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## **1 ARTICLE XI**

### **1.1 Text of Article XI**

#### **Article XI\***

##### *General Elimination of Quantitative Restrictions*

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

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

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form,\* necessary to the enforcement of governmental measures which operate:
  - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
  - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
  - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or

mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

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

## 1.2 Text of note *Ad Article XI*

### ***Ad Articles XI, XII, XIII, XIV and XVIII***

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

#### ***Ad Article XI***

##### *Paragraph 2 (c)*

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

##### *Paragraph 2, last subparagraph*

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

## 1.3 General

### 1.3.1 Role of Article XI in GATT

1. The Panel in *Turkey – Textiles* elaborated on the systemic significance of Article XI in the GATT framework.

"The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection 'of choice'. Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.

Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. In the sector of textiles and clothing, quantitative restrictions were maintained under the Multifibre Agreement (further discussed below). Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report *EEC – Imports from Hong Kong*.

Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing. This recognition is reflected in the GATT 1994 Understanding on Balance-of-Payments Provisions<sup>1</sup>, the Agreement on Safeguards<sup>2</sup>, the Agreement on Agriculture where quantitative restrictions were eliminated<sup>3</sup> and the Agreement on Textiles and Clothing (further discussed below) where MFA derived restrictions are to be completely eliminated by 2005."<sup>4</sup>

### 1.3.2 Burden of proof

2. In *India – Quantitative Restrictions*, the Panel examined whether the Indian import licensing system was inconsistent with Article XI and, in case of inconsistency, whether it was justified by Article XVIII. Referring to the Appellate Body Report on *US – Wool Shirts and Blouses* and the Appellate Body Report on *EC – Hormones*, the Panel stated on the issue of the burden of proof under Article XI:

"In all instances, each party has to provide evidence in support of each of its particular assertions. This implies that the United States has to prove any of its claims in relation to the alleged violation of Article XI:1 and XVIII:11. Similarly, India has to support its assertion that its measures are justified under Article XVIII:B. We also view the rules stated by the Appellate Body as requiring that the United States as the complainant cannot limit itself to stating its claim. It must present a *prima facie* case that the Indian balance-of-payments measures are not justified by reference to Articles XI:1 and XVIII:11 of GATT 1994. Should the United States do so, India would have to respond in order to rebut the claim."<sup>5</sup>

### 1.3.3 GATT practice

3. GATT practice: see the *GATT Analytical Index*, pages 317-319.

## 1.4 Article XI:1

### 1.4.1 The test for consistency

4. The Panel in *EU – Energy Package* noted that the Appellate Body in *Argentina – Import Measures* found that Article XI:1 of the GATT 1994 prohibits WTO members from instituting or maintaining prohibitions or restrictions other than duties, taxes, or other charges, on the importation, exportation, or sale for export of any products. With this in mind, the Panel noted that:

"Based on the text of Article XI:1 of the GATT 1994, in order to establish that a challenged measure is inconsistent with Article XI:1 of the GATT 1994, the complaining Member must demonstrate the following elements: (i) the measure falls within the scope of the phrase 'quotas, import or export licences or other measures'

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<sup>1</sup> (*footnote original*) See for instance paras. 2 and 3 of the GATT 1994 Understanding on the Balance-of-Payments Provisions which provide that Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes

<sup>2</sup> (*footnote original*) The Agreement on Safeguards also evidences a preference for the use of tariffs. Article 6 provides that provisional safeguard measures "should take the form of tariff increases" and Article 11 prohibits the use of voluntary export restraints.

<sup>3</sup> (*footnote original*) Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a "tariffication" exercise to transform quantitative restrictions into tariff based measures.

<sup>4</sup> Panel Report, *Turkey – Textiles and Clothing*, paras. 9.63-9.65.

<sup>5</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.119. The Panel in *US – Shrimp* also allocated the burden of proof to the complainant, referring to the Appellate Body Report, *US – Wool Shirts and Blouses*. Panel Report, *US – Shrimp*, para. 7.14. Further, the Panel in *Argentina – Hides and Leather* followed this practice. Panel Report, *Argentina – Hides and Leather*, paras. 11.11-11.14.

(emphasis added); and (ii) the measure constitutes a prohibition or restriction on the importation or on the exportation or sale for export of any product."<sup>6</sup>

#### 1.4.2 "restrictions or prohibitions"

5. In *India – Quantitative Restrictions*, the Panel set out the scope of the concept of "restriction":

"[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'.<sup>7</sup>

6. The Panel in *India – Autos* endorsed this view:

"The question of whether [the] measure can appropriately be described a restriction on importation turns on the issue of whether Article XI can be considered to cover situations where products are technically allowed into the market without an express formal quantitative restriction, but are only allowed under certain conditions which make the importation more onerous than if the condition had not existed, thus generating a disincentive to import.

On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. Indeed, the term 'restriction' cannot mean merely 'prohibitions' on importation, since Article XI:1 expressly covers both 'prohibition or restriction'. Furthermore, the Panel considers that the expression '*limiting condition*' used by the *India – Quantitative Restrictions* panel to define the term 'restriction' and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e. that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself."<sup>8</sup>

7. The Panel in *Dominican Republic – Import and Sale of Cigarettes* found that "not every measure affecting the opportunities for entering the market would be covered by Article XI, but only those measures that constitute a prohibition or restriction on the importation of products, i.e. those measures which affect the opportunities for importation itself."<sup>9</sup> Examining a bonding requirement, that Panel was not convinced that "the requirement is a condition for the importation of cigarettes, that is, that importation would not be allowed unless the bond requirement had been complied with. The Panel therefore does not consider that there is evidence that the bond requirement operates as a restriction on the importation of cigarettes, in a manner inconsistent with Article XI:1 of the GATT 1994."<sup>10</sup>

8. In *China – Raw Materials*, the Appellate Body examined the concepts of "prohibition" and "restriction" and concluded that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported:

"Both Article XI:1 and Article XI:2(a) of the GATT 1994 refer to 'prohibitions or restrictions'. The term "prohibition" is defined as a 'legal ban on the trade or importation of a specified commodity'. The second component of the phrase '[e]xport prohibitions or restrictions' is the noun 'restriction', which is defined as '[a] thing

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<sup>6</sup> Panel Report, *EU – Energy Package*, para. 7.243. See also Appellate Body Report, *Argentina – Import Measures*, paras. 5.216-5.218.

<sup>7</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.129.

<sup>8</sup> Panel Report, *India – Autos*, paras. 7.269-7.270.

<sup>9</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.261; finding not appealed.

<sup>10</sup> Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.265.

which restricts someone or something, a limitation on action, a limiting condition or regulation', and thus refers generally to something that has a limiting effect.

In addition, we note that Article XI of the GATT 1994 is entitled 'General Elimination of *Quantitative* Restrictions'. The Panel found that this title suggests that Article XI governs the elimination of 'quantitative restrictions' generally. We have previously referred to the title of a provision when interpreting the requirements within the provision. In the present case, we consider that the use of the word 'quantitative' in the title of the provision informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1 and XI:2. It suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported."<sup>11</sup>

#### **1.4.2.1 Not necessary to "quantify the limiting effect of the measure at issue"**

9. Referring to its finding in *China – Raw Materials*, the Appellate Body in *Argentina – Import Measures* considered that the limiting effects need not be quantified and can be demonstrated through the design, architecture, and revealing structure of the measure:

"In *China – Raw Materials*, the Appellate Body observed that the term 'prohibition' is defined as a 'legal ban on the trade or importation of a specified commodity'. In that dispute, the Appellate Body also referred to the term 'restriction' as '[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation' and, thus, generally, as something that has a limiting effect. The use of the word 'quantitative' in the title of Article XI of the GATT 1994 informs the interpretation of the words 'restriction' and 'prohibition' in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported. This provision, however, does not cover simply *any* restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions 'on the importation ... or on the exportation or sale for export'. Thus, in our view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products.<sup>12</sup> Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."<sup>13</sup>

10. The Panel in *Indonesia – Import Licensing Regimes* noted that while the Appellate Body had concluded in *Argentina – Import Measures* that quantifying the limiting effects of the measures at issue is not required under Article XI:1, a panel may nonetheless use statistical data as evidence to inform its overall examination of whether a measure has a limiting effect:

"In our view, the wording of the Appellate Body Report in *Argentina – Import Measures* is straightforward: the limiting effect of the measures 'need not be demonstrated by quantifying the effects of the measure at issue'. Hence, contrary to Indonesia's position, the co-complainants are not obliged to demonstrate the limiting effects of the measures at issue by quantifying their effects through trade flows. On the contrary, the co-complainants can demonstrate the limiting effects of the

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<sup>11</sup> Appellate Body Reports, *China – Raw Materials*, paras. 319-320.

<sup>12</sup> (*footnote original*) We note that our understanding of Article XI:1 of the GATT 1994 is supported by two provisions of the Import Licensing Agreement that suggest that certain import licensing procedures may result in some burden without themselves having trade-restrictive effects on imports. Footnote 4 of the Import Licensing Agreement provides that "import licensing procedures requiring a security which have no restrictive effects on imports are to be considered as falling within the scope of [Article 2]", which deals with automatic import licensing. In addition, Article 3.2 of the Import Licensing Agreement provides that, while "[n]on-automatic licensing shall not have trade-restrictive ... effects on imports additional to those caused by the imposition of the restriction", such procedures "shall be no more administratively burdensome than absolutely necessary to administer the measure."

<sup>13</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.217 (referring to Appellate Body Reports, *China – Raw Materials*, paras. 319-320). See also Panel Report, *EU – Energy Package*, paras. 7.974-7.975.

measures 'through the design, architecture, and revealing structure of the measure at issue considered in its relevant context'. Nevertheless, while not required to do so, the co-complainants have presented data on trade flows that we will consider when examining each of the measures at issue. In this respect, we concur with New Zealand in that, while not an essential part of the legal test under Article XI:1 of the GATT 1994, the Panel may nonetheless use statistical data as evidence to inform its overall examination of whether a measure has a limiting effect. This was confirmed by the Appellate Body in *Peru – Agricultural Products* where it noted that 'evidence on the observable effects of the measure' can be considered but that a 'panel is not required to focus its examination primarily on numerical or statistical data'.<sup>14</sup>

#### 1.4.3 "made effective through"

11. The Appellate Body in *Argentina – Import Measures* concluded that in light of the phrase "made effective through" in Article XI, the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative:

"Article XI:1 of the GATT 1994 prohibits prohibitions or restrictions other than duties, taxes, or other charges 'made effective through quotas, import or export licences or other measures'. The Appellate Body has described the word 'effective', when relating to a legal instrument, as 'in operation at a given time'. We note that the definition of the term 'effective' also includes something '[t]hat is concerned in the production of an event or condition'. Moreover, the Appellate Body has described the words 'made effective', when used in connection with governmental measures, as something that may refer to a measure being 'operative', 'in force', or as having 'come into effect'. In Article XI:1, the expression 'made effective through' precedes the terms 'quotas, import or export licences or other measures'. This suggests to us that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.<sup>15</sup><sup>16</sup>

#### 1.4.4 "other than duties, taxes or other charges"

12. The Panel in *Argentina – Financial Services* found that one of the measures at issue was fiscal in nature and thus excluded from the scope of Article XI:

"We recall that measure 3 consists in the application of transaction valuation methods based on transfer prices for the purpose of determining the tax base for the gains tax payable by Argentine taxpayers in connection with transactions effected with persons from non-cooperative countries. Therefore, measure 3 is a tool for determining the tax base for the tax on the gains of the Argentine taxpayer. Argentina maintains this measure under paragraph 5 of Article 8 of the LIG. As Argentina points out, both provisions come within the framework of Chapter I of the LIG entitled 'Subject and Object of the Tax', so that they form part of the provisions that govern two of the elements of a tax. As Argentina also points out (and as we have previously explained) the '*Principios Constitucionales en Materia Tributaria*' (Constitutional Principles on Tax Matters) specify that 'there can be no tax without a legal basis' and that 'the law must define the taxable event and the elements thereof: subject, object, tax base and tax rate'. In our view, the nature of a tool used to calculate the tax base, that is, one of the elements of gains tax, cannot, in the present case, be other than fiscal. Consequently, we consider that the fiscal nature of measure 3 excludes it from the scope of application of Article XI:1 of the GATT 1994."<sup>17</sup>

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<sup>14</sup> Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.50.

<sup>15</sup> (footnote original) Our understanding of Article XI:1 of the GATT 1994 is supported by the wording of the first sentence of Article 3.2 of the Import Licensing Agreement, which provides that "[n]on-automatic licensing shall not have trade-restrictive or -distortive effects on imports *additional* to those caused by the imposition of the restriction." (emphasis added) In our view, the first sentence of Article 3.2 of the Import Licensing Agreement also suggests an examination of whether a restriction is produced or caused through the measure at issue itself, which seems to support our understanding of the relevant part of Article XI:1 of the GATT 1994.

<sup>16</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.218.

<sup>17</sup> Panel Report, *Argentina – Financial Services*, para. 7.1067.

#### 1.4.5 *De facto* prohibitions or restrictions

13. In *Argentina – Hides and Leather*, the European Communities argued that Argentina's measure violated Article XI:1 by authorizing the presence of domestic tanners' representatives in the customs inspection procedures for hides destined for export operations, and thus, imposing *de facto* restrictions on exports of hides. The Panel noted:

"There can be no doubt, in our view, that the disciplines of Article XI:1 extend to restrictions of a *de facto* nature. It is also readily apparent that Resolution 2235, if indeed it makes effective a restriction, fits in the broad residual category, specifically mentioned in Article XI:1, of 'other measures'.<sup>18</sup>

14. Citing the Panel Report on *Japan – Film*, the Panel in *Argentina – Hides and Leather* went on to state:

"It is well-established in GATT/WTO jurisprudence that only governmental measures fall within the ambit of Article XI:1. This said, we recall the statement of the panel in *Japan – Measures Affecting Consumer Photographic Film and Paper* to the effect that:

'[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.'

We agree with the view expressed by the panel in *Japan – Film*. However, we do not think that it follows either from that panel's statement or from the text or context of Article XI:1 that Members are under an obligation to exclude any possibility that governmental measures may enable private parties, directly or indirectly, to restrict trade, where those measures themselves are not trade-restrictive.<sup>19</sup> <sup>20</sup>

15. The Panel in *Argentina – Hides and Leather* had to determine, *inter alia*, whether the presence of representatives of the domestic hide tanning industry in the Argentine customs inspection procedures for hides destined for export was an export restriction. The Panel found that evidence regarding trade effects carried weight, but that a complaining party would need to demonstrate how the measure at issue causes or contributes to a low level of exports; in that case, the EC did not meet that burden.

"[A]s to whether Resolution 2235 makes effective a restriction, it should be recalled that Article XI:1, like Articles I, II and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows. In order to establish that Resolution 2235 infringes Article XI:1, the European Communities need not prove actual trade effects. However, it must be borne in mind that Resolution 2235 is alleged by the European Communities to make effective a *de facto* rather than a *de jure* restriction. In such circumstances, it is inevitable, as an evidentiary matter, that greater weight attaches to the actual trade impact of a measure.

Even if it emerges from trade statistics that the level of exports is unusually low, this does not prove, in and of itself, that that level is attributable, in whole or in part, to the measure alleged to constitute an export restriction. Particularly in the context of an alleged *de facto* restriction and where, as here, there are possibly multiple restrictions, it is necessary for a complaining party to establish a causal link between the contested measure and the low level of exports. In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of

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<sup>18</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.17.

<sup>19</sup> (*footnote original*) As we understand it, Article XI:1 does not incorporate an obligation to exercise "due diligence" in the introduction and maintenance of governmental measures beyond the need to ensure the conformity with Article XI:1 of those measures taken alone.

<sup>20</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.18.



precisely how the measure at issue causes or contributes to the low level of exports."<sup>21</sup>

16. However, in *Colombia – Ports of Entry*, the Panel found that:

"[T]o the extent [the complainant] were able to demonstrate a violation of Article XI:1 based on the measure's design, structure, and architecture, the Panel is of the view that it would not be necessary to consider trade volumes or a causal link between the measure and its effects on trade volumes.

In support of its approach, the Panel recalls that a number of panels have previously determined the existence of a restriction on importation based on the design of the measure and its potential to adversely affect importation, as opposed to the actual resulting impact of the measure on trade flows. The Panel notes further that more than one panel has declined to make a determination based on the alleged trade effects of a measure."<sup>22</sup>

17. In *China – Raw Materials*, the Panel found that an export price coordination requirement administered by the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (CCCME) was a restriction on exportation. The Panel found that various measures involving CCCME were attributable to China, because China acknowledged that it delegated authority to the CCCME to coordinate export prices;<sup>23</sup> also that the CCCME's charter directed it to set and coordinate export prices for all branches under its authority, including the raw materials at issue in that dispute.<sup>24</sup> The Panel found that China "had in place a system of penalties imposed on exporters that failed to set prices in accordance with the coordinated export prices"<sup>25</sup> "had in place a system that imposed penalties on licensing entities that issue licences to exporters that did not follow the coordinated export prices."<sup>26</sup> The Panel found:

"[T]he authority to coordinate export prices and enforce these prices through the imposition of penalties on exporting enterprises, or on export licensing entities that issue licences to exporters that do not follow the coordinated export prices, amounts to a requirement to coordinate export prices for the raw materials at issue. The requirement derives from the fact that failure to comply with the coordinated price will result in punishment that rises to a level to prevent an enterprise from exporting altogether. In addition, under the measures at issue, export licensing entities may be punished for failing to enforce a given coordinated price. The measures do not permit exporting enterprises to deviate from coordinated export prices, or otherwise grant discretion to export licensing agencies to make exceptions. Thus, coordinated export prices must be adhered to whenever set by the CCCME."<sup>27</sup>

#### **1.4.6 Import prohibitions**

18. In *Canada – Periodicals*, the Panel found that a complete ban on imports of certain magazines was inconsistent with Article XI:1 of GATT:

"Since the importation of certain foreign products into Canada is completely denied under Tariff Code 9958, it appears that this provision by its terms is inconsistent with Article XI:1 of GATT 1994."<sup>28</sup>

19. The Panel in *US – Shrimp* found that the United States violated Article XI by imposing an import ban on shrimp and shrimp products harvested by vessels of foreign nations where such

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<sup>21</sup> Panel Report, *Argentina – Hides and Leather*, paras. 11.20-11.21. In this line, the Panel did not find an export restriction made effective by the measure at issue. See Panel Report, *Argentina – Hides and Leather*, paras. 11.22-11.55.

<sup>22</sup> Panel Report, *Colombia – Ports of Entry*, paras. 7.252-7.253.

<sup>23</sup> Panel Reports, *China – Raw Materials*, para. 7.1005.

<sup>24</sup> Panel Reports, *China – Raw Materials*, para. 7.1026.

<sup>25</sup> Panel Reports, *China – Raw Materials*, para. 7.1036.

<sup>26</sup> Panel Reports, *China – Raw Materials*, para. 7.1046.

<sup>27</sup> Panel Reports, *China – Raw Materials*, para. 7.1064.

<sup>28</sup> Panel Reports, *Canada – Periodicals*, para. 5.5.

exporting country had not been certified by United States' authorities as using methods not leading to the incidental killing of sea turtles above certain levels. The Panel stated with reference to the term "prohibitions or restrictions" as follows:

"[T]he US statutory provision in question] expressly requires the imposition of an import ban on imports from non-certified countries. ... the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions. We finally note that previous panels have considered similar measures restricting imports to be 'prohibitions or restrictions' within the meaning of Article XI."<sup>29</sup>

20. The Panel in *Brazil – Retreaded Tyres* noted: "There is no ambiguity as to what 'prohibitions' on importation means: Members shall not forbid the importation of any product of any other Member into their markets."<sup>30</sup> That Panel found that Brazilian measures prohibiting the importation of used consumer goods and the importation of retreaded tyres constituted import prohibitions inconsistent with Article XI:1.<sup>31</sup>

21. The dispute in *US – Poultry (China)* concerned a US legislative provision ("Section 727") restricting the use of funds allocated by the US Congress to the U.S. Department of Agriculture and its agency, the Food Safety and Inspection Service (FSIS). The legislation provided that these funds could not be used to establish or implement a rule allowing poultry products to be imported from China into the United States.<sup>32</sup> The Panel found that this provision imposed an import prohibition in violation of Article XI:1:

"The establishment and implementation of a rule by FSIS in the Federal Register allowing the importation of poultry products from a given country is a prerequisite for the importation of such products. Without the establishment or implementation of this rule, countries are prohibited from importing poultry products into the United States.

Section 727 prohibited the FSIS to use appropriated funds to 'establish' or 'implement' a rule allowing the importation of poultry products from China. This restriction on the use of funds, had the effect of prohibiting the importation of poultry products from China, because without a rule being established / implemented, Chinese poultry products are banned from entering the US market. Hence, Section 727 operated as a prohibition on the importation of poultry products from China into the United States."<sup>33</sup>

#### **1.4.6.1 Measure challenged individually or as a whole**

22. In *EC – Seal Products*, the Panel rejected the complainants' claim that each of the exceptions to the European Union's ban on seal products (as distinguished from the ban as such) individually imposed quantitative restrictions on imports of seal products inconsistently with Article XI:1 of the GATT 1994. The Panel considered that it was the the European Union's Seal Regime as a whole that resulted in a restrictive impact on the importation of products from certain sources:

"In the factual circumstances of this dispute, a restriction on imported products is imposed in the form of an implicit ban under the measure rather than through the individual exceptions as claimed by the complainants. In other words, it is the EU Seal Regime as a whole, providing for specific exceptions to a ban, that results in a restrictive impact on the importation of products from certain sources.

In this dispute, the complainants focused on the discriminatory aspects of the Regime, particularly with respect to the IC and MRM exceptions of the Regime, rather than the measure in its entirety as an import "prohibition or restriction" within the meaning of Article XI:1 of the GATT 1994. The complainants consider that each individual exception is an independent source of restrictiveness for imports. For the reasons explained above, however, we disagree with the complainants. With respect to the

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<sup>29</sup> Panel Report, *US – Shrimp*, para 7.16.

<sup>30</sup> Panel Report, *Brazil – Retreaded Tyres*, para. 7.11.

<sup>31</sup> Panel Report, *Brazil – Retreaded Tyres*, para. 7.29.

<sup>32</sup> Panel Report, *US – Poultry (China)*, paras. 2.2-2.3.

<sup>33</sup> Panel Report, *US – Poultry (China)*, paras. 7.455-7.456.

Travellers exception, the complainants did not present any other specific claim than Article XI:1 of the GATT 1994. However, we do not consider that the Travellers exception, considered on its own, imposes an import restriction within the meaning of Article XI:1 of the GATT 1994. As a derogation from the implicit ban, the Travellers exception allows travellers to bring into the European Union seal products that are otherwise prohibited under the measure.

...

Based on our considerations above, we are not persuaded by the complainants' argument that each of the IC, MRM, and Travellers exceptions individually imposes an import restriction in violation of Article XI:1 of the GATT 1994. Thus, the Panel rejects the complainants' claims under Article XI:1 of the GATT 1994 with respect to all three exceptions under the EU Seal Regime."<sup>34</sup>

#### **1.4.7 Enforcement measures**

23. In *Brazil – Retreaded Tyres*, the Panel examined a fine of R\$400 per unit on the importation of retreaded tyres, which both parties agreed were an enforcement measure in addition to and in support of the import ban on these tyres. Brazil confirmed that the fines were intended to exceed the unit value of most tyres, because they were a punitive measure intended to penalize traders that circumvented the import ban.<sup>35</sup> The Panel analysed the fines as follows:

"[W]hat is important in considering whether a measure falls within the types of measures covered by Article XI:1 is the nature of the measure. In the present case, we note that the fines as a whole, including that on marketing, have the effect of penalizing the act of "importing" retreaded tyres by subjecting retreaded tyres already imported and existing in the Brazilian internal market to the prohibitively expensive rate of fines. To that extent, we consider that the fact that the fines are not administered at the border does not alter their nature as a restriction on importation within the meaning of Article XI:1. In addition, the level of the fines – R\$ 400 per unit, which significantly exceeds the average prices of domestically produced retreaded tyres for passenger cars (R\$ 100-280) – is significant enough to have a restrictive effect on importation.

Thus, the Panel finds that the fines impose limiting conditions in relation to the importation of retreaded tyres, and thus act as a restriction on the importation of retreaded tyres within the meaning of Article XI:1."<sup>36</sup>

#### **1.4.8 Licensing schemes**

24. In *India – Quantitative Restrictions*, the Panel examined the application of Article XI to India's discretionary import licensing system for items on the Negative List of Imports, as well as India's Special Import License system. The Panel held that discretionary or non-automatic import licensing systems are prohibited by Article XI:1:

"Under the GATT 1947, panels have examined whether import and export licensing systems are restrictions under Article XI:1. For example, in a case involving a so-called 'SLQ' regime, which concerned products subject in principle to quantitative restrictions, but for which no quota amount had been set either in quantity or value, permit applications being granted upon request, the panel noted 'that the SLQ regime was an import licensing procedure which would amount to a quantitative restriction unless it provided for the *automatic* issuance of licences'. A similar conclusion was reached in the above-cited *Japan – Trade in Semi-conductors*, where the panel found that 'export licensing practices by Japan, leading to delays of up to three months in the issuing of licences for semi-conductors destined for contracting parties other than the United States, had been non-automatic and constituted restrictions on the exportation of such products inconsistent with Article XI'. These reports are consistent

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<sup>34</sup> Panel Reports, *EC – Seal Products*, paras. 7.660-7.663.

<sup>35</sup> Panel Report, *Brazil – Retreaded Tyres*, paras. 7.360-7.368.

<sup>36</sup> Panel Report, *Brazil – Retreaded Tyres*, paras. 7.372-7.373.

with the ordinary meaning noted above, as discretionary or non-automatic licensing systems by their very nature operate as limitations on action since certain imports may not be permitted. Thus, in light of the terms of Article XI:1 and these adopted panel reports, we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."<sup>37</sup>

25. In *Korea – Various Measures on Beef*, the Panel, in a finding not appealed, rejected the United States' claim that "Korea's regulatory regime [on beef imports], and thus its licensing system, by granting exclusive authority to [certain Korean agencies] to import beef, effectively establishes a non-automatic import licensing system in violation of Article XI:1 ...". The Panel held that discretionary licensing used in conjunction with a quantitative restriction does not necessarily constitute a restriction additional to the quantitative restriction:

"[W]here a quota is in place, the use of a discretionary licensing system need not necessarily result in any additional restriction. Where a discretionary licensing system is implemented in conjunction with other restrictions, such as in the present dispute, the manner in which the discretionary licensing system is operated may create additional restrictions independent of those imposed by the principal restriction. Since this issue was not considered in the *India - Quantitative Restrictions* report, that case does not provide authority for the proposition that a discretionary licensing system, used in conjunction with a quantitative restriction, necessarily provides some additional level of restriction over and above the inherent restriction on access created through the imposition of a quantitative restriction."<sup>38</sup>

26. In *China – Raw Materials*, the Panel found that China's export licensing regime on various raw materials was inconsistent with Article XI:1 because it was operated in a restrictive manner:

"[L]icences that are granted without condition or those that implement an underlying measure that is justified pursuant to another provision of the WTO Agreement, such as GATT Article XI:2, XII, XVIII, XIX, XX or XXI, may be consistent with Article XI:1, so long as the licence does not by its nature have a limiting or restrictive effect. Conversely, a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence *application*.

The Panel finds that China's export licensing regime is not *per se* inconsistent with Article XI:1 on the basis that it permits export licensing agencies to require a licence for "goods subject to ... export restrictions", as provided for in Article 19 of China's *Foreign Trade Law*. The Panel finds, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7) of China's *2008 Export Licence Administration Measures*, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's *Working Rules on Export Licenses*, amounts to an additional restriction inconsistent with Article XI:1."<sup>39</sup>

#### **1.4.9 Trade balancing requirements**

27. In *India – Autos*, India had argued that since Article XI of the GATT 1994 dealt with border measures and the disputed Public Notice No. 60 did not deal with any such measure, it could not violate Article XI. However, the Panel found that as it required acceptance of the so-called "trade balancing condition" it imposed a restriction on imports and therefore was inconsistent with Article XI:1 of the GATT 1994:

"[I]n determining whether Public Notice No. 60 is inconsistent with Article XI:1 of the *GATT 1994*, the Panel recalls its earlier analysis of the trade balancing condition as contained in the previous section.

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<sup>37</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.130.

<sup>38</sup> Panel Report, *Korea – Various Measures on Beef*, para. 782.

<sup>39</sup> Panel Reports, *China – Raw Materials*, paras. 7.957-7.958.

First, it recalls its conclusion that Public Notice No. 60, as a governmental measure requiring manufacturers to accept certain conditions in order to be allowed to import restricted automotive kits and components, constituted a 'measure' within the meaning of Article XI:1. This conclusion remains relevant to this analysis and the Panel confirms its earlier conclusion in this respect.

Second, in order to establish whether Public Notice No. 60, in itself, can be considered to be inconsistent with Article XI:1, it has to be established that it constitutes a 'restriction ... on importation' within the meaning of that provision. The Panel recalls in this respect its earlier conclusion that the trade balancing condition, as contained both in Public Notice No. 60 and in the MOUs signed thereunder, constituted a restriction on importation contrary to Article XI:1 in that it effectively limits the amount of imports that a manufacturer may make by linking imports to commitment to undertake a certain amount of exports. Under such circumstance, an importer is not free to import as many restricted kits or components as he otherwise might so long as there is a finite limit to the amount of possible exports.

...

The Panel therefore concludes that Public Notice No. 60 in itself, to the extent that it requires the acceptance of the trade balancing condition in order to gain the advantage of importing the restricted products, imposes a restriction on imports and is inconsistent with Article XI:1 of the *GATT 1994*.<sup>40</sup>

#### **1.4.10 Minimum export price requirements**

28. In *China – Raw Materials*, the Panel found that a minimum export price requirement is a quantitative restriction on trade prohibited by Article XI:1.<sup>41</sup>

#### **1.4.11 Restrictions on circumstances of importation**

##### **1.4.11.1 Restrictions on imports by particular persons**

29. The Panel in *India – Quantitative Restrictions* examined, *inter alia*, an "Actual User Requirement" under India's Export and Import Policy 1997-2002, under which import licences were generally available only to "Actual Users" (persons who would employ the imported goods "for their own use"). In a finding that was not appealed, the Panel determined that the Actual User condition operated as a restriction on imports within the meaning of Article XI:1.<sup>42</sup>

"As noted above, Article XI:1 is "comprehensive" in that it prohibits import restrictions "made effective through quotas, import or export licences *or other measures*", excluding from its coverage only "duties, taxes or other charges". In considering the scope of the prohibition, it is instructive to consider how it has been dealt with in prior panel reports. For example, a minimum import price system has been considered to be a restriction within the meaning of Article XI:1. In a case involving limitations on the points of sale available to imported beer, a panel found that such limitations were restrictions within the meaning of Article XI:1. These reports are in accord with the ordinary meaning of the term "restriction", which, as noted above, is "a limitation on action, a limiting condition or regulation". Applied to the "Actual User" condition, they lead to the conclusion that it is a restriction on imports because it precludes imports of products for resale by intermediaries, i.e. distribution to consumers who are unable to import directly for their own immediate use is restricted."<sup>43</sup>

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<sup>40</sup> Panel Report, *India – Autos*, 7.318 – 7.322.

<sup>41</sup> Panel Reports, *China – Raw Materials*, paras. 7.1081-7.1082.

<sup>42</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.143.

<sup>43</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.142.

#### 1.4.11.2 Restrictions on ports of entry

30. The Panel in *Colombia – Ports of Entry* examined a ports of entry measure that had been implemented for a period of six months, extended twice, and a similar measure had been in place earlier for 18 months.<sup>44</sup> The Panel concluded that "all of these uncertainties, including access to one seaport for extended periods of time and the likely increased costs that would arise for importers operating under the constraints of the port restrictions, limit competitive opportunities for imports arriving from Panama"<sup>45</sup> and that "the ports of entry measure has a limiting effect on imports arriving from Panama . . . the restriction to two ports of entry for subject goods arriving from Panama imposed under the ports of entry measure constitutes a restriction on importation within the meaning of Article XI:1 of the *GATT 1994*."<sup>46</sup>

#### 1.4.12 "restrictions made effective through state-trading operations "

31. The Panel in *India – Quantitative Restrictions*, in examining the contested Indian measures, addressed the phrase "restrictions made effective through state-trading operations". In its findings on this issue, which were not appealed, the Panel emphasized that the fact that imports were effected through state-trading operations did not *per se* mean that imports were being restricted:

"In analyzing the US claim, we note that violations of Article XI:1 can result from restrictions made effective through state trading operations. This is made very clear in the Note Ad Articles XI, XII, XIII, XIV and XVIII, which provides that 'Throughout Article XI, XII; XIII; XIV; and XVIII, the terms 'import restrictions' or 'export restrictions' include restrictions made effective through state-trading operations.' It should be noted however, that the mere fact that imports are effected through state trading enterprises would not in itself constitute a restriction. Rather, for a restriction to be found to exist, it should be shown that the operation of this state trading entity is such as to result in a restriction.

As noted above, the United States has shown in some instances that there have been zero imports of products reserved to state trading enterprises by India. We note, however, that canalization *per se* will not necessarily result in the imposition of quantitative restrictions within the meaning of Article XI:1, since an absence of importation of a given product may not always be the result of the imposition of a prohibitive quantitative restriction. For instance, the absence of importation of snow ploughs into a tropical island cannot be taken as sufficient evidence of the existence of import restrictions, even if the right to import those products is granted to an entity with exclusive or special privileges."<sup>47</sup>

32. The Panel in *Korea – Various Measures on Beef*, examined, *inter alia*, practices of the Livestock Products Marketing Organization (LPMO), Korea's state trading agency for beef. The LPMO was the sole administrator of beef imports; it imported 30 percent of the beef import quota, though a tendering system and with a mandate to stabilize demand and supply in the market. Groups of private end-users also could import beef within the beef import quota as allocated by LPMO. The LPMO also had a distribution monopoly for the beef that it imported.<sup>48</sup> The Panel made the factual finding that for a 7-month period in 1997-98, the LPMO suspended its tenders (effectively closing the Korean market to imported beef to the extent of the LPMO's quota share) and failed to discharge (sell its stock of) imported beef; also that this behaviour had no economic justification.<sup>49</sup> It then examined the law applicable to restrictions imposed by state-trading enterprises.

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<sup>44</sup> Panel Report, *Colombia – Ports of Entry*, paras. 7.219-7.223, 7.273.

<sup>45</sup> (*footnote original*) The Panel is of the view that a finding whereby Colombia were allowed to restrict access to two ports of entry for goods arriving from a particular Member or Members, would open the door for other WTO Members to do the same. For example, one GATT Contracting Party required all VCRs to enter its territory at a small inland customs office in the town of Poitiers.

<sup>46</sup> Panel Report, *Colombia – Ports of Entry*, paras. 7.274-7.275.

<sup>47</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.134-5.135.

<sup>48</sup> Panel Report, *Korea – Various Measures on Beef*, paras. 15-23.

<sup>49</sup> Panel Report, *Korea – Various Measures on Beef*, paras. 728-731, 732-745.

33. Referring to the Note Ad Articles XI, XII, XIII, XIV and XVIII, the Panel remarked that "[t]his is to say that when an import restriction is imposed by a state-trading enterprise, with or without exclusive rights, such restriction would be covered by Article XI."<sup>50</sup> Referring to the GATT Panel Reports on *Japan – Agricultural Products* and *Canada – Marketing Agencies*, the Panel found:

"[I]n the special case where a state-trading enterprise possesses an import monopoly and a distribution monopoly, any restriction it imposes on the distribution of imported products will lead to a restriction on importation of the particular product over which it has a monopoly. In other words, the effective control over both importation and distribution channels by a state-trading enterprise means that the imposition of any restrictive measure, including internal measures, will have an adverse effect on the importation of the products concerned. The *Ad Note* to Article XI therefore prohibits a state-trading enterprise enjoying monopoly right over both importation and distribution from imposing any internal restriction against such imported products."<sup>51</sup>

34. The Panel found that "the LPMO's lack and delays in calling for tenders and its discharge practices between the end of October 1997 and the end of May 1998, i.e. the LPMO's refusal to discharge into the Korean market imported beef led it to keep important stocks of beef and in turn to reduce imports, were restrictive. As demonstrated above, these LPMO practices are closely connected and have led to import restrictions on foreign beef, contrary to Article XI through the application of its *Ad Note*."<sup>52</sup>

35. The Panel further examined the LPMO's calls for tenders that distinguished between grain- and grass-fed beef, and excluded grass-fed beef on some occasions. The Panel found that "the LPMO practice to call for tenders on the basis of the distinction between grass-fed and grain-fed beef, constitute an import restriction in violation of Article XI of GATT, through the *Ad Note* to Articles XI, XII, XIII, XIV and XVIII" and remarked:<sup>53</sup>

"The Panel considers that the LPMO's calls for tenders that impose a distinction between grain- and grass-fed beef constitute *de facto* limits on importation of grass-fed beef, thus amounting to import restrictions. The Panel recalls its discussion on Article XI, the *Ad Note* to Articles XI, XII, XIII, XIV and XVIII, where it was concluded that the purpose of the *Ad Note* to Articles XI, XII, XIII, XIV and XVIII is to ensure that WTO Members cannot escape their basic obligations, such as the prohibition against import restrictions, by using a state-trading enterprise."<sup>54</sup>

#### **1.4.13 Bonding requirements**

36. In *US – Certain EC Products*, the measures at issue were increased bonding requirements imposed by the United States on imports from the European Communities. The increased bonding requirements were imposed in order to secure the future collection of additional import duties which were only later authorized by the Dispute Settlement Body under Article 22.6 of the DSU. While the majority of the Panel found that this bonding requirement constituted a duty or charge under Article II, one panelist found that this measure fell under Article XI of GATT:

"Any bonding requirements to cover the payment of tariffs above their bound levels cannot be viewed as a mechanism in place to secure compliance with WTO compatible tariffs and constituted, therefore, import restrictions for which there was no justification. The actual trade effects of the 3 March Measure, which are reflected on the charts contained in paragraph 2.37 of this Panel Report, confirm its restrictive nature and effect. One Panelist found, therefore, that the 3 March Measure constituted a 'restriction', contrary to Article XI of GATT, rather than a duty or charge under Article II."<sup>55</sup>

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<sup>50</sup> Panel Report, *Korea – Various Measures on Beef*, para. 748.

<sup>51</sup> Panel Report, *Korea – Various Measures on Beef*, para. 751.

<sup>52</sup> Panel Report, *Korea – Various Measures on Beef*, para. 767.

<sup>53</sup> Panel Report, *Korea – Various Measures on Beef*, para. 777.

<sup>54</sup> Panel Report, *Korea – Various Measures on Beef*, para. 774.

<sup>55</sup> Panel Report, *US – Certain EC Products*, para. 6.61.

#### **1.4.14 "prohibitions or restrictions ... on the exportation or sale for export of any product"**

37. The Panel Report on *Argentina – Hides and Leather*, referred to in paragraph 13 above, examined a claim that a measure of Argentina was an export restriction on hides in violation of Article XI:1.

38. The Panel in *China – Raw Materials* found that China maintained export quotas on bauxite, coke, fluorspar, silicon carbide and zinc, and found that for each of these products, "the series of measures operating in concert has resulted in the imposition of a restriction or prohibition on their exportation that are inconsistent with China's obligations under Article XI:1".<sup>56</sup>

#### **1.4.15 GATT practice regarding Article XI:1**

39. See the *GATT Analytical Index*, pages 315-325.

### **1.5 Article XI:2(a)**

#### **1.5.1 Burden of proof**

40. The Panel in *China – Raw Materials* found that "the burden is on the respondent ... to demonstrate that the conditions of Article XI:2(a) are met in order to demonstrate that no inconsistency arises under Article XI:1."<sup>57</sup> The Panel concluded that China had failed to demonstrate that the export quota applied to refractory-grade bauxite was justified pursuant to Article XI:2(a).<sup>58</sup> While the Panel found that refractory-grade bauxite is "essential" to China on the basis of its importance in steel production,<sup>59</sup> it found that the export restriction on this product, which had been in place at least since 2000, was not "temporarily applied",<sup>60</sup> and it did not agree that China currently faces a "critical shortage" of refractory bauxite.<sup>61</sup>

#### **1.5.2 "Export prohibitions or restrictions"**

41. The Appellate Body in *China – Raw Materials* concluded that similar to the scope of Article XI:1, the term "export prohibition" in Article XI:2 also excludes "duties, taxes, or other charges":

"Turning to the phrase '[e]xport prohibitions or restrictions' in Article XI:2(a), we note that the words 'prohibition' and 'restriction' in that subparagraph are both qualified by the word 'export'. Thus, Article XI:2(a) covers any measure prohibiting or restricting the exportation of certain goods. Accordingly, we understand the words 'prohibitions or restrictions' to refer to the same types of measures in both paragraph 1 and subparagraph 2(a), with the difference that subparagraph 2(a) is limited to prohibitions or restrictions on exportation, while paragraph 1 also covers measures relating to importation. We further note that 'duties, taxes, or other charges' are excluded from the scope of Article XI:1. Thus, by virtue of the link between Article XI:1 and Article XI:2, the term 'restrictions' in Article XI:2(a) also excludes 'duties, taxes, or other charges'. Hence, if a restriction does not fall within the scope of Article XI:1, then Article XI:2 will also not apply to it."<sup>62</sup>

42. See also paragraph 8 above.

#### **1.5.3 "temporarily applied"**

43. The Appellate Body in *China – Raw Materials* found that in the context of Article XI:2(a), the phrase "temporarily applied" describes a measure "applied for a limited time, a measure "taken to bridge a passing need":

<sup>56</sup> Panel Reports, *China – Raw Materials*, para. 7.224.

<sup>57</sup> Panel Reports, *China – Raw Materials*, para. 7.213.

<sup>58</sup> Panel Reports, *China – Raw Materials*, para. 7.353.

<sup>59</sup> Panel Reports, *China – Raw Materials*, para. 7.351.

<sup>60</sup> Panel Reports, *China – Raw Materials*, para. 7.346.

<sup>61</sup> Panel Reports, *China – Raw Materials*, para. 7.351.

<sup>62</sup> Appellate Body Reports, *China – Raw Materials*, para. 321.



"First, we note that the term 'temporarily' in Article XI:2(a) of the GATT 1994 is employed as an adverb to qualify the term 'applied'. The word 'temporary' is defined as '[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need'. Thus, when employed in connection with the word 'applied', it describes a measure applied for a limited time, a measure taken to bridge a 'passing need'. As we see it, the definitional element of 'supply[ing] a passing need' suggests that Article XI:2(a) refers to measures that are applied in the interim."<sup>63</sup>

#### **1.5.4 "foodstuffs or other products essential to the exporting Member"**

44. The Appellate Body in *China – Raw Materials* found that in order for Article XI:2(a) to apply, the shortage must relate to foodstuffs or other products that are "absolutely indispensable or necessary":

"For Article XI:2(a) to apply, the shortage, in turn, must relate to 'foodstuffs or other products essential to the exporting Member'. Foodstuff is defined as 'an item of food, a substance used as food'. The term 'essential' is defined as '[a]bsolutely indispensable or necessary'. Accordingly, Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. By including, in particular, the word 'foodstuffs', Article XI:2(a) provides a measure of what might be considered a product 'essential to the exporting Member' but it does not limit the scope of other essential products to only foodstuffs."<sup>64</sup>

#### **1.5.5 "prevent or relieve critical shortages"**

45. In *China – Raw Materials*, the Appellate Body concluded that the term "critical shortages" in Article XI refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point:

"Turning next to consider the meaning of the term 'critical shortage', we note that the noun 'shortage' is defined as '[d]eficiency in quantity; an amount lacking' and is qualified by the adjective 'critical', which, in turn, is defined as '[o]f, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense'. The term 'crisis' describes '[a] turning-point, a vitally important or decisive stage; a time of trouble, danger or suspense in politics, commerce, etc.' Taken together, 'critical shortage' thus refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point."<sup>65</sup>

### **1.6 Relationship with other GATT provisions**

#### **1.6.1 Article II**

46. In *US – Certain EC Products*, the majority of the Panel found the increased bonding requirements imposed on imports in order to secure the collection of additional import duties to be a duty or charge under Article II. One panellist found the measure at issue to be a restriction within the meaning and scope of Article XI. See paragraph 36 above.

#### **1.6.2 Article III**

47. See the discussion under Article III.

#### **1.6.3 Article VI**

48. In *US – 1916 Act (Japan)*, after finding a violation of Article VI, the Panel held that in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than

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<sup>63</sup> Appellate Body Reports, *China – Raw Materials*, para. 323.

<sup>64</sup> Appellate Body Reports, *China – Raw Materials*, para. 326.

<sup>65</sup> Appellate Body Report, *China – Raw Materials*, para. 324.

Article XI; however, the Panel stated explicitly that this did not mean that Article VI applied to the exclusion of Article XI:1. Nevertheless, the Panel found that it was entitled to exercise judicial economy and decided not to review the claims of Japan under Article XI.<sup>66</sup>

#### 1.6.4 Article VIII

49. In *Argentina – Import Measures*, the Appellate Body agreed with the Panel, and rejected Argentina's argument, that Articles VIII and XI:1 are mutually exclusive:

"[W]e agree with the Panel that formalities or requirements under Article VIII of the GATT 1994 are not excluded *per se* from the scope of application of Article XI:1 of the GATT 1994, and that their consistency could be assessed under either Article VIII or Article XI:1, or under both provisions. Thus, we reject Argentina's argument that Articles VIII and XI:1 have mutually exclusive spheres of application."<sup>67</sup>

50. With regard to measures that qualify as "formalities" or "requirements" under Article VIII of the GATT 1994, the Appellate Body in *Argentina – Import Measures* concluded that only those that have a limiting effect on the importation of products can be found to be inconsistent with Article XI:

"Formalities and requirements connected to importation that fall within the scope of application of Article VIII of the GATT 1994 typically involve the use of documentary and procedural tools to collect, process, and verify information in connection with the importation of products. Such import formalities and requirements will often entail a certain burden on the importation of products. At the same time, such formalities and requirements are, at least to some extent, a routine aspect of international trade. Compliance with such formalities and requirements enables trade to occur within a Member's specific regulatory framework. In our view, not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 of the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so."<sup>68</sup>

#### 1.6.5 Article XVII

51. Concerning import restrictions implemented through state trading, see paragraphs 31-35 above.

#### 1.6.6 Article XX

52. The Appellate Body in *China – Raw Materials* distinguished between the exceptions under Article XX and the exemptions under Article XI:2. The Appellate Body found that where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists:

"In any event, we have some doubts as to the validity of the Panel's concern that, if Article XI:2(a) is not interpreted as confined to measures of limited duration, Members could 'resort indistinguishably to either Article XI:2(a) or to Article XX(g) to address the problem of an exhaustible natural resource'. Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations. By contrast, Article XI:2 provides that the general elimination of quantitative restrictions *shall not extend to* the items listed under subparagraphs (a) to (c) of that provision. This language seems to indicate that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). Accordingly, where the requirements of Article XI:2(a) are met,

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<sup>66</sup> Panel Report, *US – 1916 Act (Japan)*, para. 6.281.

<sup>67</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.237.

<sup>68</sup> Appellate Body Reports, *Argentina – Import Measures*, para. 5.243.

there would be no scope for the application of Article XX, because no obligation exists."<sup>69</sup>

### 1.6.7 GATT practice regarding relationship with other Articles

53. See the *GATT Analytical Index*, page 348.

## 1.7 Relationship with other WTO Agreements

### 1.7.1 Agreement on Agriculture

54. The Panel in *Korea – Various Measures on Beef* found that:

"[W]hen dealing with measures relating to agricultural products which should have been converted into tariffs or tariff-quotas, a violation of Article XI of GATT and its *Ad Note* relating to state-trading operations would necessarily constitute a violation of Article 4.2 of the *Agreement on Agriculture* and its footnote which refers to non-tariff measures maintained through state-trading enterprises."<sup>70</sup>

#### 1.7.1.1 Whether Article XI of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are mutually exclusive

55. The Appellate Body in *Indonesia – Import Licensing Regimes* concluded that Article XI of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are not mutually exclusive:

"Although Article 4.2 of the Agreement on Agriculture generally applies to: (i) a broader range of measures; and (ii) a narrower scope of products than Article XI:1 of the GATT 1994; both provisions prohibit Members from maintaining quantitative import restrictions on agricultural products. A measure constituting a quantitative import restriction on agricultural products would therefore be inconsistent with both Article XI:1 and Article 4.2. Such findings of inconsistency would also result in the same implementation obligations under either provision, that is, to bring the measure into conformity with those provisions. The Appellate Body has suggested previously that there is essentially no difference between the obligation in Article XI:1 to eliminate quantitative restrictions and the obligation in Article 4.2 'not [to] maintain, resort to, or revert to' measures covered by Article 4.2."<sup>71</sup>

...

Furthermore, a measure found to be a quantitative import restriction on agricultural products inconsistent with Article XI:1 may potentially be justified under Article XX of the GATT 1994, and the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture also incorporates Article XX of the GATT 1994. To the extent that they apply to the claims regarding the 18 measures at issue in this dispute, Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture are thus subject to the same exceptions under Article XX of the GATT 1994, and, as we determine further below in our analysis, the same burden of proof applies under Article XX, regardless of whether that provision is invoked in relation to Article XI:1 or Article 4.2.

In light of the above, we consider that Article 4.2 of the Agreement on Agriculture does not apply 'to the exclusion of' Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue as quantitative restrictions. Both

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<sup>69</sup> Appellate Body Reports, *China – Raw Materials*, para. 334.

<sup>70</sup> Panel Report, *Korea – Various Measures on Beef*, para. 762.

<sup>71</sup> (*footnote original*) In *Chile – Price Band System*, the Appellate Body stated that the conversion into ordinary customs duties of measures within the meaning of Article 4.2 began during the Uruguay Round negotiations, and that, after the signing of the WTO Agreement, "there was no longer an option to replace measures covered by Article 4.2 with ordinary customs duties in excess of the levels of previously bound tariff rates." (Appellate Body Report, *Chile – Price Band System*, para. 206) After the entry into force of the WTO Agreement, Members simply have to "refrain from maintaining, reverting to, or resorting to, measures prohibited by Article 4.2". (Ibid.)

provisions contain the same substantive obligations in relation to these claims and, thus, in these circumstances, they apply cumulatively."<sup>72</sup>

### **1.7.1.2 Whether there is a mandatory sequence of analysis between Article XI of the GATT 1994 and Article 4.2 of the Agreement on Agriculture**

56. The Appellate Body in *Indonesia – Import Licensing Regimes* concluded that there is no mandatory sequence of analysis between Article XI of the GATT 1994 and Article 4.2 of the Agreement on Agriculture:

"We turn now to Indonesia's argument that the Panel should 'have concluded that Article 4.2 applies more specifically to the products at issue, i.e. agricultural products', and consider the relative specificity of Article XI:1 of the GATT 1994 in relation to Article 4.2 of the Agreement on Agriculture. We observe that an analysis of the relative specificity of Article XI:1 and Article 4.2 may lead to different conclusions, depending on the weight given to different criteria, such as the product coverage, the types of measures covered, or the specificity of the obligation contained in either provision.<sup>73</sup> As we have said above, commencing the analysis with Article XI:1 rather than with Article 4.2 had no repercussions for the substance of the analysis, and, to the extent that they apply to the 18 measures at issue, Article XI:1 and Article 4.2 impose the same substantive obligation not to maintain quantitative import restrictions on agricultural products. In light of the above, reaching a conclusion as to the relative specificity of either Article XI:1 or Article 4.2 would not be determinative for resolving this dispute.

Thus, there is no mandatory sequence of analysis between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 in this dispute. For the reasons stated above, the decision as to whether to commence the analysis with the claims under Article XI:1 or those under Article 4.2 was within the Panel's margin of discretion."<sup>74</sup>

### **1.7.1.3 Whether XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture**

57. The Appellate Body in *Indonesia – Import Licensing Regimes* found that Article XI:2(c) of the GATT 1994 has been rendered inoperative by Article 4.2 of the Agreement on Agriculture:

"With respect to the relationship between Article 4.2 of the Agreement on Agriculture and Article XI:2(c) of the GATT 1994, however, we observe that there is no express language in Article XI of the GATT 1994 that suggests that the derogations under Article XI:2(c) are relevant not only to the prohibition under Article XI:1 but also to the prohibition under Article 4.2. On the contrary, the opening clause of Article XI:2 clearly states that the derogations set out in subparagraphs 2(a) to 2(c) concern 'paragraph 1 of this Article'. Article 4.2 and footnote 1 thereto also do not expressly indicate whether the prohibition of 'quantitative import restrictions' under this provision is subject to the derogations under Article XI:2(c). In particular, the second part of footnote 1 provides that 'measures' prohibited under Article 4.2 do not include measures maintained under 'balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement'. Article XI:2(c) is clearly not a 'balance-of-payments provision[ ]'.<sup>75</sup> Article XI:2(c) also does not qualify as a 'general,

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<sup>72</sup> Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras. 5.15-5.18.

<sup>73</sup> (footnote original) For instance, the Agreement on Agriculture, which applies only to agricultural products, has a narrower product coverage than the GATT 1994. At the same time, the obligation not to maintain, resort to, or revert to certain types of measures in Article 4.2 of the Agreement on Agriculture applies to more types of measures than Article XI:1 of the GATT 1994, which only addresses quantitative import and export restrictions.

<sup>74</sup> Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras. 5.24-5.25.

<sup>75</sup> (footnote original) The term "balance-of-payments provisions" has been recognized as referring to, *inter alia*, Articles XII and XVIII:B of the GATT 1994. (See e.g. preamble to the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 (in Annex 1A to the

non-agriculture-specific provision[]' because it is 'agriculture-specific' in the sense that its application is limited to '*agricultural* or fisheries product' in express terms. As such, there is no basis in the text of Article 4.2 or footnote 1 to conclude that measures maintained under Article XI:2(c) fall outside the prohibition of 'quantitative import restrictions' under this provision. Indeed, if the drafters of the Agreement on Agriculture had intended to exempt from the prohibition of market access barriers under Article 4.2 measures maintained under Article XI:2(c) of the GATT 1994, they could have done so by, for example, adding a reference to Article XI:2(c) in, or omitting the phrase 'general, non-agriculture-specific' from, the second part of footnote 1.

...

In light of the foregoing, we disagree with Indonesia that agricultural measures maintained under Article XI:2(c) of the GATT 1994 are not 'quantitative import restrictions' within the meaning of the first part of footnote 1 to Article 4.2 of the Agreement on Agriculture. We therefore find that the prohibition of 'quantitative import restrictions' under Article 4.2 extends to the kinds of quantitative import restrictions carved out from the prohibition under Article XI:1 of the GATT 1994 by virtue of Article XI:2(c). As a consequence, Members cannot maintain quantitative import restrictions on agricultural products that satisfy the requirements of Article XI:2(c) of the GATT 1994 without violating Article 4.2 of the Agreement on Agriculture. This is because the prohibition of 'quantitative import restrictions' under Article 4.2 does not allow for the kind of derogations recognized under 'agriculture-specific' provisions such as Article XI:2(c) of the GATT 1994."<sup>76</sup>

### 1.7.2 TRIMs Agreement

58. Paragraph 2 of the Illustrative List in the Annex to the TRIMs Agreement lists three trade-related investment measures "that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994": see the discussion under Article 2 and the Illustrative list of the TRIMs Agreement. The Panel in *Colombia – Ports of Entry* reviewed the Illustrative List and found that "Article XI:1 is not restricted to such a finite list of measures. On the contrary, Article XI:1 applies to 'prohibitions or restrictions other than duties, taxes or other charges' and does not include finite categories."<sup>77</sup>

### 1.7.3 SPS Agreement

59. In *Australia – Salmon*, the Panel examined the Canadian claim that the import prohibition of uncooked salmon was inconsistent with Article XI of the *GATT* as well as with several provisions of the SPS Agreement. After finding that the Australian measure was inconsistent with the requirements of the SPS Agreement, the Panel did not find it necessary to also examine the measure in the light of Article XI.<sup>78</sup>

### 1.7.4 Anti-Dumping Agreement

60. The Panel in *US – 1916 Act (Japan)*, after finding that the measure at issue was inconsistent with provisions of the Anti-Dumping Agreement (and Article VI of the *GATT*), did not find it necessary to address the same measure also in the light of Article XI. See also paragraph 48 above.

### 1.7.5 Import Licensing Agreement

1. The Panel in *Indonesia – Chicken* was confronted with the question of the order of analysis between claims under Article 3.2 of the Import Licensing Agreement, on the one hand, and Article XI:1 of the GATT 1994 and Article 4.2 of Agreement on Agriculture, on the other hand. The Panel

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WTO Agreement); preamble to the Declaration on Trade Measures Taken for Balance-of-Payments Purposes (GATT document L/4904 adopted on 28 November 1979, BISD 26S, pp. 205-209))

<sup>76</sup> Appellate Body Report, *Indonesia – Import Licensing Regimes*, paras. 5.75-5.79.

<sup>77</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.248.

<sup>78</sup> Panel Report, *Australia – Salmon*, para. 8.185.

decided to address the claims under the substantive provisions before proceeding to the claim under the Import Licensing Agreement, for the following reasons:

"We consider that the most appropriate manner to structure our analysis is by first assessing Brazil's claims under Article XI:1 or Article 4.2, as relevant. We will then examine Brazil's claims under Article 3.2 of the Import Licensing Agreement. In our view, this approach provides a logical sequence for the following reasons.

First, we note that Article XI:1 of the GATT 1994 imposes a substantive obligation on Members to refrain from imposing prohibitions or restrictions on the importation or the exportation of goods. In contrast, Article 3.2 of the Import Licensing Agreement deals with the administration of import licensing procedures. Regarding which of these provisions is *lex specialis*, previous panels have considered that provisions of the covered agreement that deal with the substantive content of a measure, such as Article XI:1 of the GATT 1994, are more specific than those that deal with the application and administration of a measure, such as Article 3.2 of the Import Licensing Agreement. These panels reached this conclusion when confronted with claims under these two provisions."<sup>79</sup>

2. The Panel distinguished this situation from the situation that arose in *EC – Bananas III*, and noted that the Appellate Body's pronouncement in the latter case concerned the relationship between two claims regarding the administration of measures, and not their substantive content:

"Second, we note that the Appellate Body in *EC – Bananas III* referred to the decision of the panel in that dispute to begin its analysis of the claims raised by the complainants under Article X:3(a) of the GATT 1994 before assessing those raised under the Import Licensing Agreement. The Appellate Body observed that 'the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures'. We consider the situation in that dispute to be different from the one before us. In *EC – Bananas III*, the Appellate Body was confronted with a situation where the complainants raised claims under provisions that govern the administration and application of measures, rather than their substantive content. In particular, the Appellate Body dealt with claims under Articles X:3(a) of the GATT 1994 and 1.3 of the Import Licensing Agreement. We are examining a different situation. Brazil has raised claims under provisions that set out substantive obligations, such as Articles XI:1 of the GATT 1994 and 4.2 of the Agreement on Agriculture, as well as under provisions pertaining to the administration and application of measures, such as Article 3.2 of the Import Licensing Agreement."<sup>80</sup>

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<sup>79</sup> Panel Report, *Indonesia – Chicken*, paras. 7.352-7.353.

<sup>80</sup> Panel Report, *Indonesia – Chicken*, para. 7.354.