valorem*. The data was then broken down into product sectors and demonstrated graphically in another exhibit. For the United States, that exhibit reflects how high, in *ad valorem* terms, Argentina's specific duties are with respect to a variety of textile and apparel groupings, ranging on average from 40.9 per cent to 56.2 per cent. The United States also adjusted its calculations contained in these two first exhibits to take into account a new Argentine Resolution, No. 597/97, which provides five stages of modifications of specific duties in certain categories. Applying the Argentine data to the new duties, the United States submits that the duties collected are still in excess of 35 per cent, on average, with respect to 72 line items.

b) A second set of tables contains calculations performed by the United States from data that had been provided by Argentina to the European Communities during their consultations. For the United States, the information contained in that document is particularly reliable, since it was created by Argentine officials who used Argentine customs data to calculate the *ad valorem* equivalents for 35 textile line items. The document consists of four pages and covers four different types of information: EC imports to Argentina in 1995; EC imports in the first seven months of 1996; all other imports during 1995; and all other imports during the first seven months of 1996. The document identifies, for each line item the total kilograms of textiles imported, their total value, the average c.i.f. value, the specific duties charged, and the *ad valorem* equivalent. Argentina's calculations show that for 4 out of the 35 line items, the EC imports during 1995 and 1996 exceeded 35 per cent *ad valorem*. For the rest of the world, the bound rate exceeds on average in 1996 for 22 out of the 35 textile and clothing categories and, for 26 out of 35 for 1995. Many of the average percentages for the rest of the world for 1995 and 1996 are well over 50 per cent *ad valorem*. Since the prices of products within each of the 35 HS tariff headings vary, some imports are above and some were below the average prices. However, given the large number of HS categories with an average greater than 50 per cent, the United States submits that there necessarily are many individual transactions well above 35 per cent *ad valorem*.

6.49 Argentina argues that as these tables are based on averages they do not constitute evidence of effective transactions. More specifically, the main counter-argument that Argentina raises against the probative value of the first set of charts and tables is that they are based on data provided to the United States for another purpose: they were given so that the United States would realise the discrepancy between Argentine import prices and US export prices for the same items, which suggests serious underpricing. Another list was submitted to the United States so that it could note the minor trade importance of this issue for US textiles exports. These data were not supplied in order for the United

States to determine the average duties collected on imports and such data could not be used for the latter purpose. Argentina also contests the probative value of such calculations because of unacceptable margins of error based on the fact that the data were rounded up to the nearest thousand, a claim contested by the United States, which points out that the numbers were rounded to tens or hundreds of dollars and that such rounding up does not make any difference for transactions worth more than US\$10,000. Regarding the second set of charts and tables, Argentina submits that they do not originate from Argentina and that such data was not provided to the EC during the consultations, and that it had specified during the consultations that these data were irrelevant for the purpose of assessing the level of duties imposed on imports.

6.50 Argentina also argues that since the United States based its calculations on net weight whereby Argentina's statistics had been established using gross weight, all the US calculations were erroneous. In response, the United States provided further tables where the levels of duties were readjusted to take into account distortions of two to fifteen per cent due to the difference between net and gross weight. These new tables showed that in many instances duties well above 35 per cent *ad valorem* were collected. The United States referred the Panel to the second set of charts and tables received from the EC and prepared by Argentina, which is based on net weight and therefore could be used to assess whether the specific duties collected on imports were effectively above the 35 per cent *ad valorem*. Finally, to the Argentine claim that Argentina did not keep "net" weight data, the United States filed a copy of the 1983 issue of the INDEC statistical yearbook which made clear that the Argentine authorities did collect net weight data. Argentina did not inform the Panel of any change in this regard.

6.51 As Argentina did not provide any affirmative evidence to the contrary, we consider that this US evidence provides reliable information that, on a tariff line basis, duties above the bound rate of 35 per cent *ad valorem* have been imposed. We agree that, if an average calculation shows duties above 35 per cent, this is evidence of a sufficient number of transactions which were subject to duties imposed above the 35 per cent *ad valorem*. The United States was able to demonstrate that Argentina had imposed and collected duties on the effective price of the import transactions at levels well above the bound rate of 35 per cent *ad valorem*. In our view, the fact that the data was prepared by Argentina for other purposes is not relevant and the United States responded adequately to Argentina's arguments questioning the data. Thus, the US evidence based on averages confirms our finding in paragraph 6.65.

**(d) Evidence based on specific transactions**

6.52 At the first meeting of the Panel and following our request, the United States provided the Panel with nine (9) examples of transactions where it claimed that duties above 35 per cent *ad valorem* were collected on imports on textiles, apparel and footwear items. The arguments of the parties on these particular shipments are further detailed in paragraphs 3.169 and following of the Descriptive Part of the present Panel Report.

(1) A shipment on 9 May 1996 of U.S. carpets in HS category 5703.20 with a c.i.f. value of US\$56,271.90, i.e., the imposition of specific duties of US\$20,531, or a 36 per cent *ad valorem* equivalent.

(2) Imports on 4 April 1996 of three types of U.S. carpets in HS Category 5703.30, for which the imposition of specific duties resulted in the payment of duties of 40, 60 and 67 per cent *ad valorem*.

(3) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$15,722.53 and a total specific duty of US\$10,560.00, i.e. the specific duties constituted an *ad valorem* equivalent of 67 per cent.

- (4) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$23,046.20 and a total specific duty of US\$14,476.00, i.e. the specific duties constituted an *ad valorem* equivalent of 63 per cent.
- (5) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$7,444.33 and a total specific duty of US\$4,809.60, i.e. the specific duties constituted an *ad valorem* equivalent of 65 per cent.
- (6) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$94,846.13 and a total specific duty of US\$56,909.70, i.e. the specific duties constituted an *ad valorem* equivalent of 60 per cent.
- (7) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$30,690.17 and a total specific duty of US\$19,576.20, i.e. the specific duties constituted an *ad valorem* equivalent of 64 per cent.
- (8) Woven cotton fabric imports indicating a total c.i.f. value of US\$19,384.01 and a total specific duty of US\$7,087.61, i.e. the specific duties constituted an *ad valorem* equivalent of 37 per cent.
- (9) A shipment of U.S. carpet resulted in payment of specific duties of US\$1775.00 on a c.i.f. value of US\$2811.58, i.e. the imposition of the specific duties resulted in a duty equivalent to 63 per cent *ad valorem*.

6.53 Argentina challenges the validity of these invoices because the name of the importer and all relevant data that could help identifying the importer or the exporter were deleted. The US response is that it has to protect the confidentiality of the persons involved in these transactions. Argentina claims that this information would be very useful in its attempt to deal with the immense import underpricing problem it faces. In this context, Argentina suggests that the difference between the US average export prices and the specific invoice prices for some of these items was such that it affected the probative value of the US evidence. For these imports, Argentina also argues that all invoices related to footwear items should be excluded if the Panel does not review the specific duties imposed on footwear items. Argentina also opposes consideration of the imports from Indonesia, stating that only imports from the United States are relevant to the present case. On the ninth example, Argentina submits that the amount is very small, and emphasizes that the transaction value is said to be US\$1.90 although in 1995, the year of the transaction, the average price for exports from the United States to Argentina in the same tariff heading had a unit value of US\$2.79. Finally, Argentina generally argues that the evidence submitted by the United States is not the best evidence, and, therefore, is not reliable. However, we note that Argentina does not challenge the accuracy of the amount of duties imposed.

6.54 At the end of the first meeting of the Panel, the United States argued that the best evidence was in possession of Argentina and therefore requested Argentina to produce all relevant customs forms involving imports in HS line-items 5407.81 (woven synthetic fibre fabric), 5703.20 (carpets), and 6110.30 (manmade fibre sweaters) for the period January-September 1996. The United States said that it chose these three categories in part because Argentine customs data showed that the average duty paid for these three groups of imports from the United States was 99, 43 and 56 per cent, respectively, during the period January-July 1996. Argentina did not produce these documents.

6.55 Just a few days before the second hearing of the Panel, the United States sent to Argentina some 90 additional invoices and customs documents as further detailed in paragraph 3.179 of the Descriptive Part of this panel report. The documents purport to show examples in which Argentina applied duties in excess of its 35 per cent *ad valorem* tariff binding. At the beginning of the second hearing Argentina requested the Panel to disregard this evidence as untimely. We note that the rules of procedures of panels do not prohibit the practice of submitting additional evidence after the first hearing of the Panel. Until the WTO Members agree on different and more specific rules on this regard,

our main concern is to ensure that "due process" is respected and that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible. In light of the difficulties faced by Argentina in responding to this evidence on such a short notice, we decided to accept this additional evidence on the understanding that Argentina would have a period of two weeks to provide further comments on these additional invoices and customs documents. Argentina informed the Panel that it would not be submitting any further comment.

6.56 The United States submitted additional evidence of invoices of shipments during 1996 and 1997 which involved seventy-eight instances where Argentina applied duties in excess of 35 per cent *ad valorem*. The United States used one of these invoices<sup>195</sup> to demonstrate its points but argued that all other invoices were similar and added that if requested it would provide additional comment on the other invoices.

6.57 Argentina raises a series of objections to this evidence:

- most of these invoices concern import transactions for which customs clearance was carried out manually; consequently these invoices suffer from a number of formal defects which ultimately invalidate the substantive arguments they are intended to support;
- most of these invoices represent only part of a larger shipment for which the customs documentation has not been supplied.
- concerning the specific invoice used by the United States during its demonstration, Argentina argued that the legal basis indicated for determining the *ad valorem* duty applied to the goods and the legal basis on which the three per cent statistical tax was levied were erroneous;
- the values declared are considerably lower than the average export prices of like goods originating in the United States in 1996;
- the alleged importer's registration number and tax identification number (CUIT) as well as the import registration number, and the name and registration number of the customs agent, had been shaded out;
- the goods concerned are of Italian origin in all cases but one;
- there is no receipt from the *Banco de la Nación* of payment of duties which represents the last step in the customs clearance procedure for imported goods;
- there is no evidence of import duties actually paid to Argentine Customs by importers;
- all of the transactions occurred in 1997 except one.

We note that Argentina does not deny that the amounts of duties so indicated were those effectively imposed, it simply claims that it was for the United States to prove that full payment was made to the Customs Authorities.

6.58 We do not consider that the fact that the United States submitted copies of customs documents affects their probative value. The United States did try to obtain the original copies in Argentina's possession. Before an international tribunal, parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession. In the absence of the originals,

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<sup>195</sup>See para. 3.179 and following of the Descriptive Part.

and after careful examination and consideration of the evidence, we consider that the copies submitted by the United States constitute sufficient evidence to allow us to make the conclusions we have reached.

6.59 Argentina claims that it is facing a serious problem of frequent underpriced imports and that it needs the names of the parties involved in the said transactions in order to try to defeat such illegal practices. We note the difficulties faced by Argentina but we must also limit ourselves to the claims presented to us. We also note that a claim of underpricing practices is not a legal defence to alleged violations of Article II of GATT. The WTO Agreement offers specific means for the importing country to redress such practices. We note also that it is often the practice in disputes such as this one, for a party to protect commercial in-confidence information such as the names and other information of the private entities involved. Finally, after reviewing all the evidence and arguments of the parties, we consider that the underpricing arguments raised by Argentina (referred to in paragraph 6.53 above) do not affect the probative value of the US evidence.

6.60 Argentina claims that invoices representing imports from Indonesia and Italy are not admissible since the complainant in the present dispute is the United States. The issue before the Panel is whether Argentina's measures lead to the imposition of duties above its bound rate of 35 per cent *ad valorem*, irrespective of the source.

6.61 The fact that Argentina challenged the admissibility of the customs documentation submitted by the United States on the basis that some of the customs clearance were carried out manually, or that there were cases where the wrong resolution<sup>196</sup> was used and that many of the sets of documents were incomplete does not, in our view, affect the probative value of the evidence provided by the United States. Argentina did not question the rate of duty applicable and the way the amount of duties payable was calculated. Argentina also alluded to the possibility of fraud. Although the Panel understands the difficulties faced by Argentina, in a dispute over the application of Article II of GATT, these points made by Argentina are not relevant. Therefore, we consider, after review of all the evidence and arguments and the fact that Argentina did not present any convincing evidence to the contrary, that there is a presumption, within the meaning given to it by the Appellate Body, that these documents are official and reflect the amount of duties actually imposed. Moreover, we note that customs stamps and signatures can be found on many of these documents. Many of these stamps and signatures were from Argentine customs authorities and a number of these forms had a stamp "*Oficializado - Firma y Sello Despachante de Aduana*" on them.

6.62 Concerning Argentina's claim that there is no evidence of actual payment of the said duties, we recall that we are not faced with a domestic recourse for reimbursement of overpayment. The alleged violation, and the obligation under Article II, is to not impose duties above the bound rate and Argentina does not deny that for each of the 78 examples there is a reflection of the calculation of specific duties in excess of 35 per cent equivalent *ad valorem*.

6.63 Finally, Argentina raises the fact that most of the transactions referred to in the set of invoices submitted a few days before the second meeting of the Panel<sup>197</sup> relate to transactions that took place in 1997 implying that these should not be admissible since they took place after the consultations were initiated. In the present dispute, the purpose of the panel process is to try to understand the way the Argentine tariff system functions. The examination of, amongst other elements, some applications of this tariff system is done in this perspective. In our view, these 1997 transactions based on the resolutions and other legislation at issue, further confirm the evidence submitted by the United States for transactions that took place in the preceding years. This is also why we have looked at the invoices

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<sup>196</sup>We note also that the level of the specific duties imposed pursuant to the resolution in force at the time of the importation and that of the expired resolution referred to on the customs clearance were identical and that the amount of duties payable for this imported item under both resolutions were also identical.

<sup>197</sup>See para. 3.179 of the Descriptive Part.

related to footwear imports before 14 February 1997. We recall that we are looking at specific transactions in order to assess whether the Argentine resolutions and regulations, as revealed in their application, are inconsistent with Article II of GATT. For this reason, we consider that these examples of 1997 transactions are relevant for our understanding of the effective functioning and application of the minimum specific duty system on textiles and apparel and constitute admissible and relevant evidence for the present dispute.

6.64 We consider, therefore, that Argentina has not rebutted the presumption raised by the United States to the effect that Argentine customs officials have imposed duties, which in many cases are well above 35 per cent *ad valorem*, contrary to Argentine tariff bindings and contrary to GATT Article II. Argentina's arguments do not affect the admissibility and reliability of the evidence submitted.

6.65 In the light of the foregoing, we find that the United States has provided sufficient evidence that Argentina has effectively imposed duties on imports of textiles and apparel above 35 per cent *ad valorem*, that indeed the total amount of duties collected annually on these items leads to the conclusion that duties above 35 per cent *ad valorem* on the average transaction value have been imposed on the same items, and that in any case, as we found in paragraph 6.47 above, the very nature of the minimum specific duty system imposed in Argentina on the items at issue will inevitably lead, in certain instances, to the imposition of duties above 35 per cent *ad valorem*. In addition, the fact that Argentina is using minimum specific duties while they bound their tariffs according to an *ad valorem* type of duties, is inconsistent with its Schedule and with the requirements of Article II of GATT. Therefore, we consider that minimum specific duties imposed by Argentina on textile and apparel imports constitute a treatment of those imports that is less favourable than that provided for in Argentina's Schedule and contrary to Article II of GATT.

### 3. ***THE DOMESTIC CHALLENGE PROCEDURE***

6.66 Argentina denies the legitimacy of the US claims, but in the event that the Panel should agree with the United States in respect of those claims, Argentina argues that its domestic challenge procedure is a defense against any claim that it has violated Article II of GATT. Argentina notes that under Article 75.22 of the Argentine Constitution, international law takes precedence over domestic legislation. Therefore, any judge in Argentina has the power to declare, at the request of an interested party, the unconstitutionality of any measure adopted in breach of rules contained in an international treaty, such as the WTO Agreement. Subsequent domestic law cannot annul an international treaty, as such law is lower in rank. Should an importer be victim of domestic legislation or regulations that would violate the provisions of the WTO Agreement, including Article II of GATT and the Argentina's Schedule, Argentina argues that the importer should simply trigger the domestic challenge procedure which is quick and free. Furthermore, all Argentine judges are obligated to recognise the supremacy of WTO rules over an inconsistent Argentine measure such as one imposing duties above the bound rate.

6.67 In our view, this argument has two main flaws. First, although under the Argentine Constitution the WTO Agreement takes precedence over any domestic regulations in Argentina, Argentina states that its customs officials have no discretion and must impose the minimum specific duties even if found to be above the bound rate of 35 per cent *ad valorem* and notwithstanding the fact that such imposition violates the WTO Agreement and the Argentine Constitution.

6.68 Second, Article II of GATT imposes an unconditional obligation on a WTO Member to offer to other Members treatment not less favourable than that provided for in its Schedule. A Member violates this obligation, regardless of whether that Member provides a remedy for such violation in its domestic legal system. Notwithstanding how efficient such domestic court system may be, until the court system acts the Member is in violation of its WTO obligations. Moreover, it is not certain that the violation will ever be corrected since such correction is conditional on a decision by the Argentine importer or the holder of the clearance documents to initiate a domestic action. The inevitable delay



and uncertainty in such procedure are fundamentally at variance with the WTO principles and the aim of GATT/WTO tariff bindings which are to provide predictability and security for international trade.<sup>198</sup> We agree with the statement concerning the purpose of the commitments made in tariff bindings as stated in *Bananas II*.<sup>199</sup>

"135. The Panel recalled the importance of security and predictability in the application of tariffs bindings. It noted that previous panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition. [...] The Panel [...] concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade".

6.69 Consequently, we do not accept Argentina's defense that its national challenge process is such as to ensure that Argentina does not and will not violate its obligations pursuant to Article II of GATT.

### C. THE STATISTICAL TAX

6.70 Argentina maintains an *ad valorem* tax of three per cent on imports, without a minimum or maximum charge, to cover the cost of providing the statistical service intended to provide a reliable basis for foreign trade operators.<sup>200</sup> According to Argentina, this service is not rendered to any individual importer, or to the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity per se.<sup>201</sup>

6.71 The United States claims that this statistical tax is in violation of Article VIII of GATT. Argentina responds that its statistical tax is permitted under Article VIII. For Argentina, Article VIII should permit the collection of costs not only for the services rendered to the individual importer for a given transaction but also for all costs (direct and indirect) incurred in providing the services. Argentina adds that this three per cent tax is bound in its GATT 1994 Tariff Schedule under the heading "Other Duties and Charges". Although it states that a similar tax has been in place since 1989<sup>202</sup>, Argentina argues that this statistical tax is now part of an overall "package" of fiscal commitments it has undertaken with the International Monetary Fund ("IMF"). Consequently, Argentina argues that its obligations under Article VIII should be interpreted to take into account the existence of a potential conflict of rules which goes beyond the framework of a possible bilateral trade dispute.

6.72 This issue subsumes three questions:

- a) Is an *ad valorem* statistical tax of three per cent imposed on imports compatible with Article VIII?

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<sup>198</sup>There is a general rule of international law that a state cannot plead provisions of its own law (or deficiencies in that law) as a defence to a claim against it for an alleged breach of its obligations under international law. Thus, in the *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court of International Justice said: "It is certain that France cannot rely on her own legislation to limit the scope of her international obligations". (1932, PCIJ, Series A/B, case No.46, p.167). A WTO Member cannot offer as a defence to a claim of violation of a WTO agreement, that its internal system provides for a remedy to such violation to certain individuals, either national or foreign, and that no violation of WTO has therefore taken place.

<sup>199</sup>*Bananas II*, Op. Cit., para. 6.29 of the present report.

<sup>200</sup>As further described in paras. 2.19-2.21 of the Descriptive Part.

<sup>201</sup>See para. 3.266 of the Descriptive Part.

<sup>202</sup>See para. 2.19 of the Descriptive Part.

- b) What effect, if any, does Argentina's relationship with the IMF have on the answers to the above question?
- c) Does the fact that this tax was bound as such in Argentina's Schedule exempt Argentina from the requirements of Article VIII?

## I. ARTICLE VIII OF GATT

6.73 Paragraph 1(a) of Article VIII of GATT provides that

"[a]ll fees and charges of whatever character [...] imposed by Members on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes".

Article VIII:4(e) makes it clear that fees and charges relating to "statistical services" fall within the scope of Article VIII.

6.74 The meaning of Article VIII was examined in detail in the Panel Report on *United States - Customs Users Fee*.<sup>203</sup> The panel found that Article VIII's requirement that the charge be "limited in amount to the approximate cost of services rendered" is "actually a dual requirement, because the charge in question must first involve a 'service' rendered, and then the level of the charge must not exceed the approximate cost of that 'service'".<sup>204</sup> According to the panel report, the term "services rendered" means "services rendered to the individual importer in question".<sup>205</sup> In the present case Argentina states that the service is not rendered to the individual importer, or to the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity per se.

6.75 An *ad valorem* duty with no fixed maximum fee, by its very nature, is not "limited in amount to the approximate cost of services rendered". For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited *ad valorem* charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered. For example, in the *Customs User Fee* report, the panel examined the consistency with Article VIII of 0.22 and 0.17 per cent *ad valorem* customs merchandise processing fees with no upper limits. The panel concluded that "the term 'cost of services rendered' . . . in Article VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question and accordingly that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with Article VIII:1(a) to the extent that it caused fees to be levied in excess of such costs".<sup>206</sup>

6.76 The Report of the Working Party on *Accession of the Democratic Republic of the Congo*<sup>207</sup> is also relevant to the present dispute:

"Members of the Working Party pointed out that the statistical tax of three per cent *ad valorem* applied by the Congolese authorities on imports was not commensurate with the service rendered and was contrary to the provisions of Article VIII:1(a). The representative of the Congo recognized that this tax exceeded the cost of the service,

<sup>203</sup>Adopted on 2 February 1988, 35S/245.

<sup>204</sup>*Customs Users Fee*, Op. Cit., para. 69.

<sup>205</sup>*Ibid.*, para. 80.

<sup>206</sup>*Ibid.*, para. 86.

<sup>207</sup>Adopted on 29 June 1971, BISD 18S/89, para. 5.

and explained that the surplus revenue from the tax would be employed toward improving the service. His authorities were prepared to consider the adjustment of the statistical tax, in the light of the provisions of Article VIII as soon as they were in a position to afford it. The Working Party took note of this statement and invited the Government of the Democratic Republic of the Congo to re-examine its present method of application of the statistical tax and to report to the CONTRACTING PARTIES on the possibilities of bringing the tax into line with the provisions of Article VIII:1(a)".

6.77 Argentina's statistical tax is levied on an *ad valorem* basis with no ceiling. As described in paragraph 6.70 above, Argentina's tax is clearly not related to the cost of a service rendered to the specific importers concerned. The tax as assessed on many goods is not in proportion to the cost of any service rendered. The tax purportedly raises revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports. While the gathering of statistical information concerning imports may benefit traders in general, Article VIII bars the levying of any tax or charge on importers to support the related costs "for the individual entry in question" since it will also benefit exports and exporters.<sup>208</sup>

6.78 As to Argentina's argument that it was collecting this tax for "fiscal" purposes in the context of its undertakings with the IMF, we note that not only does Article VIII of GATT expressly prohibit such measures for fiscal purposes but that clearly a measure for fiscal purposes will normally lead to a situation where the tax results in charges being levied in excess of the approximate costs of the statistical services rendered.

6.79 In addition, although it does not argue that it is required to impose this specific tax in order to meet its commitments to the IMF, Argentina argues that the tax should be found to comply with Article VIII, if necessary through a less strict application of the requirements of Article VIII of GATT than was adopted in the *Customs Users Fee*. We find no exception in the WTO Agreement that would excuse Argentina's compliance with the requirements of Article VIII of GATT. Moreover, we see nothing in the Agreement Between the IMF and the WTO<sup>209</sup>, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking that suggests that we should interpret Article VIII as argued by Argentina.

6.80 Consequently, following the GATT practice on the subject matter, we conclude that Argentina's statistical tax of three per cent *ad valorem*, in its present form, is in violation of Article VIII:1(a) of GATT to the extent it results in charges being levied in excess of the approximate costs of the services rendered as well as being a measure designated for fiscal purposes.

## **2. EFFECT OF INCLUDING STATISTICAL TAX IN TARIFF SCHEDULE**

6.81 Argentina argues that its three per cent statistical tax was included in its Schedule LXIV and is therefore not in violation of GATT rules. The provisions of the WTO Understanding on the Interpretation of Article II:1(b) of GATT 1994, dealing with 'other duties and charges', make clear that including a charge in a schedule of concessions in no way immunizes that charge from challenge as a violation of an applicable GATT rule. The Understanding provides:

"1. 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 annexed to GATT 1994 against the tariff item to which they apply.

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<sup>208</sup>See *Customs User Fee*, Op. Cit., paras. 84-86.

<sup>209</sup>Annex I to WT/L/195, adopted by the General Council on 7, 8 and 13 November 1996.

It is understood that such recording does not change the legal character of 'other duties or charges'.

[...]

5. The recording of 'other duties or charges' in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the consistency of any 'other duty or charge' with such obligations.

6. For the purposes of this Understanding, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply".

This provision is consistent with GATT and WTO jurisprudence dealing with conflicts between non-tariff provisions included in the Member's Schedules and general GATT and WTO rules.<sup>210</sup>

6.82 Therefore, we consider that the fact that Argentina's statistical tax is included in its Schedule is not a defence to its inconsistency with the provisions of Article VIII of GATT.

6.83 Consequently, for all the reasons mentioned above, we find that the Argentine statistical tax of three per cent *ad valorem* is inconsistent with the provisions of Article VIII of GATT in that it is not "limited in amount to the approximate cost of services rendered".

#### **D. ARTICLE 7 OF THE ATC**

6.84 The United States claims that because Argentina has violated Articles II and VIII of GATT with respect to textiles and apparel, it has also violated Article 7 of the ATC. The United States claims that a violation of any provisions of any of the WTO agreements in the sector of textiles and apparel would necessarily constitute a violation of Article 7 of the ATC.

6.85 Argentina's response is two fold: First, Argentina argues that since it has not violated any provision of any of the WTO covered agreements, it cannot be said to violate Article 7 of the ATC; second, Argentina claims that the provisions of Article 7 are only applicable to the measures notified pursuant to Article 7. Since it has not notified and does not maintain any quantitative restrictions or non-tariff measures and it has respected its tariffs reduction commitments, Article 7 is not applicable.

6.86 The parties and third parties have entered into long and well-argued debates as to whether Article 7 covers only actions and obligations covered by the ATC, i.e., quantitative restrictions, or whether the purpose of Article 7 is to ensure that measures other than quantitative restrictions such as tariffs, non-tariff barriers, licensing provisions and intellectual property provisions are not used in a manner which undermines market access in the textile and apparel sector for all WTO Members.

6.87 We have decided to exercise judicial economy and not address the US claim related to the ATC. Such decision is consistent with the findings of the Appellate Body report in the *Shirts and Blouses* case.<sup>211</sup> We do not see how a finding on Article 7 of the ATC would help the parties to resolve their dispute. It would not provide Argentina with any further guidance as to how it should reform its measures found to be inconsistent with the provisions of Articles II and VIII of GATT. Indeed, even if we found that the Argentine measures also violated the provisions of Article 7 of the ATC, such

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<sup>210</sup>See Panel Report on *United States - Restrictions on Imports of Sugar*, adopted on 22 June 1989, BISD 36S/331 and *Bananas III*, Op. Cit.

<sup>211</sup>*Shirts and Blouses*, Appellate Body Report, Op. Cit., pp. 17-20.

finding would add nothing to the conclusions we reached concerning the violations of Articles II and VIII of GATT. Accordingly, we consider that a finding on Article 7 of the ATC is not necessary, nor useful for the present dispute.

## **VII. CONCLUSIONS**

7.1 In the light of the findings above, we conclude that

- (a) the minimum specific duties imposed by Argentina on textiles and apparel are inconsistent with the requirements of Article II of GATT;
- (b) the statistical tax of three per cent *ad valorem* imposed by Argentina on imports is inconsistent with the requirements of Article VIII of GATT.

7.2 The Panel *recommends* that the Dispute Settlement Body request Argentina to bring its measures into conformity with its obligations under the WTO Agreement.