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## **1 ARTICLE I**

### **1.1 Text of Article I**

#### **Article I**

##### *General Most-Favoured-Nation Treatment*

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

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

- (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
- (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
- (c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
- (d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

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\* For the convenience of the reader, asterisks mark the portions of the text which should be read in conjunction with notes and supplementary provisions.

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

*(footnote original)*<sup>1</sup> The authentic text erroneously reads "subparagraph 5 (a)".

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

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

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

## 1.2 Text of note *Ad Article I*

### ***Ad Article I***

#### *Paragraph 1*

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

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

*(footnote original)*<sup>1</sup> This Protocol entered into force on 14 December 1948.

#### *Paragraph 4*

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

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

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

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

- (i) The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and
- (ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.

### 1.3 Article I:1

#### 1.3.1 General

##### 1.3.1.1 Object and purpose

1. In *Canada – Autos*, in support of its interpretation of Article I:1, the Appellate Body explained that the object and purpose of Article I "is to prohibit discrimination among like products originating in or destined for different countries"<sup>1</sup>.

2. In *EC – Seal Products* the Appellate Body explained that "Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994. The obligation set out in Article I:1 has been described by the Appellate Body as 'pervasive', a 'cornerstone of the GATT', and 'one of the pillars of the WTO trading system'."<sup>2</sup>

##### 1.3.1.2 Application to de facto discrimination

3. In *EC – Bananas III*, in support of the proposition that Article II of GATS prohibits *de facto* discrimination as well as *de jure* discrimination, the Appellate Body noted that GATT Article I applies to *de facto* discrimination.

4. In *Canada – Autos*, the Appellate Body reviewed the Panel's finding that the Canadian import duty exemptions granted to motor vehicles originating in certain countries were inconsistent with Article I:1. The Appellate Body found the prohibition of discrimination under Article I:1 to include both *de jure* and *de facto* discrimination:

"[T]he words of Article I:1 do not restrict its scope only to cases in which the failure to accord an 'advantage' to like products of all other Members appears *on the face* of the measure, or can be demonstrated on the basis of the words of the measure. ... Article I:1 does not cover only 'in law', or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or *de facto*, discrimination."<sup>3</sup>

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<sup>1</sup> Appellate Body Report, *Canada – Autos*, para. 84.

<sup>2</sup> Appellate Body Report, *EC – Seal Products*, para. 5.86 (quoting Appellate Body Report, *EC – Tariff Preferences*, para. 101).

<sup>3</sup> (*footnote original*) We note, though, that the measures examined in those reports differed from the measure in this case. Two of those reports dealt with "like" product issues: Panel Report, *Spain – Unroasted Coffee*; Panel Report, *Japan – SPF Dimension Lumber*. In this case, as we have noted, there is no dispute that the motor vehicles subject to the import duty exemption are "like" products. Furthermore, two other reports dealt with measures which, on their face, discriminated on a strict "origin" basis, so that, at any given time, either *every* product, or *no* product, of a particular origin was accorded an advantage. See Panel Report, *Belgium – Family Allowances*; Panel Report, *EEC – Imports of Beef*. In this case, motor vehicles imported into Canada are not disadvantaged in that same sense.

Like the Panel, we cannot accept Canada's argument that Article I:1 does not apply to measures which, on their face, are 'origin-neutral'.<sup>4</sup>

### 1.3.1.3 Order of examination

5. In *EC – Seal Products* the Appellate Body explained that:

"Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are 'like' products within the meaning of Article I:1; (iii) that the measure at issue confers an 'advantage, favour, privilege, or immunity' on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended 'immediately' and 'unconditionally' to 'like' products originating in the territory of all Members. Thus, if a Member grants *any* advantage to *any* product originating in the territory of *any* other country, such advantage must be accorded 'immediately and unconditionally' to like products originating from all other Members."<sup>5</sup>

### 1.3.2 "charges of any kind imposed ... on the international transfer of payments for imports or exports"

6. In *Argentina – Financial Services* the Panel assessed whether a presumption of unjustified increase in wealth applicable to entry of funds, for the purpose of gains tax, constituted a "charge imposed on the international transfer of payments for exports" within the meaning of Article I:1.<sup>6</sup> The Panel recalled that "[i]n the context of Article VIII:1 of the GATT 1994, the panel in *China – Raw Materials* defined the equivalent English term 'charge' as 'pecuniary burden, cost', 'expense', or '[a] price required or demanded for service rendered or goods supplied'.<sup>7</sup> The Panel also highlighted that "[t]o fall within the scope of Article I:1 of the GATT 1994, that levy or charge must be imposed on the international transfer of payments for imports or exports."<sup>8</sup> Applying this legal standard, the Panel found that the complainant, Panama, had failed to demonstrate that the measure constituted a charge imposed on the international transfer of payments for exports:

"According to Panama, the fiscal consequences of a finding of unjustified increase in wealth constitute a 'charge' insofar as they lead to the payment of gains tax, VAT and internal taxes with respect to the international transfer of payments for exports. In our view, the measure at issue and hence what should constitute a 'charge' are not the fiscal consequences of a finding of unjustified increase in wealth, i.e. the possible consequences of the application of measure 2. Our task is to determine whether measure 2 is a 'charge'. Measure 2 is a tool that takes the form of a presumption that the AFIP uses to calculate one of the elements of the gains tax, namely, the tax base, and is therefore fiscal in nature. It does not seem to us that it can be characterized as a 'charge' as defined above, since the presumption challenged by Panama cannot be characterized as a 'pecuniary burden, cost', 'expense', or '[a] price required or demanded for service rendered or goods supplied'.

Even assuming that measure 2 could be considered a charge, we note that, in accordance with the wording of Article I:1 of the GATT 1994, such a charge must be imposed on the international transfer of payments for exports. The presumption in question affects not the international transfer of payments but the assets of the taxpayer. In fact, the presumption is not applied during or on the occasion of the transfer of payments but at the time of calculating the tax on the gains of the Argentine taxpayer, irrespective of the time at which the transfer took place."<sup>9</sup>

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<sup>4</sup> Appellate Body Report, *Canada – Autos*, para. 78.

<sup>5</sup> Appellate Body Report, *EC – Seal Products*, para. 5.86.

<sup>6</sup> Panel Report, *Argentina – Financial Services*, paras. 7.1001-7.1008.

<sup>7</sup> Panel Report, *Argentina – Financial Services*, para. 7.1003 (quoting Panel Report, *China – Raw Materials*, para. 7.820).

<sup>8</sup> Panel Report, *Argentina – Financial Services*, para. 7.1004.

<sup>9</sup> Panel Report, *Argentina – Financial Services*, paras. 7.1006-7.1007.

### 1.3.3 "all rules and formalities in connection with importation or exportation"

7. The Panel in *EC – Bananas III* noted that "Article I requires MFN treatment in respect of 'rules and formalities in connection with importation', a phrase that has been interpreted broadly in past GATT practice, such that it can appropriately be held to cover rules related to tariff quota allocations. Such rules are clearly rules applied in connection with importation. Indeed, they are critical to the determination of the amount of duty to be imposed."<sup>10</sup> The Panel further found that "import licensing procedures, including the operator category rules" are 'rules and formalities in connection with importation' in the meaning of Article I:1."<sup>11</sup>

8. In *Colombia – Ports of Entry*, textile, apparel and footwear importers arriving from Panama or the Colon Free Zone (CFZ) were subject to a special advance import declaration requirement for imports of textiles, apparel and footwear, and had to pay customs duties and sales tax on the basis of the advance declaration. Imports of these products originating in countries other than Panama were not subject to these requirements. Also, importers of textiles arriving from Panama and the CFZ were subject to additional legalization fees and customs compliance requirements. The parties agreed that these measures constituted "rules and formalities in connection with importation."<sup>12</sup>

9. 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 US 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>13</sup> The Panel observed:

"We conclude that 'in connection with importation' as used in Article I, not only encompasses measures which directly relate to the process of importation but could also include those measures, such as Section 727, which relate to other aspects of the importation of a product or have an impact on actual importation. Given the foregoing, we determine that Section 727 is a rule in connection with importation within the meaning of Article I:1 of the GATT 1994."<sup>14</sup>

10. In *Argentina – Financial Services*, the Panel assessed whether a presumption of an unjustified increase in wealth applicable to the entry of funds, for the purpose of gains tax, constituted a rule or formality in connection with exportation within the meaning of Article I:1.<sup>15</sup> The Panel found that the measure constituted a "rule", but considered that it could not be characterized as a "formality".<sup>16</sup> In order to determine whether the rule was connected to exportation, the Panel considered it "important to examine the core features that define the centre of gravity of measure 2 to establish whether there actually is ... an association, link or logical relationship between the measure and exportation".<sup>17</sup> The Panel found that "the fact that, hypothetically, part of the income of an Argentine taxpayer subject to gains tax might come from payments for exports does not suffice to support the conclusion that measure 2 has, as a core feature or 'centre of gravity', its relationship, linkage or association with exports made by the Argentine taxpayer."<sup>18</sup> The Panel found:

"[T]he panel in *US – Poultry (China)* accorded a broad meaning to this category of measures covered by Article I:1 of the GATT 1994. Nevertheless, we consider that the broad interpretation adopted by that panel does not mean that any measure that has a hypothetical or remote connection with importation or exportation can be considered to be covered by Article I:1 of the GATT 1994.

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<sup>10</sup> Panel Report, *EC – Bananas III*, para. 7.107.

<sup>11</sup> Panel Report, *EC – Bananas III*, para. 7.189.

<sup>12</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.342.

<sup>13</sup> Panel Report, *US – Poultry (China)*, paras. 2.2-2.3.

<sup>14</sup> Panel Report, *US – Poultry (China)*, para. 7.410.

<sup>15</sup> Panel Report, *Argentina – Financial Services*, paras. 7.980-7.1000.

<sup>16</sup> Panel Report, *Argentina – Financial Services*, paras. 7.981-7.982.

<sup>17</sup> Panel Report, *Argentina – Financial Services*, para. 7.987.

<sup>18</sup> Panel Report, *Argentina – Financial Services*, paras. 7.989.

If we were to opt for the interpretation advocated by Panama, we would be broadening the scope of Article I:1 of the GATT 1994 to include a government measure that might hypothetically affect exports or imports. Indeed, such an interpretation might mean that any government measure would be covered by that provision if it were possible to prove a remote and hypothetical relationship with imports or exports. We believe that this would generate an expansion of the scope of Article I:1 that would result in an almost unlimited number of measures being encompassed by that provision, since it would cover every type of measure that had any sort of connection with the process of exportation or importation, however tenuous."<sup>19</sup>

11. In *EU – Footwear (China)* the Panel found that "rules and formalities applied in anti-dumping investigations ... fall within the scope of the 'rules and formalities in connection with importation' referred to in Article I:1."<sup>20</sup>

#### **1.3.4 "all matters referred to in paragraphs 2 and 4 of Article III"**

12. The Panel in *EU – Energy Package* acknowledged the Appellate Body's finding in *EC – Seal Products* that Article I:1 of the GATT incorporated all matters referred to in paragraphs 2 and 4 of Article III. With this in mind, the Panel stated that its analysis of Russia's claim that the liquefied natural gas (LNG) measure falls within the scope of Article I:1 shall aim at establishing whether it is a law, regulation or requirement "affecting" the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported natural gas.<sup>21</sup>

13. The Panel in *Russia – Railway Equipment* found that Russia's non-recognition of conformity assessment certificates issued in other countries of the Eurasian Customs Union had an adverse effect on a supplier's ability to offer the product covered by the certificate for internal sale, because the product could not be lawfully offered for internal sale in Russia's territory without a valid certificate. Moreover, the Panel noted that even if the product could be offered for sale, it could not be lawfully sold for operation in Russia's territory without a valid certificate. The Panel thus concluded that this measure fell within the scope of Article I:1 of the GATT 1994.<sup>22</sup>

14. In *EC – Trademarks and Geographical Indications (US)*, the Panel found that the EC regulation related to protection of geographical indications and designations of origin was a law or regulation affecting the internal sale and offering for sale of products within the meaning of Article III:4 of GATT 1994, and therefore fell within the "matters referred to in paragraphs 2 and 4 of Article III" as that phrase is used in Article I:1.<sup>23</sup>

15. In *EC – Commercial Vessels*, Korea challenged an EC Regulation providing aid in support of EC shipbuilders competing for shipbuilding contracts where Korean shipyards had offered a lower price. Korea argued that this provision breached Article I:1 because bids competing with Korean shipyards would be subsidized but bids competing with other shipyards would not. Korea argued that the Regulation was a measure within the scope of GATT Article III:4, and therefore subject to Article I:1.<sup>24</sup> The Panel found:

"[W]e have concluded that the TDM Regulation is a measure that falls within the scope of Article III:8(b) of the GATT 1994 because it provides for 'the payment of subsidies exclusively to domestic producers' and that the TDM Regulation is therefore not inconsistent with Article III:4. In that connection, we have rejected the argument of Korea that since Korea challenges the TDM Regulation as a regulatory framework, Article III:8(b) is irrelevant. ...

... the issue here is not whether Article III:8(b) somehow affects the scope of Article I in its entirety. Rather, the question is limited to whether and if so how Article III:8(b) affects the scope of 'all matters referred to in paragraphs 2 and 4 of Article III'. In

<sup>19</sup> Panel Report, *Argentina – Financial Services*, paras. 7.995 and 7.999.

<sup>20</sup> Panel Report, *EU – Footwear (China)*, para. 7.100.

<sup>21</sup> Panel Report, *EU – Energy Package*, para. 7.829.

<sup>22</sup> Panel Report, *Russia – Railway Equipment*, para. 7.894.

<sup>23</sup> Panel Report, *EC – Trademarks and Geographical Indications (US)*, para. 7.713.

<sup>24</sup> Panel Report, *EC – Commercial Vessels*, paras. 7.79-7.81.

this connection, the argument of Korea that Article III:8(b) only refers to 'the provisions of this Article' and therefore does not apply to Article I is unpersuasive. To the extent that Article III:8(b) plays a role in determining the scope of the matters referred to in Article III:2 and III:4, a direct reference to Article I is not necessary.

... Articles III:2 and 4 lay down substantive legal obligations. In light of this use of the word 'matters' to refer to provisions containing legal obligations, we consider that among the various dictionary definitions, 'subject' and 'substance' are particularly pertinent to define the meaning of the word 'matters' as used in Article I:1. Therefore, interpreting the ordinary meaning of the terms used in their context, the Panel considers that the phrase 'matters referred to in...' in Article I:1 refers to the subject matter of those provisions in terms of their substantive legal content. Understood in this sense, it is clear to us that the 'matters referred to in paragraphs 2 and 4 of Article III' cannot be interpreted without regard to limitations that may exist regarding the scope of the substantive obligations provided for in these paragraphs. If it is explicitly provided that a particular measure is not subject to the obligations of Article III, that measure in our view does not form part of the 'matters referred to' in Articles III:2 and 4. Thus, since Article III:8(b) provides that Article III 'shall not prevent the payment of subsidies exclusively to domestic producers', such subsidies are not part of the subject matter of Article III:4 and cannot be covered by the expression 'matters referred to in paragraphs 2 and 4 of Article III' in Article I:1."<sup>25</sup>

16. In *Argentina – Financial Services* one of the measures at issue consisted of applying methods for valuing transactions based on transfer prices in order to determine the tax base for the gains tax payable by Argentine taxpayers. This valuation method applied to transactions between Argentine taxpayers and persons from non-cooperative countries irrespective of whether they were related.<sup>26</sup> In considering whether this measure constituted a matter referred to in Article III:4 of the GATT 1994, the Panel noted that "the precedents accord a broad meaning to the scope of application of Article III:4 of the GATT 1994 and indicate that that provision also covers those measures which, even though their main objective is not to regulate the internal sale, offering for sale, purchase or use of the product, affect the conditions of competition of the products in question on the domestic market."<sup>27</sup> The Panel found that the complainant failed to demonstrate that the measure fell within the scope of Article III:4, and consequently failed to demonstrate that the measure fell within the scope of Article I:1:

"In our view, the broad scope attributed in previous cases to the interpretation of the term 'affect' does not mean that any measure that might hypothetically affect the conditions of competition of hypothetical products could be covered by Article III:4 of the GATT 1994. In this case, we do not consider it proven that, once products from non-cooperative countries have entered the Argentine market, measure 3 affects the conditions of competition of imports from non-cooperative countries on the Argentine market in such a way that the domestic industry is protected."<sup>28</sup>

### **1.3.5 "any advantage, favour, privilege or immunity granted by any Member"**

#### **1.3.5.1 General**

17. In *EC – Bananas III*, the Panel considered that "advantages" in the sense of Article I:1 are those that create "more favourable import opportunities" or affect the commercial relationship between products of different origins.<sup>29</sup>

18. In *Canada – Autos*, the Appellate Body found that Canada's import duty exemption accorded to motor vehicles originating in some countries in which affiliates of certain designated manufacturers were present, was inconsistent with Article I:1. The Appellate Body noted:

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<sup>25</sup> Panel Report, *EC – Commercial Vessels*, paras. 7.81-7.83.

<sup>26</sup> Panel Report, *Argentina – Financial Services*, para. 2.19.

<sup>27</sup> Panel Report, *Argentina – Financial Services*, para. 7.1023.

<sup>28</sup> Panel Report, *Argentina – Financial Services*, para. 7.1028.

<sup>29</sup> Panel Report, *EC – Bananas III*, para. 7.239.



"Article I:1 requires that '*any advantage, favour, privilege or immunity granted by any Member to any product* originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all other Members*.' (emphasis added) The words of Article I:1 refer not to *some* advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to '*any advantage*'; not to *some* products, but to '*any product*'; and not to like products from *some* other Members, but to like products originating in or destined for '*all other*' Members."<sup>30</sup>

19. In *EC – Seal Products*, the Appellate Body explained that "Article I:1 thus prohibits discrimination among like imported products originating in, or destined for, different countries.<sup>31</sup> In so doing, Article I:1 protects expectations of equal competitive opportunities for like imported products from all Members.<sup>32</sup> ... it is for this reason that an inconsistency with Article I:1 is not contingent upon the actual trade effects of a measure."<sup>33</sup>

20. The European Union in that the same dispute asserted that "the analysis under Article I:1 is not limited to an assessment of whether a measure has a detrimental impact on competitive opportunities for like imported products" and, instead, "if it is found that a measure has a detrimental impact on competitive opportunities for like imported products, the analysis under Article I:1 must consider further the rationale for such impact, and, more specifically, whether it stems exclusively from a legitimate regulatory distinction."<sup>34</sup> The Appellate Body rejected this argument:

"Contrary to what the European Union suggests, we see no basis in the text of Article I:1 to find that, for the purposes of establishing an inconsistency with that provision, it must be demonstrated that the detrimental impact of a measure on competitive opportunities for like imported products does not stem exclusively from a legitimate regulatory distinction. Instead, we consider that, where a measure modifies the conditions of competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1.

...

In the light of the above, we consider that Article I:1 prohibits Members from conditioning the extension of an 'advantage', within the meaning of Article I:1, on criteria that have a detrimental impact on the competitive opportunities for like imported products from any Member. A panel is not required, under Article I:1, to assess whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction. Such an assessment is a necessary analytical element of Article 2.1 of the TBT Agreement, but not of Article I:1 of the GATT 1994."<sup>35</sup>

21. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)* the Appellate Body explained that the Panel "separately examined whether each of the three sets of requirements under the amended tuna measure – the eligibility criteria, the certification requirements and the tracking and verification requirements – [was] consistent with Article I:1."<sup>36</sup> The Appellate Body faulted the Panel for failing to conduct a holistic assessment of all the requirements under the measure:

"[B]y segmenting its analysis along the three sets of requirements under the amended tuna measure, the Panel failed to conduct a holistic assessment of how those various labelling conditions, taken together, adversely affect the conditions of competition for Mexican tuna products in the US market as compared to like US and other tuna

<sup>30</sup> Appellate Body Report, *Canada – Autos*, para. 79.

<sup>31</sup> (footnote original) Appellate Body Report, *Canada – Autos*, para. 84.

<sup>32</sup> (footnote original) Panel Reports, *US – COOL*, para. 7.571 (referring to Panel Report, *Colombia – Ports of Entry*, para. 7.236, in turn referring to Panel Report, *Argentina – Hides and Leather*, para. 11.20, in turn referring to Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 16, DSR 1996:I, p. 109; and *Korea – Alcoholic Beverages*, paras. 119, 120, and 127).

<sup>33</sup> Appellate Body Report, *EC – Seal Products*, para. 5.87.

<sup>34</sup> Appellate Body Report, *EC – Seal Products*, para. 5.89.

<sup>35</sup> Appellate Body Report, *EC – Seal Products*, paras. 5.90 and 5.93.

<sup>36</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.271.

products. Nor did the Panel give due consideration to the question of whether and how such detrimental impact resembles, in nature or extent, the detrimental impact that was found, in the original proceedings, to exist under the original tuna measure. These considerations apply equally to the Panel's analytical approach under Articles I:1 and III:4. In our view, the Panel's examination of relative access to the dolphin-safe label for Mexican, US, and other tuna products should not have been limited to the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods. Indeed, while Mexican tuna products may be denied access to the dolphin-safe label by virtue of the fact that they are derived from tuna caught by setting on dolphins, other elements of the amended tuna measure, such as the 'no dolphin killed or seriously injured' standard and the certification and tracking and verification requirements, may also exclude some tuna products of US or other origin from access to the label. Thus, the Panel should *also* have assessed how the certification and tracking and verification requirements introduced by the 2013 Final Rule for tuna products originating outside the ETP large purse-seine fishery had the effect of reducing (or increasing) access to the dolphin-safe label for such tuna products, thus narrowing (or broadening) the difference in treatment between Mexican tuna products and like US or other products in terms of access to the dolphin-safe label. By failing to do so, the Panel's segmented analysis falls short of a proper examination of the extent to which the various labelling conditions under the amended tuna measure, taken together, modify the detrimental impact that was found to exist in the original proceedings."<sup>37</sup>

#### **1.3.5.2 Allocation of tariff quotas**

22. The appeal in *EC – Bananas III* focused *inter alia* on the banana tariff rate quota (TRQ) "activity function" rules, under which the requirements for TRQ allocation to importers differed depending on the origin of the imported bananas:

"[T]he Panel found that the procedural and administrative requirements of the activity function rules for importing third-country and non-traditional ACP bananas differ from, and go significantly beyond, those required for importing traditional ACP bananas. This is a factual finding. Also, a broad definition has been given to the term 'advantage' in Article I:1 of the GATT 1994 by the panel in *United States – Non-Rubber Footwear*. It may well be that there are considerations of EC competition policy at the basis of the activity function rules. This, however, does not legitimize the activity function rules to the extent that these rules discriminate among like products originating from different Members. For these reasons, we agree with the Panel that the activity function rules are an 'advantage' granted to bananas imported from traditional ACP States, and not to bananas imported from other Members, within the meaning of Article I:1. Therefore, we uphold the Panel's finding that the activity function rules are inconsistent with Article I:1 of the GATT 1994."<sup>38</sup>

#### **1.3.5.3 Flexibility in import procedures**

23. In *Colombia – Ports of Entry*, the Panel found that the advance import declaration and legalization requirements referred to in paragraph 8 above conferred an advantage on imports of the relevant products from other WTO Members, as compared with the like products imported from Panama or the Colon Free Zone (CFZ). The Panel observed that these requirements applied to goods originating in Panama or the CFZ, as well as goods originating elsewhere which transited Panama or the CFZ before arriving in Colombia. Like products originating elsewhere that did not transit Panama or the CFZ were not subject to the requirements. Observing that "[i]nherently, an advantage arises for an importer that can choose how to operate his business in order to enhance his profitability and competitiveness, among other concerns", the Panel found that:

"[O]ne advantage arises from the fact that importers of subject goods from territories other than Panama or the CFZ are granted flexibility to make customs duty and tax payments when they see fit. Additionally, an importer that has not filed an advance

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<sup>37</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.280.

<sup>38</sup> Appellate Body Report, *EC – Bananas III*, para. 206.

import declaration would retain the option to inspect his goods on site upon arrival, verifying its dimension and weight, prior to submitting a declaration, thereby assuring himself of the accuracy of the declaration and avoiding fees required to file a legalization declaration."<sup>39</sup>

#### **1.3.5.4 Access to certification procedures**

24. In *US – Poultry (China)*, in examining the measure described in paragraph 9 above, the Panel observed that:

"[S]uccessful completion of the mentioned procedures is the only way that an importer can enter the United States market for poultry products. The opportunity to sell poultry products in the United States market is therefore a very favourable market opportunity and not having such an opportunity would mean a serious competitive disadvantage, or rather would amount to an exclusion from competition in the US market. Such an opportunity would also affect the commercial relationship between products of two different origins where one of the countries of origin is denied access to the PPIA and the FSIS procedures.

The Panel thus considers that the opportunity to export poultry products to the United States after successful completion of the PPIA and the FSIS procedures *is* an advantage within the meaning of Article I:1 of the GATT 1994 because it creates market access opportunities and affects the commercial relationship between products of different origins."<sup>40</sup>

#### **1.3.5.5 Procedures in anti-dumping investigations**

25. In *EU – Footwear (China)* the Panel assessed whether a provision of the European Union's anti-dumping regulations violated Article I:1 on the basis that it subjected certain "[non-market economy (NME)] WTO Members, including China, to additional conditions in order for exporting producers to receive [individual treatment (IT)], while WTO Members with market economies automatically receive IT."<sup>41</sup> The Panel found that:

"[T]he automatic grant of IT to imports from market economy countries is an 'advantage' within the meaning of Article I:1. In our view, individual treatment ensures that producers and exporters receiving such treatment will not be subject to a duty higher than their own dumping margin, as would be the case for some producers or exporters subject to a country-wide duty imposed on the basis of a margin calculated on average export prices. Moreover, Article 9(5) of the Basic AD Regulation lists the WTO Members, including China, whose producers are not automatically accorded the right to individual dumping margins and anti-dumping duties, but must fulfil the conditions of that provision in order to benefit from that right. Thus, the application of Article 9(5) of the Basic AD Regulation will, in some instances, result in import of the same product from different WTO members being treated differently in anti-dumping investigations by the European Union. This to us establishes that the advantage of automatic IT is conditioned on the origin of the products. We therefore consider that Article 9(5) of the Basic AD Regulation violates the MFN obligation set forth in Article I:1 of the GATT 1994."<sup>42</sup>

#### **1.3.5.6 Import requirements**

26. In *EC – Seal Products*, in a finding upheld by the Appellate Body, the Panel found that:

"[T]he advantage granted by the EU Seal Regime is in the form of market access; it is granted to seal products that meet the conditions under the IC exception. The EU Seal Regime affects the placing on the market of seal products and therefore the 'internal sale', 'offering for sale', 'distribution' and 'purchase' of seal products.

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<sup>39</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.352.

<sup>40</sup> Panel Report, *US – Poultry (China)*, paras. 7.416-7.417.

<sup>41</sup> Panel Report, *EU – Footwear (China)*, para. 7.98.

<sup>42</sup> Panel Report, *EU – Footwear (China)*, para. 7.100.

With respect to the third element of Article I:1, the MFN obligation contained therein requires that once seal products from Greenland are granted the advantage of access to the European Union market, such advantage be extended 'immediately and unconditionally' to Canadian and Norwegian seal products that are found to be 'like'. As explained above, the evidence suggests that this has not been the case because the vast majority of seal products from Canada and Norway do not meet the IC requirements for placing on the market under the EU Seal Regime. In contrast, virtually all of Greenlandic seal products are likely to qualify under the IC exception for placing on the market. Thus, in terms of its design, structure, and expected operation, the EU Seal Regime detrimentally affects the conditions of competition on the market of Canadian and Norwegian origin as compared to seal products of Greenlandic origin."<sup>43</sup>

### 1.3.5.7 Tax reductions

27. In *Brazil - Taxation*, the Panel found that tax reductions accorded to motor vehicles imported from some WTO Members, but not others, constituted an "advantage" within the meaning of Article I:1. The Panel stated that:

"[A]n 'advantage' within the meaning of Article I:1 of the GATT 1994 exists when a measure alters the conditions of competition for certain imported products relative to other like imported products.

Applying this to the present dispute, the Panel considers that the tax reductions challenged under Article I:1 do indeed act as advantages relative to like imported products that do not receive that tax reduction. Insofar as one product receives a lower tax burden than another like product, there is a change in the conditions of competition for the like product relative to the less-taxed product. Brazil has not presented any argument to the contrary."<sup>44</sup>

### 1.3.6 "like products"

28. In *Indonesia - Autos*, examining the consistency of the Indonesian National Car Programme with Article I:1, the Panel compared the concepts of "like products" under Articles I and III:

"We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car. The same considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I."<sup>45</sup>

29. In *Colombia - Ports of Entry*, the Panel found that because the measures at issue explicitly discriminated, a full like product analysis was not needed:

"In the Panel's view, it is not necessary to determine through lengthy analysis whether textiles, apparel or footwear arriving from other countries are in fact like products to those goods originating in and arriving from Panama. Based on the design of the ports of entry measure, any textiles, apparel or footwear imported from territories other than Panama or the CFZ, are like products, and would necessarily be allowed entry at 11 ports of entry in Colombia without presenting an advance import declaration, as long as the product did not circulate through Panama or the CFZ prior to arrival in Colombia."<sup>46</sup>

30. Citing the like product analysis based on hypothetical imports in the Appellate Body Report on *Canada - Periodicals*, the Panel then found:

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<sup>43</sup> Panel Report, *EC - Seal Products*, para. 7.597. See also Appellate Body Report, *EC - Seal Products*, para. 5.96.

<sup>44</sup> Panel Reports, *Brazil - Taxation*, paras. 7.1041-7.1042.

<sup>45</sup> Panel Report, *Indonesia - Autos*, para. 14.141.

<sup>46</sup> Panel Report, *Colombia - Ports of Entry*, para. 7.355.

"[S]ince Panama does not currently produce any of these products for export to Colombia, but in light of the fact that the Panel views it as proper to consider Panama's claim, hypothetical imports from Panama or the CFZ are appropriate for consideration. An advance import declaration, advance payment of customs duties and taxes, and special rules concerning legalization would be required simply because of the products' origin. In the Panel's view, the hypothetical origin-based distinction that would arise if Panama were to produce the subject goods and export those goods to Colombia is sufficient for the Panel to proceed in considering Panama's claim under Article I:1 of the GATT 1994."<sup>47</sup>

31. In *US – Poultry (China)*, the Panel set out the main approaches to determining "likeness" of products:

"The concept of like product has been abundantly interpreted in the prior decisions of panels and the Appellate Body. Whatever the provision at issue, the Appellate Body has explained that a like product analysis must always be done on a case-by-case basis.

The traditional approach for determining 'likeness' has, in the main, consisted of employing four general criteria: '(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.'

A different approach used by panels and the Appellate Body to determine the likeness of the products has been to assume – hypothetically – that two like products exist in the market place when one of two situations arises: first cases concerning origin-based discrimination, and second, cases where it was not possible to make the like product comparison because of – for example – a ban on imports.

The panel in *China – Publications and Audiovisual Products* recalled the relevant WTO jurisprudence which supports a hypothetical like product analysis where a difference in treatment between domestic and imported products is based exclusively on the products' origin. In these cases, the complainant did not need to identify specific domestic and imported products and establish their likeness in terms of the traditional criteria in order to make a prima facie case of 'likeness'. Instead, when origin is the sole criterion distinguishing the products, it has been sufficient for a complainant to demonstrate that there can or will be domestic and imported products that are 'like'. ... We also note that panels have found that foreign origin cannot serve as a basis for a determination that imported products are 'unlike' domestic ones.

...

We note that the United States has argued that the differing safety levels of poultry from China *vis-à-vis* other WTO Members may have an impact on the like products analysis. However, the United States did not provide specific evidence relating to different safety levels between poultry products From China and other WTO Members. Therefore, we see no reason not to proceed with the 'hypothetical' like products analysis and base our determination on whether the products alleged to be 'like' are distinguished solely because of their origin."<sup>48</sup>

32. Noting that the funding restriction in question was "origin-based in respect of the products it affects", that Panel followed a hypothetical like products analysis.<sup>49</sup>

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<sup>47</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.356.

<sup>48</sup> Panel Report, *US – Poultry (China)*, paras. 7.424-7.427, and 7.429.

<sup>49</sup> Panel Report, *US – Poultry (China)*, paras. 7.430-7.432. See also Panel Report, *Russia – Railway Equipment*, paras. 7.898 (regarding the non-recognition of conformity certificates issued in other countries from the Eurasian Economic Union under Article I:1 of the GATT 1994); and 7.917-7.920 (regarding the non-recognition of conformity certificates issued in other countries from the Eurasian Economic Union under Article III:4 of the GATT 1994).

33. In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, which concerned the consistency with Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994 of the United States' dolphin-safe labelling regime, the Appellate Body found error in the Panel's like product definition. Specifically, the Appellate Body noted that "by limiting its comparison to the treatment accorded to tuna products that are 'eligible' for the dolphin-safe label, the Panel's analyses of the respective costs and burdens flowing from the different certification and tracking and verification requirements focused on a *subset* of the products found to be 'like' in this dispute."<sup>50</sup> The Appellate Body stressed that Article 2.1 of the TBT Agreement requires a panel first to define the like product and then to conduct the detrimental impact analysis on that basis. The Appellate Body cautioned panels against artificially limiting their analysis to subsets of the relevant groups of products:

"In considering the propriety of the Panel's approach, we recall that the product scope for a detrimental impact comparison depends on the products that a panel has found to be 'like' for the purposes of Article 2.1. Once the 'like' products have been properly identified, Article 2.1 requires a panel to compare, on the one hand, the treatment accorded under the measure at issue to the 'group' of like products imported from the complaining Member with, on the other hand, that accorded to the 'group' of like domestic products and/or the 'group' of like products originating in all other countries. This is not to say that a finding of detrimental impact requires that *all* products imported from the complaining Member be treated less favourably than *all* like domestic products and/or *all* like products originating in other countries. However, in our view, a panel may not artificially limit its analysis to only subsets of the relevant groups of like products in a manner that risks skewing the proper comparison for purposes of determining detrimental impact."<sup>51</sup>

34. In the Appellate Body's view, "in order to reach its conclusions on detrimental impact, the Panel was called upon to compare the treatment that the labelling conditions under the amended tuna measure accord to the *group* of Mexican tuna products, on the one hand, with the treatment accorded to the *groups* of like tuna products from the United States and other countries, on the other hand."<sup>52</sup> However, the Appellate Body added that:

"This does not imply that the Panel's conclusions of detrimental impact had to rest on a finding that the certification and tracking and verification requirements impose additional costs and burdens on *every* Mexican tuna product, or on the *entire* group of Mexican tuna products, as compared to *every* like product, or on the *entirety* of the groups of like products from the United States and other countries. Indeed, there may well be instances in which an examination of the treatment accorded to a portion of a relevant group of like products will suffice to support a finding that such a product group is detrimentally affected by the technical regulation at issue ... The Panel did not explain why an analysis of the treatment that the amended tuna measure accords to this category of tuna products had explanatory force for, and could properly support, a finding that the *group* of Mexican tuna products is detrimentally affected by the certification and tracking and verification requirements."<sup>53</sup>

35. On this basis, the Appellate Body concluded that:

"By focusing exclusively on the costs and burdens imposed by the certification and tracking and verification requirements on only 'eligible' Mexican tuna products, the Panel artificially skewed the proper comparison for purposes of determining detrimental impact, rather than grounding its analysis on a full comparison of the relevant groups of like products in the light of the particular facts and circumstances of this dispute."<sup>54</sup>

36. Finally, the Appellate Body pointed out that its like product analysis under Article 2.1 of the TBT Agreement also applied under Article I:1 of the GATT 1994:

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<sup>50</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.70.

<sup>51</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.71.

<sup>52</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.72.

<sup>53</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.73.

<sup>54</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.74.

"We took the view that, in order to reach its conclusions on detrimental impact, the Panel should have, instead, compared the treatment that the labelling conditions under the amended tuna measure accord to the *group* of Mexican tuna products, on the one hand, with the treatment accorded to the *groups* of like tuna products from the United States and other countries, on the other hand. These considerations apply with equal force to the analytical approach adopted, and the product groups compared by the Panel in order to assess whether the certification and tracking and verification requirements discriminate against Mexican tuna products under Articles I:1 and III:4 of the GATT 1994."<sup>55</sup>

37. For the treatment of this subject-matter under the GATT 1947, see the *GATT Analytical Index*, pages 35-40.

### **1.3.7 "any product originating in or destined for any other country"**

38. In *EC – Bananas III*, the Appellate Body reviewed the Panel's finding that the EC import regime for bananas was inconsistent with Article XIII in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. Pointing out that "there [were] two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas", the European Communities appealed that "the non-discrimination obligations of Article I:1, X:3(a) and XIII of GATT 1994 and Article 1.3 of the *Licensing Agreement* apply only *within* each of these separate regimes."<sup>56</sup> The Appellate Body responded as follows:

"The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements, if these provisions apply only *within* regulatory regimes established by that Member."<sup>57</sup>

### **1.3.8 "shall be accorded immediately and unconditionally"**

39. In *EC – Seal Products* the Appellate Body explained that:

"Under Article I:1, a Member is proscribed from granting an 'advantage' to imported products that is not 'immediately' and 'unconditionally' extended to like imported products from all Members. This means, in our view, that any advantage granted by a Member to imported products must be made available 'unconditionally', or *without conditions*, to like imported products from all Members.<sup>58</sup> However, as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching *any* conditions to the granting of an 'advantage' within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from *any* Member. Conversely, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member."<sup>59</sup>

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<sup>55</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.281.

<sup>56</sup> Appellate Body Report, *EC – Bananas III*, para. 189.

<sup>57</sup> Appellate Body Report, *EC – Bananas III*, para. 190.

<sup>58</sup> Panel Report, *EC – Tariff Preferences*, para. 7.59.

<sup>59</sup> Appellate Body Report, *EC – Seal Products*, para. 5.88.

40. In *Indonesia – Autos*, the Panel found that the exemption of import duties and sales taxes to automobiles which met certain origin-neutral requirements was inconsistent with Article I:1, because of the existence of a number of "conditions":

"Indeed, it appears that the design and structure of the June 1996 car programme is such as to allow situations where another Member's like product to a National Car imported by PT PTN from Korea will be subject to much higher duties and sales taxes than those imposed on such National Cars. ... The distinction as to whether one product is subject to 0% duty and the other one is subject to 200% duty or whether one product is subject to 0% sales tax and the other one is subject to a 35% sales tax, depends on whether or not PT TPN had made a 'deal' with that exporting company to produce that National Car, and is covered by the authorization of June 1996 with specifications that correspond to those of the Kia car produced only in Korea. In the GATT/WTO, the right of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty benefits accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.

We note also that under the February 1996 car programme the granting of customs duty benefits to parts and components is conditional to their being used in the assembly in Indonesia of a National Car. The granting of tax benefits is conditional and limited to the only Pioneer company producing National Cars. And there is also a third condition for these benefits: the meeting of certain local content targets. Indeed under all these car programmes, customs duty and tax benefits are conditional on achieving a certain local content value for the finished car. The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty advantages accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members 'immediately and unconditionally'.

For the reasons discussed above, we consider that the June 1996 car programme which introduced discrimination between imports in the allocation of tax and customs duty benefits based on various conditions and other criteria not related to the imports themselves and the February 1996 car programme which also introduce discrimination between imports in the allocation of customs duty benefits based on various conditions and other criteria not related to the imports themselves, are inconsistent with the provisions of Article I of GATT."<sup>60</sup>

41. In *Canada – Autos*, the Canadian measure at issue was an exemption of import duties, granted for motor vehicles if the exporter of the vehicles was affiliated with a manufacturer/importer in Canada that had been designated (contingent on compliance with other allegedly WTO-inconsistent requirements) as eligible to import motor vehicles duty-free under the Motor Vehicle Tariff Order (MVTO) 1998 or under a so-called Special Remission Order (SRO). In practice, exporters of motor vehicles affiliated with a manufacturer/importer in Canada were located in a small number of countries. The Panel found the Canadian measure breached Article I:1. On appeal, the Appellate Body first discussed the concepts of *de jure* and *de facto* discrimination under Article I:1 (see paragraph 3 above) and then held that, by granting an advantage to some products from some Members and not to others, the measure in question was inconsistent with Article I:1:

"[F]rom both the text of the measure and the Panel's conclusions about the practical operation of the measure, it is apparent to us that '[w]ith respect to customs duties...imposed on or in connection with importation...', Canada has granted an 'advantage' to some products from some Members that Canada has not 'accorded immediately and unconditionally' to 'like' products 'originating in or destined for the

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<sup>60</sup> Panel Report, *Indonesia – Autos*, paras. 14.145-14.147. Preceding the cited paragraphs, the Panel refers to the GATT Panel Report, *Belgium – Family Allowances*.



territories of *all other Members.*' (emphasis added) And this, we conclude, is not consistent with Canada's obligations under Article I:1 of the GATT 1994.<sup>61</sup>

42. The Appellate Body in *Canada – Autos* added that the context and the "pervasive character" of the MFN principle supported its finding:

"The context of Article I:1 within the GATT 1994 supports this conclusion. Apart from Article I:1, several 'MFN-type' clauses dealing with varied matters are contained in the GATT 1994.<sup>62</sup> The very existence of these other clauses demonstrates the pervasive character of the MFN principle of non-discrimination."<sup>63</sup>

43. The Panel in *Canada – Autos* also clarified the meaning of the term "unconditionally". With respect to this term, Japan argued that, by making the import duty exemption conditional upon criteria related to the importer but unrelated to the imported product itself, Canada failed to accord the import duty exemption immediately and unconditionally to like products originating in all WTO Members. The Panel held that the term "unconditionally" could not be "determined independently of an examination of whether it involves discrimination between like products of different countries". The Panel emphasized the "important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other Members":

"[W]e believe that this interpretation of Japan does not accord with the ordinary meaning of the term 'unconditionally' in Article I:1 in its context and in light of the object and purpose of Article I:1. In our view, whether an advantage within the meaning of Article I:1 is accorded 'unconditionally' cannot be determined independently of an examination of whether it involves discrimination between like products of different countries.

Article I:1 requires that, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded 'immediately and unconditionally' to the like product originating in the territories of all other Members. We agree with Japan that the ordinary meaning of 'unconditionally' is 'not subject to conditions'. However, in our view Japan misinterprets the meaning of the word 'unconditionally' in the context in which it appears in Article I:1. The word 'unconditionally' in Article I:1 does not pertain to the granting of an advantage *per se*, but to the obligation to accord to the like products of all Members an advantage which has been granted to any product originating in any country. The purpose of Article I:1 is to ensure unconditional MFN treatment. In this context, we consider that the obligation to accord 'unconditionally' to third countries which are WTO Members an advantage which has been granted to any other country means that the extension of that advantage may not be made subject to conditions with respect to the situation or conduct of those countries. This means that an advantage granted to the product of any country must be accorded to the like product of all WTO Members without discrimination as to origin.

In this respect, it appears to us that there is an important distinction to be made between, on the one hand, the issue of whether an advantage within the meaning of Article I:1 is subject to conditions, and, on the other, whether an advantage, once it has been granted to the product of any country, is accorded 'unconditionally' to the like product of all other Members. An advantage can be granted subject to conditions without necessarily implying that it is not accorded 'unconditionally' to the like product of other Members. More specifically, the fact that conditions attached to such an advantage are not related to the imported product itself does not necessarily imply that such conditions are discriminatory with respect to the origin of imported

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<sup>61</sup> Appellate Body Report, *Canada – Autos*, para. 81.

<sup>62</sup> (*footnote original*) These relate to such matters as internal mixing requirements (Article III:7); cinema films (Article IV(b)); transit of goods (Article V:2, 5, 6); marks of origin (Article IX:1); quantitative restrictions (Article XIII:1); measures to assist economic development (Article XVIII:20); and measures for goods in short supply (Article XX(j)).

<sup>63</sup> Appellate Body Report, *Canada – Autos*, para. 82.

products. We therefore do not believe that, as argued by Japan, the word 'unconditionally' in Article I:1 must be interpreted to mean that making an advantage conditional on criteria not related to the imported product itself is per se inconsistent with Article I:1, irrespective of whether and how such criteria relate to the origin of the imported products.

We thus find that Japan's argument is unsupported by the text of Article I:1."<sup>64</sup>

44. The Panel in *Canada – Autos* rejected Canada's defence that the Canadian import duty exemption, as described in paragraph 41 above, was a permitted exception under Article XXIV because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.<sup>65</sup> As this finding of the Panel was not appealed, the Appellate Body concluded:

"The drafters also wrote various exceptions to the MFN principle into the GATT 1947 which remain in the GATT 1994.<sup>66</sup> Canada invoked one such exception before the Panel, relating to customs unions and free trade areas under Article XXIV. This justification was rejected by the Panel, and the Panel's findings on Article XXIV were not appealed by Canada. Canada has invoked no other provision of the GATT 1994, or of any other covered agreement, that would justify the inconsistency of the import duty exemption with Article I:1 of the GATT 1994.

The object and purpose of Article I:1 supports our interpretation. That object and purpose is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis."<sup>67</sup>

45. In *US – Certain EC Products*, the United States increased the bonding requirements on imports from the European Communities in order to secure the payment of additional import duties to be imposed in retaliation for certain EC measures. Examining the consistency of the increased bonding requirements with GATT Article I, the Panel stated, with reference to the finding of the Panel in *Indonesia – Autos* referenced in paragraph 39 above:

"We find that the 3 March additional bonding requirements violated the most-favoured-nation clause of Article I of GATT, as it was applicable only to imports from the European Communities, although identical products from other WTO Members were not the subject of such an additional bonding requirement. The regulatory distinction (whether an additional bonding requirement is needed) was not based on any characteristic of the product but depended exclusively on the origin of the product and targeted exclusively some imports from the European Communities."<sup>68</sup><sup>69</sup>

46. In *EC – Tariff Preferences*, the Panel interpreted the term "unconditionally" as meaning "not limited by or subjected to any conditions":

"In the Panel's view, moreover, the term 'unconditionally' in Article I:1 has a broader meaning than simply that of not requiring compensation. While the Panel acknowledges the European Communities' argument that conditionality in the context of traditional MFN clauses in bilateral treaties may relate to conditions of trade compensation for receiving MFN treatment, the Panel does not consider this to be the full meaning of 'unconditionally' under Article I:1. Rather, the Panel sees no reason not to give that term its ordinary meaning under Article I:1, that is, 'not limited by or subject to any conditions'.

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<sup>64</sup> Panel Report, *Canada – Autos*, paras 10.22-10.25.

<sup>65</sup> Panel Report, *Canada – Autos*, paras. 10.55-10.56.

<sup>66</sup> (*footnote original*) Such as in Articles XX (general exceptions), XXI (security exceptions) and XXIV (customs unions and free trade areas).

<sup>67</sup> Appellate Body Report, *Canada – Autos*, paras. 83-84.

<sup>68</sup> (*footnote original*) Panel Report, *Indonesia – Autos*, para. 14.147.

<sup>69</sup> Panel Report, *US – Certain EC Products*, para. 6.54.

Because the tariff preferences under the Drug Arrangements are accorded only on the condition that the receiving countries are experiencing a certain gravity of drug problems, these tariff preferences are not accorded 'unconditionally' to the like products originating in all other WTO Members, as required by Article I:1. The Panel therefore finds that the tariff advantages under the Drug Arrangements are not consistent with Article I:1 of GATT 1994."<sup>70</sup>

47. In *Colombia - Ports of Entry*, the Panel found that the advantage described in paragraph 23 above was not extended "immediately and unconditionally" to imports from Panama, because an advantage granted to the subject goods of other Members is not similarly accorded to those products originating in Panama for reasons related to its origin or the conduct of Panama.<sup>71</sup>

48. In *US - Poultry (China)*, the Panel observed:

"[E]ven if Chinese poultry production system is found to provide equivalent food safety standards as those applied in the United States, it will not be able to export poultry products because of the funding prohibition. Further, the United States acknowledges that the purpose and effect of Section 727 was to prevent Chinese poultry products from being imported into the United States.

No other country was subject to the funding prohibition that Section 727 imposed on China. This means that China is the only WTO Member that is denied the advantage that the Panel identified earlier – the opportunity to export poultry products to the United States after the successful completion of the FSIS procedures. Therefore, Section 727 discriminates against China with respect to other WTO Members by denying the above-mentioned advantage, and this discriminatory treatment means that the United States is not extending an advantage 'immediately and unconditionally'.<sup>72</sup>

## **1.4 Exceptions to and derogations from the MFN principle**

### **1.4.1 Enabling Clause**

49. For the text and background of the Enabling Clause, see "Other material" under Article I of the GATT 1994.

#### **1.4.1.1 As an exception to Article I:1 of the GATT 1994**

50. In *EC - Tariff Preferences*, the Appellate Body addressed the relationship between Article I:1 of the GATT 1994 and the Enabling Clause and upheld the Panel's characterization of the Enabling Clause as an exception to Article I:1 based on the ordinary meaning of paragraph 1 of the Enabling Clause. It also stated that such a characterization does not affect the importance of the policy objectives of the Enabling Clause:

"By using the word 'notwithstanding', paragraph 1 of the Enabling Clause permits Members to provide 'differential and more favourable treatment' to developing countries 'in spite of' the MFN obligation of Article I:1. Such treatment would otherwise be inconsistent with Article I:1 because that treatment is not extended to all Members of the WTO 'immediately and unconditionally'.<sup>73</sup> Paragraph 1 thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause. As such, the Enabling Clause operates as an 'exception' to Article I:1.

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<sup>70</sup> Panel Report, *EC - Tariff Preferences*, paras. 7.59-7.60.

<sup>71</sup> Panel Report, *Colombia - Ports of Entry*, paras. 7.632-7.365.

<sup>72</sup> Panel Report, *US - Poultry (China)*, paras. 7.439-7.440.

<sup>73</sup> (footnote original) GATT 1994, Art. I:1.

In sum, in our view, the characterization of the Enabling Clause as an exception in no way diminishes the right of Members to provide or to receive 'differential and more favourable treatment'. The status and relative importance of a given provision does not depend on whether it is characterized, for the purpose of allocating the burden of proof, as a claim to be proven by the complaining party, or as a defence to be established by the responding party. Whatever its characterization, a provision of the covered agreements must be interpreted in accordance with the 'customary rules of interpretation of public international law', as required by Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the 'DSU').<sup>74</sup> Members' rights under the Enabling Clause are not curtailed by requiring preference-granting countries to establish in dispute settlement the consistency of their preferential measures with the conditions of the Enabling Clause. Nor does characterizing the Enabling Clause as an exception detract from its critical role in encouraging the granting of special and differential treatment to developing-country Members of the WTO."<sup>75</sup>

#### **1.4.1.2 Order of analysis**

51. The Appellate Body stated in *EC – Tariff Preferences* that the Enabling Clause does not exclude the applicability of Article I:1. Rather, it is a more specific rule [on GSP matters] that prevails over Article I:1. According to the Appellate Body, a panel should first examine the consistency of a challenged measure with Article I:1 and then proceed to examine the justifiability of the measure under the Enabling Clause:

"It is well settled that the MFN principle embodied in Article I:1 is a 'cornerstone of the GATT' and 'one of the pillars of the WTO trading system', which has consistently served as a key basis and impetus for concessions in trade negotiations. However, we recognize that Members are entitled to adopt measures providing 'differential and more favourable treatment' under the Enabling Clause. Therefore, challenges to such measures, brought under Article I:1, cannot succeed where such measures are in accordance with the terms of the Enabling Clause. In our view, this is so because the text of paragraph 1 of the Enabling Clause ensures that, to the extent that there is a conflict between measures under the Enabling Clause and the MFN obligation in Article I:1, the Enabling Clause, as the more specific rule, prevails over Article I:1. In order to determine whether such a conflict exists, however, a dispute settlement panel should, as a first step, examine the consistency of a challenged measure with Article I:1, as the general rule. If the measure is considered at this stage to be inconsistent with Article I:1, the panel should then examine, as a second step, whether the measure is nevertheless justified by the Enabling Clause. It is only at this latter stage that a final determination of consistency with the Enabling Clause or inconsistency with Article I:1 can be made.

In other words, the Enabling Clause 'does not exclude the applicability' of Article I:1 in the sense that, as a matter of procedure (or "order of examination", as the Panel stated), the challenged measure is submitted successively to the test of compatibility with the two provisions. But, as a matter of final determination—or *application* rather than *applicability*—it is clear that only one provision applies at a time."<sup>76</sup>

#### **1.4.1.3 Burden of proof under the Enabling Clause**

52. The Appellate Body stated in *EC – Tariff Preferences* that as an exception provision, the ultimate burden of proof under the Enabling Clause falls on the respondent:

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<sup>74</sup> (*footnote original*) In this regard, we recall the Appellate Body's statement in *EC – Hormones* that: ... merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation. (Appellate Body Report, para. 104)

<sup>75</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 90 and 98.

<sup>76</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 101-102.

"As a general rule, the burden of proof for an 'exception' falls on the respondent, that is, as the Appellate Body stated in *US – Wool Shirts and Blouses*, on the party 'assert[ing] the affirmative of a particular ... defence'.<sup>77</sup> From this allocation of the burden of proof, it is normally for the respondent, first, to *raise* the defence and, second, to *prove* that the challenged measure meets the requirements of the defence provision.

We are therefore of the view that the European Communities must *prove* that the Drug Arrangements satisfy the conditions set out in the Enabling Clause. Consistent with the principle of *jura novit curia*, it is not the responsibility of the European Communities to provide us with the legal interpretation to be given to a particular provision in the Enabling Clause; instead, the burden of the European Communities is to adduce sufficient evidence to substantiate its assertion that the Drug Arrangements comply with the requirements of the Enabling Clause."<sup>78</sup>

53. However, the Appellate Body also found in *EC – Tariff Preferences* that the complainant bears the burden of raising the Enabling Clause in its panel request, although the ultimate burden of justifying the challenged measure under the Enabling Clause is with the respondent:

"In our view, the special status of the Enabling Clause in the WTO system has particular implications for WTO dispute settlement. As we have explained, paragraph 1 of the Enabling Clause enhances market access for developing countries as a means of improving their economic development by authorizing preferential treatment for those countries, 'notwithstanding' the obligations of Article I. It is evident that a Member cannot implement a measure authorized by the Enabling Clause without according an 'advantage' to a developing country's products over those of a developed country. It follows, therefore, that every measure undertaken pursuant to the Enabling Clause would necessarily be inconsistent with Article I, if assessed on that basis alone, but it would be exempted from compliance with Article I because it meets the requirements of the Enabling Clause. Under these circumstances, we are of the view that a complaining party challenging a measure taken pursuant to the Enabling Clause must allege more than mere inconsistency with Article I:1 of the GATT 1994, for to do only that would not convey the 'legal basis of the complaint sufficient to present the problem clearly'. In other words, it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. This is especially so if the challenged measure, like that at issue here, is plainly taken pursuant to the Enabling Clause, as we discuss *infra*.

...

The responsibility of the complaining party in such an instance, however, should not be overstated. It is merely to *identify* those provisions of the Enabling Clause with which the scheme is allegedly inconsistent, without bearing the burden of *establishing* the facts necessary to support such inconsistency. That burden, as we concluded above, remains on the responding party invoking the Enabling Clause as a defence."<sup>79</sup>

54. In *Brazil – Taxation*, the Panel found that certain tax reductions accorded by Brazil to motor vehicles imported from MERCOSUR members and Mexico were not accorded to like products from other WTO Members, inconsistently with Article I:1 of the GATT 1994.<sup>80</sup> Brazil sought to defend its measures under the Enabling Clause, and argued that the European Union and Japan had the burden of invoking the Enabling Clause in their panel requests.<sup>81</sup> The Panel understood the

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<sup>77</sup> (footnote original) Appellate Body Report, p. 14, DSR 1997:I, at 335. (See also, Appellate Body Report on *US – FSC (Article 21.5 – EC)*, para. 133; and Appellate Body Report on *India – Quantitative Restrictions*, para. 136).

<sup>78</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 104-105.

<sup>79</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 110 and 115.

<sup>80</sup> Panel Reports, *Brazil – Taxation*, para. 7.1048.

<sup>81</sup> Panel Reports, *Brazil – Taxation*, para. 7.1048.

Appellate Body's statements in *EC – Tariff Preferences* to indicate a distinction "between the burden on the complainant of 'raising' or 'invoking' the Enabling Clause, that involves the identification of the relevant provisions of the Enabling Clause with which the complaining parties consider the measure to be inconsistent, and the burden on the respondent of 'proving' that the relevant differential and more favourable treatment satisfies the requirements of the Enabling Clause."<sup>82</sup> The Panel elaborated that:

"From the foregoing, and in light of other comments made by the Appellate Body in *EC – Tariff Preferences*, the Panel understands that the issue of whether the Enabling Clause has been properly invoked by the complaining parties pertains to the jurisdiction of the Panel, and specifically whether the complaining parties' claim under Article I:1 of the GATT 1994 is within the Panel's terms of reference. Brazil has not clearly expressed its concerns with respect to the burden of invocation as a jurisdictional issue. Regardless, the Panel notes that a panel has a duty to address 'issues which go to the root of their jurisdiction ... if necessary, on their own motion – in order to satisfy themselves that they have authority to proceed'."<sup>83</sup>

55. The Panel proceeded to highlight that the Appellate Body's statements in *EC – Tariff Preferences* were in the context of a preferential scheme adopted by a developed country in favour of a developing country, and that it was clear that the measure was adopted pursuant to the Enabling Clause.<sup>84</sup> The Panel therefore considered that:

"[T]he burden of invoking the Enabling Clause is placed on the complaining party in situations where the complaining party is on notice that the challenged measure was adopted (and in the view of the adopting member, justified) under the Enabling Clause. In other words, a burden to invoke a particular provision of the Enabling Clause in a panel request could only be placed on a complaining party, if that complaining party was appropriately informed prior to the time of the panel request that the responding party considered the relevant measure to be adopted and justified pursuant to the Enabling Clause. Indeed, the Panel considers that an alternative approach could result in absurd outcomes, such as a complaining party invoking *all* the provisions of the Enabling Clause in its panel request in any dispute involving claims under Article I:1 of the GATT 1994, in order to resolve its burden of invocation, and guard against *all* possible defences raised by a responding party pursuant to the Enabling Clause."<sup>85</sup>

56. The Panel in *Brazil – Taxation* highlighted that "the only argument raised by Brazil in support of placing the burden of invocation on the complaining parties [wa]s that the relevant measures were notified to the WTO as adopted pursuant to the Enabling Clause."<sup>86</sup> In the Panel's view:

"[I]n situations where a WTO Member has notified a particular arrangement imposing discriminatory treatment as adopted or modified under the Enabling Clause, other WTO Members are presumed to be aware that the specific discriminatory treatment was adopted pursuant to the Enabling Clause. In such circumstances, in light of the Enabling Clause's special nature (as identified by the Appellate Body in *EC – Tariff Preferences*), it is reasonable to impose the burden of pleading specific provisions of the Enabling Clause on the party alleging that the particular differential treatment is inconsistent with Article I:1 of the GATT 1994."<sup>87</sup>

57. The Appellate Body in *Brazil – Taxation* agreed with the standard articulated by the Panel and pointed out that "a notification pursuant to paragraph 4(a) of the Enabling Clause speaks to and has a direct bearing on a complaining party's knowledge and, consequently, on its burden to

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<sup>82</sup> Panel Reports, *Brazil – Taxation*, para. 7.1059.

<sup>83</sup> Panel Reports, *Brazil – Taxation*, para. 7.1062.

<sup>84</sup> Panel Reports, *Brazil – Taxation*, para. 7.1063.

<sup>85</sup> Panel Reports, *Brazil – Taxation*, para. 7.1064.

<sup>86</sup> Panel Reports, *Brazil – Taxation*, para. 7.1065.

<sup>87</sup> Panel Reports, *Brazil – Taxation*, para. 7.1066.

raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request".<sup>88</sup> The Appellate Body reached this conclusion after analysing the text of paragraph 4(a):

"The use of the word 'shall' indicates that paragraph 4(a) imposes an obligation on a Member according differential and more favourable treatment to notify the WTO of the arrangement it has adopted. In addition to the obligation to notify the introduction of an arrangement, paragraph 4(a) also imposes an obligation on Members to notify any modification or the withdrawal of the arrangement according differential and more favourable treatment. Paragraph 4(a) thus envisages that, at all times, Members are kept informed of any changes to, including the withdrawal of, an arrangement according differential and more favourable treatment.

Moreover, we observe that paragraph 4(a) provides that a Member adopting an arrangement according differential and more favourable treatment 'furnish' Members 'with all the information they may deem appropriate' relating to the introduction, modification, or withdrawal of the arrangements adopted. This requirement to furnish 'all' the information suggests that a notification pursuant to paragraph 4(a) should be sufficiently detailed so as to put the Members on notice regarding any 'action' taken pursuant to paragraphs 1 through 3 of the Enabling Clause. The need for notifications under paragraph 4(a) to be sufficiently detailed is also borne out by the requirement to notify not only the introduction or withdrawal of an arrangement according differential and more favourable treatment but also of any modifications thereof.

...

Paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which provision of the Enabling Clause the differential and more favourable treatment has been adopted. Paragraph 4(a) indicates that arrangements or measures adopted under different subparagraphs of paragraph 2 would have to be notified to the WTO so as to put other Members on notice regarding the relevant differential and more favourable treatment sought to be accorded and justified under the Enabling Clause. In such circumstances, the mere procedural propriety of the notification itself, for example, in terms of 'whether such notification was ... sent by the right actor or body, under the right procedure, at the right time, etc.', is, however, not sufficient to dislodge the presumption that the complaining party is on notice that the responding party has adopted an arrangement or a measure that may be inconsistent with its obligations under Article I:1 of the GATT 1994, but that may nonetheless be justified under the Enabling Clause."<sup>89</sup>

#### **1.4.1.4 Paragraph 2(a)**

##### **1.4.1.4.1 "generalized"**

58. The Appellate Body addressed the meaning of the term "generalized" in footnote 3 to paragraph 2(a) as context for the interpretation of the term "non-discriminatory" in *EC – Tariff Preferences* and found that its ordinary meaning is to "apply more generally". The Appellate Body also took note of the historical context leading to this requirement:

"We continue our interpretive analysis by turning to the immediate context of the term 'non-discriminatory'. We note first that footnote 3 to paragraph 2(a) stipulates that, in addition to being 'non-discriminatory', tariff preferences provided under GSP schemes must be 'generalized'. According to the ordinary meaning of that term, tariff preferences provided under GSP schemes must be 'generalized' in the sense that they 'apply more generally; [or] become extended in application'. However, this ordinary meaning alone may not reflect the entire significance of the word 'generalized' in the context of footnote 3 of the Enabling Clause, particularly because that word resulted from lengthy negotiations leading to the GSP. In this regard, we note the Panel's finding that, by requiring tariff preferences under the GSP to be 'generalized', developed and developing countries together sought to eliminate existing 'special'

<sup>88</sup> Appellate Body Report, *Brazil – Taxation*, para. 5.366.

<sup>89</sup> Appellate Body Report, *Brazil – Taxation*, paras. 5.357-5.358 and 5.363.

preferences that were granted only to certain designated developing countries.<sup>90</sup> Similarly, in response to our questioning at the oral hearing, the participants agreed that one of the objectives of the 1971 Waiver Decision and the Enabling Clause was to eliminate the fragmented system of special preferences that were, in general, based on historical and political ties between developed countries and their former colonies".<sup>91</sup>

#### 1.4.1.4.2 "non-discriminatory"

59. In *EC – Tariff Preferences*, the European Communities appealed the Panel's findings based on the drafting history of the Generalized System of Preferences that the term "non-discriminatory" in footnote 3 to paragraph 2 of the Enabling Clause requires that identical tariff preferences be provided to all developing countries without differentiation, except as regards the implementation of *a priori* limitations.<sup>92</sup> While rejecting the Panel's findings, the Appellate Body interpreted the ordinary meaning of the term "non-discriminatory" as requiring that preference-giving countries make identical tariff preferences available to all similarly-situated beneficiary developing countries:

"[T]he ordinary meanings of 'discriminate' point in conflicting directions with respect to the propriety of according differential treatment. Under India's reading, any differential treatment of GSP beneficiaries would be prohibited, because such treatment necessarily makes a distinction between beneficiaries. In contrast, under the European Communities' reading, differential treatment of GSP beneficiaries would not be prohibited *per se*. Rather, distinctions would be impermissible only where the basis for such distinctions was improper. Given these divergent meanings, we do not regard the term 'non-discriminatory', on its own, as determinative of the permissibility of a preference-granting country according different tariff preferences to different beneficiaries of its GSP scheme.

Nevertheless, at this stage of our analysis, we are able to discern some of the content of the 'non-discrimination' obligation based on the ordinary meanings of that term. Whether the drawing of distinctions is *per se* discriminatory, or whether it is discriminatory only if done on an improper basis, the ordinary meanings of 'discriminate' converge in one important respect: they both suggest that distinguishing among similarly-situated beneficiaries is discriminatory. For example, India suggests that all beneficiaries of a particular Member's GSP scheme are similarly-situated, implicitly arguing that any differential treatment of such beneficiaries constitutes discrimination. ...

Paragraph 2(a), on its face, does not explicitly authorize or prohibit the granting of different tariff preferences to different GSP beneficiaries. It is clear from the ordinary meanings of 'non-discriminatory', however, that preference-granting countries must make available identical tariff preferences to all similarly-situated beneficiaries."<sup>93</sup>

60. After taking into account the stated objectives of the Preamble to the WTO Agreement, Appellate Body stated in *EC – Tariff Preferences* that the interpretation of the term "non-discriminatory" in the Enabling Clause should allow the possibility of additional preferences to be given to developing countries with particular needs:

"We are of the view that the objective of improving developing countries' 'share in the growth in international trade', and their 'trade and export earnings', can be fulfilled by promoting preferential policies aimed at those interests that developing countries have in common, *as well as* at those interests shared by sub-categories of developing countries based on their particular needs. An interpretation of 'non-discriminatory'

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<sup>90</sup> (*footnote original*) Panel Report, paras. 7.135-7.137. The Panel also observed that statements by developed and developing countries indicated the aim of providing GSP schemes with a broad scope, encompassing the granting of preferences by *all* developed countries to *all* developing countries. (*Ibid.*, paras. 7.131-7.132)

<sup>91</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 155.

<sup>92</sup> Panel Report, *EC – Tariff Preferences*, paras. 7.126-7.161.

<sup>93</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 152-154.



that does not require the granting of 'identical tariff preferences' allows not only for GSP schemes providing preferential market access to all beneficiaries, but also the possibility of additional preferences for developing countries with particular needs, provided that such additional preferences are not inconsistent with other provisions of the Enabling Clause, including the requirements that such preferences be 'generalized' and 'non-reciprocal'. We therefore consider such an interpretation to be consistent with the object and purpose of the *WTO Agreement* and the Enabling Clause."<sup>94</sup>

61. After considering its ordinary meaning, its context and the object and purpose of the WTO Agreement, the Appellate Body found in *EC – Tariff Preferences* that the term "non-discriminatory" in footnote 3 to paragraph 2 of the Enabling Clause requires that identical preference be made available to all similarly situated GSP beneficiaries that have the "development, financial and trade needs" to which the preference is intended to respond:

"Having examined the text and context of footnote 3 to paragraph 2(a) of the Enabling Clause, and the object and purpose of the *WTO Agreement* and the Enabling Clause, we conclude that the term 'non-discriminatory' in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the 'development, financial and trade needs' to which the treatment in question is intended to respond."<sup>95</sup>

62. The Appellate Body further found in *EC – Tariff Preferences* that due to the closed nature of the beneficiary list and the lack of objective criteria or standards in its GSP Regulation, the European Communities failed to make its special preferences (i.e., the Drug Arrangements) available to all similarly situated beneficiaries:

"We recall our conclusion that the term 'non-discriminatory' in footnote 3 of the Enabling Clause requires that identical tariff treatment be available to all similarly-situated GSP beneficiaries. We find that the measure at issue fails to meet this requirement for the following reasons. First, as the European Communities itself acknowledges, according benefits under the Drug Arrangements to countries other than the 12 identified beneficiaries would require an amendment to the Regulation. Such a 'closed list' of beneficiaries cannot ensure that the preferences under the Drug Arrangements are available to all GSP beneficiaries suffering from illicit drug production and trafficking.

Secondly, the Regulation contains no criteria or standards to provide a basis for distinguishing beneficiaries under the Drug Arrangements from other GSP beneficiaries. Nor did the European Communities point to any such criteria or standards anywhere else, despite the Panel's request to do so. As such, the European Communities cannot justify the Regulation under paragraph 2(a), because it does not provide a basis for establishing whether or not a developing country qualifies for preferences under the Drug Arrangements. Thus, although the European Communities claims that the Drug Arrangements are available to all developing countries that are 'similarly affected by the drug problem', because the Regulation does not define the criteria or standards that a developing country must meet to qualify for preferences under the Drug Arrangements, there is no basis to determine whether those criteria or standards are discriminatory or not."<sup>96</sup>

63. The Appellate Body also stated in *EC – Tariff Preferences* that in addition to the non-discriminatory requirement in paragraph 2(a), the Enabling Clause also sets out other conditions in paragraph 3(c) and 3(a) that must be complied with by any particular GSP preference scheme. However, the Appellate Body did not examine *per se* the consistency of the Drug Arrangements

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<sup>94</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 169.

<sup>95</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 173.

<sup>96</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 187-188.

with the conditions set out in paragraph 3(c) and 3(a) due to the fact that the Panel had not made findings in this regard:

"Although paragraph 3(c) informs the interpretation of the term 'non-discriminatory' in footnote 3 to paragraph 2(a), as detailed above, paragraph 3(c) imposes requirements that are separate and distinct from those of paragraph 2(a). We have already concluded that, where a developed-country Member provides additional tariff preferences under its GSP scheme to respond positively to widely-recognized 'development, financial and trade needs' of developing countries within the meaning of paragraph 3(c) of the Enabling Clause, this 'positive response' would not, as such, fail to comply with the 'non-discriminatory' requirement in footnote 3 of the Enabling Clause, even if such needs were not common or shared by all developing countries. We have also observed that paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members. With these considerations in mind, and recalling that the Panel made no finding in this case as to whether the Drug Arrangements are inconsistent with paragraphs 3(a) and 3(c) of the Enabling Clause, we limit our analysis here to paragraph 2(a) and do not examine *per se* whether the Drug Arrangements are consistent with the obligation contained in paragraph 3(c) to 'respond positively to the development, financial and trade needs of developing countries' or with the obligation contained in paragraph 3(a) not to 'raise barriers' or 'create undue difficulties' for the trade of other Members."<sup>97</sup>

#### **1.4.1.4.3 "developing countries"**

64. Based on its findings on the term "non-discriminatory" in footnote 3 of paragraph 2 and on its discussion of paragraph 3(c), the Appellate Body found in *EC – Tariff Preferences* that the phrase "developing countries" in paragraph 2 of the Enabling Clause does not mean "all developing countries":

"We have concluded, contrary to the Panel, that footnote 3 and paragraph 3(c) do *not* preclude the granting of differential tariffs to different sub-categories of GSP beneficiaries, subject to compliance with the remaining conditions of the Enabling Clause. We find, therefore, that the term 'developing countries' in paragraph 2(a) should not be read to mean 'all' developing countries and, accordingly, that paragraph 2(a) does not prohibit preference-granting countries from according different tariff preferences to different sub-categories of GSP beneficiaries."<sup>98</sup>

#### **1.4.1.5 Paragraph 2(b)**

65. The Panel in *Brazil – Taxation*, having determined that Brazil had failed to properly notify the relevant measure as adopted pursuant to paragraph 2(b) of the Enabling Clause, nevertheless felt it appropriate to assess "whether Brazil ha[d] demonstrated that the differential and more favourable treatment at issue could fit within the scope of paragraph 2(b), assuming it had been duly notified under paragraph 2(b)".<sup>99</sup> Brazil had argued that the measures at issue, certain tax reductions, fell within the scope of paragraph 2(b) because they were "internal taxes subject to Article III of the GATT 1994 and, consequently, [we]re subject to the MFN obligation under Article I:1 of the GATT 1994."<sup>100</sup> In Brazil's view, the internal taxes were NTMs "governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" because the GATT 1947 and GATT 1994 are multilaterally-negotiated instruments covering internal taxation, and there was no specific agreement in the WTO covering internal taxes.<sup>101</sup> The Panel rejected this argument:

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<sup>97</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 179. Actually, in this case, India had not challenged the inconsistency of the Drug Arrangements with either paragraph 3(c) or paragraph 3(a) during the proceedings. See, Appellate Body Report, *EC – Tariff Preferences*, para. 178.

<sup>98</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 175.

<sup>99</sup> Panel Reports, *Brazil – Taxation*, para. 7.1084.

<sup>100</sup> Panel Reports, *Brazil – Taxation*, para. 7.1086.

<sup>101</sup> Panel Reports, *Brazil – Taxation*, para. 7.1086.

"In the Panel's view, the term 'General Agreement' in paragraph 2(b) refers to the 'General Agreement on Tariffs and Trade 1947'. Applying the principle of effectiveness in treaty interpretation, by which the Panel must give meaning to all parts of paragraph 2(b), the Panel considers that the terms of paragraph 2(b) (referring to '[d]ifferential and more favourable treatment with respect to the provisions of the General Agreement concerning *non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT*'), at the time the Enabling Clause was adopted, meant non-tariff measures *other than* those non-tariff measures governed exclusively by the provisions of the GATT 1947. If at the time of its adoption paragraph 2(b) covered non-tariff measures governed exclusively by the provisions of the GATT 1947, then the second half of paragraph 2(b) would have been superfluous.<sup>102</sup> The Panel therefore considers that at the time of the Enabling Clause's initial adoption, the scope of paragraph 2(b) did *not* include non-tariff measures governed solely by the provisions of the GATT 1947.

Paragraph 1(a) of the language of Annex 1A incorporating the GATT 1994 into the WTO Agreement indicates that the GATT 1994 consists of, amongst other things, 'the provisions in the [GATT 1947]'. Indeed, the provisions of the GATT 1994 that Brazil relies on here, namely Article III:2 and III:4 of the GATT 1994, are substantively no different to Article III:2 and III:4 of the GATT 1947 as they existed at the time of the Enabling Clause's adoption. At the time of the Enabling Clause's adoption, these provisions would have been considered provisions of the 'General Agreement'. As indicated above, at the time of the Enabling Clause's adoption, non-tariff measures governed only by the provisions of the General Agreement and not by the Tokyo Round Codes would *not* have been covered by paragraph 2(b)."<sup>103</sup>

66. The Panel also referred to the historical context in which the Enabling Clause was adopted, in particular focusing on the context of the Tokyo Round of negotiations. The Panel explained that:

"[T]he Enabling Clause was adopted by the GATT Contracting Parties during the Tokyo Round of negotiations, an important element of which was the conclusion of a number of plurilateral agreements governing certain non-tariff measures, including subsidies and countervailing duties, standards, customs valuation, government procurement, import licensing, and anti-dumping duties. These agreements, the Tokyo Round 'Codes', also included a number of provisions on special and differential (S&D) treatment for developing countries. A Decision of the Contracting Parties adopted during the Tokyo Round states that 'existing rights and benefits under the GATT of contracting parties not being parties to [the Tokyo Round Codes], including those derived from Article I, are not affected by [the Tokyo Round Codes]'. This Decision explicitly recognized the continued applicability of the GATT MFN obligation in respect of those Contracting Parties that did not become party to the Tokyo Round Codes. In that context, paragraph 2(b) of the Enabling Clause clarifies that the S&D provisions in the Codes, as well as any measures adopted in accordance with those S&D provisions, were institutionally justified, notwithstanding the MFN principle in Article I:1 of the GATT 1947. The goal of paragraph 2(b) was therefore to institutionally link the S&D provisions in the Tokyo Round Codes with the general MFN obligation of the GATT 1947, such that a Contracting Party granting more favourable treatment to developing countries, in accordance with the S&D provisions contained in the Tokyo Round Codes, would not be subject to claims of inconsistency under Article I:1.

The Panel notes that paragraph 2(b) refers generally to 'non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT', and does not refer explicitly to S&D provisions. If paragraph 2(b) were interpreted to grant a general right to adopt any discriminatory non-tariff measures, insofar as those non-tariff measures are the subject matter of the general provisions

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<sup>102</sup> (*footnote original*) If paragraph 2(b) had read solely "differential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures" then its scope would necessarily have included both non-tariff measures governed exclusively by the provisions of the GATT 1947, and "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT". By virtue of the principle of effectiveness in treaty interpretation, the latter reference in paragraph 2(b) must be meaningful.

<sup>103</sup> Panel Reports, *Brazil – Taxation*, paras. 7.1089-7.1090.

of the Tokyo Round Codes, such an interpretation would render superfluous those specific S&D provisions that were provided at the time in the Tokyo Round Codes (and today in the multilateral trade agreements), that explicitly permitted (and today permit) limited deviations from the MFN principle in favour of developing countries. Bearing in mind the principle of effectiveness in treaty interpretation, the Panel therefore considers that the intended application of paragraph 2(b) must have been limited to the discrimination explicitly provided for in specific S&D provisions of the Tokyo Round Codes. In other words, paragraph 2(b) must have been intended to cover those situations in which specific 'differential and more favourable treatment' in favour of developing countries was 'governed by the provisions' of the Codes."<sup>104</sup>

67. The Appellate Body in *Brazil – Taxation* upheld the finding of the Panel that paragraph 2(b) of the Enabling Clause does not apply with respect to Articles III:2 and III:4 of the GATT 1994,<sup>105</sup> based on its interpretation of the text of paragraph 2(b). Specifically, the Appellate Body considered that if it were to read paragraph 2(b) as "extending to the adoption of differential and more favourable treatment concerning non-tariff measures governed by 'provisions of the General Agreement'" itself", "the latter part of paragraph 2(b) in referring to 'provisions of instruments multilaterally negotiated under the auspices of the GATT' would be deprived of any meaning."<sup>106</sup> In so finding, the Appellate Body also made reference to the contextual history surrounding the Enabling Clause, as did the Panel.<sup>107</sup> The Appellate Body concluded:

"These considerations, read in light of the text, context, and circumstances surrounding the adoption of the Enabling Clause and thereafter the establishment of the WTO, indicate that paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994. Instead, paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of 'instruments multilaterally negotiated under the auspices of the [WTO]'.<sup>108</sup> Brazil's contention that paragraph 2(b) applies to non-tariff measures taken pursuant to the provisions of the GATT 1994 incorporating the GATT 1947, in our view, calls for paragraph 2(b) to be given a meaning that was not ascribed to it either at the time of its adoption or thereafter with the establishment of the WTO. We therefore uphold the Panel's finding, in paragraph 7.1096 of the Panel Reports, that 'a non-tariff measure within the scope of paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947.'<sup>109</sup>

#### 1.4.1.6 Paragraph 2(c)

68. In *Brazil – Taxation*, Brazil argued that certain tax reductions accorded to motor vehicles from Argentina, Mexico and Uruguay, and found to be inconsistent with Article I:1 of the GATT 1994, were justified under paragraph 2(c) of the Enabling Clause because the differential treatment was adopted pursuant to the Treaty of Montevideo, which was notified to the WTO as adopted pursuant to paragraph 2(c) of the Enabling Clause.<sup>110</sup> Brazil argued that four specific regional trade agreements, or Economic Complementations Agreements (ECAs), were negotiated under the auspices of the Treaty of Montevideo and in order to pursue the objectives of the Treaty of Montevideo.<sup>111</sup> The Panel considered it relevant to assess, as a threshold issue, "whether the notification of the Treaty of Montevideo and the ECAs could substantively serve as a notification of the adoption under paragraph 2(c) of the Enabling Clause of the arrangement introducing the differential and more favourable treatment (in the form of tax treatment) found to be inconsistent with Article I:1 of the GATT 1994."<sup>112</sup> The Panel concluded that:

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<sup>104</sup> Panel Reports, *Brazil – Taxation*, paras. 7.1092-7.1093.

<sup>105</sup> Appellate Body Report, *Brazil – Taxation*, para. 5.415.

<sup>106</sup> Appellate Body Report, *Brazil – Taxation*, para. 5.407.

<sup>107</sup> Appellate Body Report, *Brazil – Taxation*, paras. 5.408 – 5.411.

<sup>108</sup> (*footnote original*) This reading of paragraph 2(b) of the Enabling Clause does not, however, affect the S&D treatment provisions contained in the other multilateral agreements on trade in goods in Annex 1A to the WTO Agreement. The S&D treatment provisions of these multilateral agreements on trade in goods apply in their own right in the context of their respective agreements as among all WTO Members.

<sup>109</sup> Appellate Body Report, *Brazil – Taxation*, para. 5.414.

<sup>110</sup> Panel Reports, *Brazil – Taxation*, paras. 7.1100 and 7.1103-7.1104.

<sup>111</sup> Panel Reports, *Brazil – Taxation*, para. 7.1111.

<sup>112</sup> Panel Reports, *Brazil – Taxation*, para. 7.1105.

"[O]ther WTO Members could not have been expected to be informed that Brazil intended to accord internal tax reductions to motor vehicles from Argentina, Mexico and Uruguay, and not to motor vehicles from other WTO Members. Brazil has not demonstrated how the relevant tax reductions found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA that Brazil has notified to the WTO (the Treaty of Montevideo) or the ECAs allegedly implementing that RTA."<sup>113</sup>

69. The Appellate Body in *Brazil – Taxation* upheld the Panel's finding that the measures at issue were not justified under paragraph 2(c) of the Enabling Clause and thus were inconsistent with Article I:1 GATT. Yet, it only upheld the Panel's analysis of the substantive requirements of paragraph 2(c), "to the extent that the Panel found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the INOVAR-AUTO programme". That is, the Appellate Body disagreed with the Panel's view that in addition to a genuine link, a close link should also exist between the differential treatment and the arrangement at issue:

"[P]aragraph 2(c) adds that the 'mutual reduction or elimination of non-tariff measures' have to be 'in accordance with criteria or conditions which may be prescribed' by the WTO Members. Paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they may deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, it suffices that the instrument adopted that way, to be justified under paragraph 2(c) for the differential and more favourable treatment it accords, has a 'genuine' link or a rational connection with the regional or global arrangement adopted and notified to the WTO. Therefore, we disagree with the Panel to the extent it considered that, in order for any differential and more favourable treatment to be justified under paragraph 2(c), there must exist both a 'close' and 'genuine' link to a 'regional arrangement entered into amongst' developing country Members.

...

Therefore, to the extent that the Panel relied on its earlier analysis concerning whether or not the INOVAR-AUTO programme, which accords the differential and more favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions accorded to some but not other Members), had a genuine link to 'the arrangement notified to the WTO' in determining if the differential and more favourable tax treatment was substantively justified under paragraph 2(c), we find no error in the Panel's approach. The considerations outlined by the Panel in that part of its analysis were bound to have a substantial bearing on whether or not the differential and more favourable treatment under the INOVAR-AUTO programme was substantively justified under paragraph 2(c), given the manner in which Brazil framed its arguments before the Panel. Indeed, if there is no genuine link between the measure at issue according the differential and more favourable treatment and the arrangements notified to the WTO, it is difficult to see how the measure at issue could be substantively justified under paragraph 2(c)."<sup>114</sup>

#### **1.4.1.7 Relationship between paragraphs 2(a) and 2(d)**

70. The Appellate Body stated in *EC – Tariff Preferences* that paragraph 2(d) is not an exception to paragraph 2(a) of the Enabling Clause. Rather, it found that by virtue of paragraph 2(d), preference-giving countries need not establish that the differentiation between developing and the least-developed countries is "non-discriminatory":

"We do not agree with the Panel that paragraph 2(d) is an 'exception' to paragraph 2(a), or that it is rendered redundant if paragraph 2(a) is interpreted as allowing developed countries to differentiate in their GSP schemes between developing countries. To begin with, we note that the terms of paragraph 2 do not expressly indicate that each of the four sub-paragraphs thereunder is mutually exclusive, or that any one is an exception to any other. Moreover, in our view, it is clear from several provisions of the Enabling Clause that the drafters wished to emphasize that least-

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<sup>113</sup> Panel Reports, *Brazil – Taxation*, para. 7.1115.

<sup>114</sup> Appellate Body Report, *Brazil – Taxation*, paras. 5.423 and 5.426.

developed countries form an identifiable sub-category of developing countries with 'special economic difficulties and ... particular development, financial and trade needs'.<sup>115</sup> When a developed-country Member grants tariff preferences in favour of developing countries under paragraph 2(a), as we have already found, footnote 3 imposes a requirement that such preferences be 'non-discriminatory'. In the absence of paragraph 2(d), a Member granting preferential tariff treatment only to least-developed countries would therefore need to establish, under paragraph 2(a), that this preferential treatment did not 'discriminate' against other developing countries contrary to footnote 3. The inclusion of paragraph 2(d), however, makes clear that developed countries may accord preferential treatment to least-developed countries distinct from the preferences granted to other developing countries under paragraph 2(a). Thus, pursuant to paragraph 2(d), preference-granting countries need not establish that differentiating between developing and least-developed countries is 'non-discriminatory'. This demonstrates that paragraph 2(d) does have an effect that is different and independent from that of paragraph 2(a), even if the term 'non-discriminatory' does not require the granting of 'identical tariff preferences' to all GSP beneficiaries."<sup>116</sup>

#### 1.4.1.8 Paragraph 3(a)

71. The Appellate Body found in *EC – Tariff Preferences* although there was a requirement of non-discrimination, this did not mean that identical tariff preferences should be granted to "all" developing countries. The Appellate Body concluded that the Enabling Clause contains sufficient other conditions on the granting of preferences, including those under paragraph 3(a), to guard against such a conclusion:

"It does not necessarily follow, however, that 'non-discriminatory' should be interpreted to require that preference-granting countries provide 'identical' tariff preferences under GSP schemes to 'all' developing countries. In concluding otherwise, the Panel assumed that allowing tariff preferences such as the Drug Arrangements would necessarily 'result [in] the collapse of the whole GSP system and a return back to special preferences favouring selected developing countries'.<sup>117</sup> To us, this conclusion is unwarranted. We observe that the term 'generalized' requires that the GSP schemes of preference-granting countries remain generally applicable.<sup>118</sup> Moreover, unlike the Panel, we believe that the Enabling Clause sets out sufficient conditions on the granting of preferences to protect against such an outcome. As we discuss below, provisions such as paragraphs 3(a) and 3(c) of the Enabling Clause impose specific conditions on the granting of different tariff preferences among GSP beneficiaries."<sup>119</sup>

72. The Appellate Body stated in *EC – Tariff Preferences* that paragraph 3(a) requires that any positive response of a preference-giving country to the varying needs of developing countries not impose unjustifiable burdens on other Members:

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<sup>115</sup> (*footnote original*) Enabling Clause, para. 6 (attached as Annex 2 to this Report). Similarly, paragraph 8 of the Enabling Clause refers to the "special economic situation and [the] development, financial and trade needs" of least-developed countries.

<sup>116</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 172.

<sup>117</sup> (*footnote original*) Panel Report, para. 7.102.

<sup>118</sup> (*footnote original*) The European Communities argues in this respect that the GATT Contracting Parties and the WTO Members have granted a number of waivers, as mentioned in the Panel Report, for tariff preferences that are "confined *ab initio* and permanently to a limited number of developing countries located in a certain geographical region". (European Communities' appellant's submission, paras. 184-185 (referring to Panel Report, para. 7.160)) See also, Panel Report, footnote 31 to para. 4.32 (referring to Waiver Decision on the Caribbean Basin Economic Recovery Act, GATT Document L/5779, 15 February 1985, BISD 31S/20, renewed 15 November 1995, WT/L/104; Waiver Decision on CARIBCAN, GATT Document L/6102, 28 November 1986, BISD 33S/97, renewed 14 October 1996, WT/L/185; Waiver Decision on the United States – Andean Trade Preference Act, GATT Document L/6991, 19 March 1992, BISD 39S/385, renewed 14 October 1996, WT/L/184; Waiver Decision on The Fourth ACP-EEC Convention of Lomé, GATT Document L/7604, 9 December 1994, BISD 41S/26, renewed 14 October 1996, WT/L/186; and Waiver Decision on European Communities – The ACP-EC Partnership Agreement, WT/MIN (01)/15, 14 November 2001.

<sup>119</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 156.

"Finally, we note that, pursuant to paragraph 3(a) of the Enabling Clause, any 'differential and more favourable treatment ... shall be designed to facilitate and promote the trade of developing countries and not to raise barriers to or create undue difficulties for the trade of any other contracting parties.' This requirement applies, *a fortiori*, to any preferential treatment granted to one GSP beneficiary that is not granted to another. Thus, although paragraph 2(a) does not prohibit *per se* the granting of different tariff preferences to different GSP beneficiaries, and paragraph 3(c) even contemplates such differentiation under certain circumstances, paragraph 3(a) requires that any positive response of a preference-granting country to the varying needs of developing countries not impose unjustifiable burdens on other Members."<sup>120</sup>

#### 1.4.1.9 Paragraph 3(c)

73. The Appellate Body stated in *EC – Tariff Preferences* that in the light of one of the stated objectives of the Preamble to the WTO Agreement, the text of paragraph 3(c) authorizes preference-giving countries to treat different developing countries differently:

"[T]he Preamble to the *WTO Agreement*, which informs all the covered agreements including the GATT 1994 (and, hence, the Enabling Clause), explicitly recognizes the 'need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'. The word 'commensurate' in this phrase appears to leave open the possibility that developing countries may have different needs according to their levels of development and particular circumstances. The Preamble to the *WTO Agreement* further recognizes that Members' 'respective needs and concerns at different levels of economic development' may vary according to the different stages of development of different Members.

In sum, we read paragraph 3(c) as authorizing preference-granting countries to 'respond positively' to 'needs' that are *not* necessarily common or shared by all developing countries. Responding to the 'needs of developing countries' may thus entail treating different developing-country beneficiaries differently."<sup>121</sup>

74. The Appellate Body in *EC – Tariff Preferences* also stated that paragraph 3(c) requires that a response to particular "development, financial and trade needs" must be based on an objective standard. These standards could be those particular needs as broadly recognized and explicitly set out in the WTO Agreement or in multilateral instruments adopted by international organizations. It also stated that in order to make the "response" "positive", sufficient nexus should exist between the preferential treatment and the likelihood of alleviating the relevant need:

"At the outset, we note that the use of the word 'shall' in paragraph 3(c) suggests that paragraph 3(c) sets out obligations for developed-country Members in providing preferential treatment under a GSP scheme to 'respond positively' to the 'needs of developing countries'. ...

...

However, paragraph 3(c) does not authorize *any* kind of response to *any* claimed need of developing countries. First, we observe that the types of needs to which a response is envisaged are limited to 'development, financial and trade needs'. In our view, a 'need' cannot be characterized as one of the specified 'needs of developing countries' in the sense of paragraph 3(c) based merely on an assertion to that effect by, for instance, a preference-granting country or a beneficiary country. Rather, when a claim of inconsistency with paragraph 3(c) is made, the existence of a 'development, financial [or] trade need' must be assessed according to an *objective* standard. Broad-based recognition of a particular need, set out in the *WTO Agreement* or in

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<sup>120</sup> Appellate Body Report, *EC – Tariff Preferences*, para. 167.

<sup>121</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 161-162.

multilateral instruments adopted by international organizations, could serve as such a standard.

Secondly, paragraph 3(c) mandates that the response provided to the needs of developing countries be 'positive'. 'Positive' is defined as 'consisting in or characterized by constructive action or attitudes'. This suggests that the response of a preference-granting country must be taken with a view to *improving* the development, financial or trade situation of a beneficiary country, based on the particular need at issue. As such, in our view, the expectation that developed countries will 'respond positively' to the 'needs of developing countries' suggests that a sufficient nexus should exist between, on the one hand, the preferential treatment provided under the respective measure authorized by paragraph 2, and, on the other hand, the likelihood of alleviating the relevant 'development, financial [or] trade need'. In the context of a GSP scheme, the particular need at issue must, by its nature, be such that it can be effectively addressed through tariff preferences. Therefore, only if a preference-granting country acts in the 'positive' manner suggested, in 'respon[se]' to a widely-recognized 'development, financial [or] trade need', can such action satisfy the requirements of paragraph 3(c)."<sup>122</sup>

#### 1.4.1.10 Paragraph 4(a)

75. In *Brazil – Taxation*, the Panel and the Appellate Body addressed the issue of whether the notification of a measure pursuant to one provision of the Enabling Clause can also serve as a notification under a *different* provision of the Enabling Clause. In that dispute, Brazil argued that "the notification of the Treaty of Montevideo under paragraph 2(c) [wa]s sufficient to satisfy the notification requirement for an arrangement adopted pursuant to paragraph 2(b)".<sup>123</sup> The Panel considered that "the object and purpose of notification (namely informing other Members about the measures to be taken, and giving them the opportunity to question the deviation from the MFN obligation) would be circumvented if Members could initially notify an arrangement under one provision, but later justify it in dispute settlement under another provision"<sup>124, 125</sup> The Panel added:

"Furthermore, and bearing in mind the allocation of burden of invoking the Enabling Clause described in paragraphs 7.1059 to 7.1060 above, permitting notification under *one* provision of the Enabling Clause to suffice for notification under *all* provisions of the Enabling Clause could result in undesirable outcomes. In order to comply with the Appellate Body's standard in respect of burden of invocation, in cases where the responding Member has notified the challenged arrangement under a particular provision, a complaining party would be at risk of failing to meet its burden of invocation if it only identifies the notified provision in its panel request, and the responding party subsequently seeks to justify the arrangement under a different provision. Thus, complaining parties would have an incentive to invoke the entirety of paragraph 2 of the Enabling Clause in their panel requests, resulting in *less* clarity for responding parties."<sup>126</sup>

76. On appeal, the Appellate Body disagreed with the Panel's statement that paragraph 4(a) does not explicitly indicate what precisely needs to be notified, however agreed with the Panel's conclusion that the notification of a measure adopted under one provision of the Enabling clause cannot "serve equally as a notification of that measure being adopted under another provision of the Enabling Clause, unless indicated in the notification itself".<sup>127</sup>

77. The Panel further considered that this logic was reflected in two General Council decisions that "pertain to the notification requirement in the Enabling Clause". The Panel stated that:

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<sup>122</sup> Appellate Body Report, *EC – Tariff Preferences*, paras. 158, 163 and 164.

<sup>123</sup> Panel Reports, *Brazil – Taxation*, para. 7.1075.

<sup>124</sup> (*footnote original*) The Panel notes that the purpose of "questioning" a deviation is irrelevant if the deviation is to be justified under an entirely different provision to that under which it is *claimed* to be justified.

<sup>125</sup> Panel Reports, *Brazil – Taxation*, para. 7.1077.

<sup>126</sup> Panel Reports, *Brazil – Taxation*, para. 7.1078.

<sup>127</sup> Appellate Body Report, *Brazil – Taxation*, paras. 5.375-5.376.



"Specifically, the Transparency Mechanism for Preferential Trade Arrangements, adopted on 14 December 2010, contains procedures for notifying so-called "preferential trade arrangements" (PTAs) adopted pursuant to paragraph 2(a), (b) or (d) of the Enabling Clause. The Transparency Mechanism for PTAs indicates in paragraph 4 that '[n]otifying Members shall specify under which provision or provisions in paragraph 1 their PTAs are notified.' Similarly, the Transparency Mechanism for Regional Trade Agreements, adopted on 14 December 2006, contains procedures for notifying "regional trade agreements" (RTAs) adopted pursuant to paragraph 2(c) of the Enabling Clause. Paragraph 4 of that Transparency Mechanism indicates that "[i]n notifying their RTA, the parties shall specify under which provision(s) of the WTO agreements it is notified." Both Transparency Mechanisms indicate that Members notifying an RTA or PTA must specify under which precise provision of the Enabling Clause the RTA or PTA is being notified. Thus, per the plain language of the Transparency Mechanisms, a notification under one provision of the Enabling Clause is *not* sufficient to serve as a notification under another provision of the Enabling Clause. In the view of the Panel, the Transparency Mechanisms serve to further confirm, at least in respect of those alleged notifications that took place *subsequent* to the adoption of one or both transparency mechanisms, that paragraph 4(a) does not permit a notification of a measure adopted [under] one provision of the Enabling Clause to function as a notification of adoption of that same measure under another provision of the Enabling Clause."<sup>128</sup>

78. In *Brazil – Taxation*, Brazil also argued that certain tax reductions accorded to motor vehicles from Argentina, Mexico and Uruguay, and found to be inconsistent with Article I:1 of the GATT 1994, were justified under paragraph 2(c) of the Enabling Clause because the differential treatment was adopted pursuant to the Treaty of Montevideo, which was notified to the WTO as adopted pursuant to paragraph 2(c).<sup>129</sup> The Panel explained that:

"In the view of the Panel, in order for all WTO Members to be put on notice as to the differential and more favourable treatment being introduced by the adopting Member, there must be a clear connection between the RTA itself and the differential and more favourable treatment being adopted. In the Panel's view, the differential and more favourable treatment sought to be justified under paragraph 2(c) must have a close and genuine link to the arrangement notified to the WTO *such as to put other WTO Members on notice* as to the adoption of the differential and more favourable treatment pursuant to the Enabling Clause. The key question in respect of the notification requirement for paragraph 2(c) is therefore whether the RTA notified to the WTO put the rest of the Membership on notice as to the adoption of the particular differential and more favourable treatment sought to be justified under paragraph 2(c)."<sup>130</sup>

79. The Panel proceeded to assess Brazil's argument that the tax reductions were implementation measures of the Treaty of Montevideo, and that the specific regional trade agreements (so-called Economic Complementation Agreements (ECAs)) providing for the tax reductions were negotiated under the auspices of the Treaty of Montevideo. The Panel considered that:

"[N]one of the provisions cited to in the Treaty of Montevideo bear the slightest relation in and of themselves, to the internal tax reductions found to be inconsistent with Article I:1 of the GATT 1994. Furthermore, Brazil has not pointed to a single provision of any ECA that would attest to the fundamental premise of Brazil's argument, namely that the INOVAR-AUTO programme is implementing the objectives of the ECAs. Indeed, in its own review of the evidence before it, the Panel could not discern any such relationship: the MERCOSUR Treaty is completely silent with respect to the automotive industry; and while ECAs No. 55, No. 14 and No. 2 refer to trade in the automotive sector, they do not refer to internal taxation."<sup>131</sup>

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<sup>128</sup> Panel Reports, *Brazil – Taxation*, para. 7.1080.

<sup>129</sup> Panel Reports, *Brazil – Taxation*, paras. 7.1100 and 7.1103-7.1104.

<sup>130</sup> Panel Reports, *Brazil – Taxation*, para. 7.1108.

<sup>131</sup> Panel Reports, *Brazil – Taxation*, para. 7.1115.

80. The Panel also examined the content of the ECAs, including several provisions in the ECAs related to tariff reductions in the context of the automotive sector. The Panel concluded that:

"[A]ll of these provisions are indicative of tariff preferences granted by Brazil to Mexico, Argentina and Uruguay. However, these provisions do not refer to internal taxation. Moreover, the Panel could not find any provision authorizing Brazil to adopt any preferential treatment it wishes towards products imported from those countries. In this respect, the Panel notes that the Enabling Clause contains four distinct subparagraphs defining its scope of application, and that these paragraphs distinguish between 'tariff' measures (as referred to in paragraph 2(a), and the first clause of paragraph 2(c), of the Enabling Clause) and 'non-tariff' measures (as referred to in paragraph 2(b) and the second clause of paragraph 2(c)). Without prejudice to the issue of whether an internal tax measure could be considered a 'non-tariff measure', the Panel does not consider that internal tax preferences are the same as tariff preferences.

In the view of the Panel, on the basis of the evidence and arguments before it, other WTO Members could not have been expected to be informed that Brazil intended to accord internal tax reductions to motor vehicles from Argentina, Mexico and Uruguay, and not to motor vehicles from other WTO Members. Brazil has not demonstrated how the relevant tax reductions found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA that Brazil has notified to the WTO (the Treaty of Montevideo) or the ECAs allegedly implementing that RTA."<sup>132</sup>

#### **1.4.2 Anti-dumping and countervailing duties**

81. In *Brazil – Coconut*, the Appellate Body upheld the Panel's finding that the applicability of GATT Article VI to a countervailing duty investigation also determined the applicability of GATT Articles I and II. The panel had found that Article VI of the GATT 1994 did not apply to a countervailing duty measure that was the result of an investigation initiated prior to 1 January 1995, and as a consequence, claims under Articles I and II based on claims of inconsistency with GATT Article VI could not succeed.<sup>133</sup>

82. In *EC – Fasteners*, the Appellate Body examined a Panel finding that an EC anti-dumping Regulation applying only to imports from non-market economy countries violated the MFN obligation of Article I:1; the complaining party, China, had not raised a claim under Article VI in respect of the measure at issue. The Appellate Body declined to rule on this finding and declared it moot and of no legal effect<sup>134</sup>, observing:

"Article VI of the GATT 1994 permits the imposition of anti-dumping duties, which may otherwise be inconsistent with other provisions of the GATT 1994, such as Article I:1. Therefore, in our view, a preliminary question to be addressed before determining whether an anti-dumping duty has been imposed inconsistently with Article I:1 of the GATT 1994 is whether the anti-dumping duty had been imposed consistently with Article VI of the GATT 1994.

...

... [I]t was not argued before the Panel and it is not disputed before us whether Article 9(5) of the Basic AD Regulation is applied consistently with the provisions of Article VI of the GATT 1994. This has significant implications for the question of whether Article 9(5) of the Basic AD Regulation is inconsistent with Article I:1 of the GATT 1994.

... The Panel did not engage with the implications of the absence of a claim under Article VI of the GATT 1994 for a claim under Article I:1 of the GATT 1994. Nor did the Panel consider the relationship between Article VI of the GATT 1994 and the provisions of the *Anti-Dumping Agreement*, which according to Article 1 of the *Anti-Dumping Agreement* 'govern the application of, Article VI of the GATT 1994'. We thus

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<sup>132</sup> Panel Reports, *Brazil – Taxation*, paras. 7.1114-7.1115.

<sup>133</sup> Appellate Body Report, *Brazil – Coconut*, paras. 280-281.

<sup>134</sup> Appellate Body Report, *EC – Fasteners*, para. 398.

consider that the Panel's finding under Article I:1 of the GATT 1994 lacks an essential step in the sequence of its legal analysis, that is, the determination of whether and under what circumstances an anti-dumping measure that is inconsistent with the *Anti-Dumping Agreement* may be reviewed under Article I:1 of the GATT 1994 in the absence of a review under Article VI of the GATT 1994."<sup>135</sup>

#### **1.4.3 Frontier traffic, customs unions and free trade areas**

83. In *Canada – Autos*, Canada invoked an Article XXIV exception with respect to a certain import duty exemption which had been found inconsistent with GATT Article I. The Panel rejected this defence, because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.<sup>136</sup> Since Canada did not appeal this finding of the Panel, the Appellate Body did not address the issue.

### **1.5 Relationship with other GATT provisions**

#### **1.5.1 Article II**

84. In *EU – Footwear (China)* the respondent, the European Union, argued that "if the AD Agreement permits WTO Members to subject the right to an individual margin of dumping to the fulfilment of certain conditions in investigation involving NMEs, there can be no violation of Article I:1 of the GATT 1994 by virtue of the *lex specialis* principle and Article II:2(b) of the GATT 1994".<sup>137</sup> The Panel stated:

"We do not agree that Article II:2(b) of the GATT 1994 limits the scope of Article I:1. The chapeau of Article II:2(b) states: 'Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product ... any anti-dumping ... duty applied consistently with the provisions of Article VI'. It is thus clear that Article II:2(b) refers only to Article II of the GATT 1994, establishing a 'safe harbour' for anti-dumping measures applied consistently with the provisions of Article VI of the GATT 1994 from the provisions of Articles II:1(a) and (b) governing the maximum amounts of customs duties. Finally, we recall that the General Interpretative Note to Annex 1A of the WTO Agreement provides that, in case of a conflict between a provision of the AD Agreement and a provision of the GATT 1994, the former shall prevail to the extent of the conflict. The European Union attempts to apply this conflict rule to argue that, where something is permitted under the AD Agreement, this permission prevails over the prohibition on discrimination set out in Article I:1 of the GATT 1994. We disagree with this proposition. In our view, there is no conflict between the AD Agreement and the GATT 1994 in this case. That is, we see nothing that would prevent a Member from complying with both its obligations under the AD Agreement and Article I:1 of the GATT 1994, and therefore there is no need to resort to either the *lex specialis* principle or the General Interpretative Note to resolve a conflict between the two."<sup>138</sup>

#### **1.5.2 Article III**

85. In *US – Gasoline*, with respect to the relationship between Articles I and III, the Panel considered:

"[The Panel's] findings on treatment under the baseline establishment methods under Articles III:4 and XX (b), (d) and (g) would in any case have made unnecessary the examination of the 75 percent rule under Article I:1."<sup>139</sup>

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<sup>135</sup> Appellate Body Report, *EC – Fasteners*, paras. 388, 395.

<sup>136</sup> Panel Report, *Canada – Autos*, paras. 10.55-10.56.

<sup>137</sup> Panel Report, *EU – Footwear (China)*, para. 7.104.

<sup>138</sup> Panel Report, *EU – Footwear (China)*, para. 7.104.

<sup>139</sup> Panel Report, *US – Gasoline*, para. 6.19.

### 1.5.3 Article VI

86. The Panel in *Brazil – Desiccated Coconut* found that because Article VI of the GATT 1994 did not constitute applicable law for the purposes of the dispute, the claims made under Articles I and II of the GATT 1994, which were derived from claims of inconsistency with Article VI of the GATT 1994, could not succeed.<sup>140</sup> The Appellate Body in *Brazil – Desiccated Coconut* confirmed this finding.<sup>141</sup>

87. In *EC – Fasteners*, the Appellate Body found:

"Article VI of the GATT 1994 permits the imposition of anti-dumping duties, which may otherwise be inconsistent with other provisions of the *GATT 1994*, such as Article I:1. Therefore, in our view, a preliminary question to be addressed before determining whether an anti-dumping duty has been imposed inconsistently with Article I:1 of the GATT 1994 is whether the anti-dumping duty had been imposed consistently with Article VI of the *GATT 1994*."<sup>142</sup>

88. The Appellate Body considered that the Panel's finding that a particular EC measure violates Article I:1 "lacks an essential step in the sequence of its legal analysis" because China had not claimed that the measure at issue violated Article VI and the parties did not present arguments regarding the relationship between the Anti-Dumping Agreement and GATT Articles VI and I. The Appellate Body then ruled that the Panel findings that the EC measure violated Article I:1 were "moot and of no effect".<sup>143</sup>

### 1.5.4 Article X

89. In *US – OCTG (Korea)*, Korea argued that, in an anti-dumping investigation, the United States' investigating authority (USDOC) had acted inconsistently with Article X:3(a) of the GATT 1994 by denying "an opportunity to the Korean respondents to submit rebuttal facts in the underlying investigation while granting the respondents in the Turkish investigation an opportunity to do so."<sup>144</sup> Korea also argued that this was inconsistent with Article I:1 of the GATT 1994, because "it discriminated against the Korean respondents".<sup>145</sup> The Panel rejected Korea's claim under Article X:3(a), on the grounds that, "[t]he fact that the opportunity to provide rebuttal facts was available to interested parties under different US domestic regulations in the Turkish and in the underlying investigation does not establish that the Korean respondents in the underlying investigation were treated differently from the interested parties in the Turkish investigation."<sup>146</sup> In respect of the claim under Article I:1, the Panel found that, "[c]onsidering that Korea's Article I:1 claim rests on the same factual basis, we conclude that Korea has also failed to establish the factual basis of its claim under Article I:1 of the GATT 1994. Therefore, we reject Korea's claim under Article I:1 of the GATT 1994."<sup>147</sup>

### 1.5.5 Article XI

90. In *US – Shrimp*, with respect to the relationship between Articles I and XI, the Panel stated:

"Given our conclusion in paragraph 7.17 above that Section 609 violates Article XI:1, we consider that it is not necessary for us to review the other claims of the complainants with respect to Articles I:1 and XIII:1. This is consistent with GATT<sup>148</sup> and WTO<sup>149</sup> panel practice and has been confirmed by the Appellate Body in its report in the *Wool Shirts* case, where the Appellate Body mentioned that 'A panel need only

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<sup>140</sup> Panel Report, *Brazil – Desiccated Coconut*, para. 281.

<sup>141</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 21.

<sup>142</sup> Appellate Body Report, *EC – Fasteners*, para. 392.

<sup>143</sup> Appellate Body Report, *EC – Fasteners*, paras. 395-398.

<sup>144</sup> Panel Report, *US – OCTG (Korea)*, para. 7.326.

<sup>145</sup> Panel Report, *US – OCTG (Korea)*, para. 7.352.

<sup>146</sup> Panel Report, *US – OCTG (Korea)*, para. 7.333.

<sup>147</sup> Panel Report, *US – OCTG (Korea)*, para. 7.353.

<sup>148</sup> (footnote original) See, e.g., Panel Report, *Canada – FIRA*, para. 5.16.

<sup>149</sup> (footnote original) See, e.g., Panel Report, *Brazil – Desiccated Coconut*, para. 293.

address those claims which must be addressed in order to resolve the matter in issue in the dispute'.<sup>150</sup>

Therefore we do not find it necessary to review the allegations of the complainants with respect to Articles I:1 and XIII:1. On the basis of our finding of violation of Article XI:1, we move to address the defence of the United States under Article XX."<sup>151</sup>

### 1.5.6 Article XIII

91. In *EC – Bananas III*, the European Communities argued that a violation of Article XIII in respect of its tariff regime for bananas was covered by the Lomé waiver, whereby the provisions of Article I:1 of the GATT 1994 were waived in respect of the allocation of country-specific tariff quotas for bananas to certain countries. Although the Panel agreed with this argument, on appeal, the Appellate Body reversed this conclusion, finding that the Lomé waiver waives only the provisions of Article I:1.<sup>152</sup> The Appellate Body stated:

"We consider that the notion of 'non-discrimination' in the application of tariffs under Article I:1 and the notion of non-discriminatory application of a 'prohibition or restriction' under Article XIII are distinct, and that Article XIII ensures that a Member applying a restriction or prohibition does not discriminate among all other Members. Article I:1, which applies to tariffs, and Article XIII:1, which applies to quantitative restrictions and tariff quotas, may apply to different elements of a measure or import regime. Article XIII adapts the MFN-treatment principle to specific types of measures, that is, quantitative restrictions, and, by virtue of Article XIII:5, tariff quotas. Tariff quotas must comply with the requirements of both Article I:1 and Article XIII of the GATT 1994. This, in our view, does not make Article XIII redundant in respect of tariff quotas: if a Member imposes differential in-quota duties on imports of like products from different supplier countries under a tariff quota, Article I:1 would be implicated; if that Member fails to give access to or allocate tariff quota shares on a non-discriminatory basis among supplier countries, the requirements of Articles XIII:1 and XIII:2 would apply. In the absence of Article XIII, Article I would not provide specific guidance on how to administer tariff quotas in a manner that avoids discrimination in the allocation of shares."<sup>153</sup>

92. In *EU – Poultry Meat (China)*, the Panel noted that the complainant, China, had not argued that the challenged tariff rate quotas "impose[d] 'differential in-quota duties on imports of like products from different supplier countries under a tariff quota'", but rather had made a claim under Article I:1 "based on essentially the same elements as its claims regarding the TRQ allocation under Article XIII:2, simply articulated in a more general way".<sup>154</sup> The Panel nevertheless noted China's argument that the allocation of tariff rate quotas was "disproportionate". The Panel found:

"Given that China argues that its claims under Article I:1 are 'independent legal claims' that are 'not a consequential claim that depends on the outcome of claims under Articles XIII or XXVIII', it might be surmised that in China's view, whether a TRQ allocation is "disproportionate" under Article I:1 is to be assessed on a basis that is different from the TRQ allocation rules set forth in Article XIII:2. However, China has not elaborated its argument beyond stating that the TRQ allocation is 'disproportionate'. We see no basis in the text of Article I:1 for applying a stand-alone 'disproportionate' standard to assess the GATT-consistency of the allocation of TRQ shares among supplying countries. Moreover, to read such a standard into Article I:1 would mean that there are different and potentially conflicting requirements under

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<sup>150</sup> (footnote original) Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19.

<sup>151</sup> Panel Report, *US – Shrimp*, paras. 7.22-7.23.

<sup>152</sup> Appellate Body Report, *EC – Bananas III*, paras. 183-187.

<sup>153</sup> Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

<sup>154</sup> Panel Report, *EU – Poultry Meat (China)*, para. 7.447.

Article I:1 and Article XIII governing the allocation of TRQs among supplying countries."<sup>155</sup>

93. The Panel in *EU – Poultry Meat (China)* also addressed China's argument regarding transparency, predictability and competition. The Panel found that:

"China also notes that Brazil and Thailand are granted a country-specific volume of the tariff rate quotas, with a volume that is transparent, predictable, and free from competition from other supplying countries, while other substantial suppliers such as China are not. However, as the European Union has observed, these 'are inherent features of any share allocated to any substantial supplier pursuant to Article XIII:2(d)'. Thus, to find a violation of Article I:1 on that basis would again require interpreting Article I:1 to mean that Members are legally prohibited, by the terms of Article I:1, from allocating a TRQ among supplying countries.

The Appellate Body has clarified that Article I and XIII may apply to 'different elements' of a measure or import regime<sup>156</sup>, and we do not exclude, *a priori*, that certain elements relating to the allocation of a TRQ among supplying countries could potentially fall within the scope of the general MFN obligation in Article I:1. However, in the present case, China has not identified any elements of the TRQ allocation that fall within the scope of Article I:1."<sup>157</sup>

#### **1.5.7 Article XIX**

94. In *Dominican Republic – Safeguard Measures* the complainants argued that the challenged measure constituted a safeguard measure within the meaning of the Safeguards Agreement and Article XIX of the GATT 1994, on the basis that the challenged measures constituted a "suspension of obligations ... under Articles I:1 and II:1(b) ... of the GATT 1994."<sup>158</sup> The Panel noted that "the text of Article XIX:1(a) does not expressly limit the obligations of the GATT 1994 that may be suspended by invoking that provision", and ultimately concluded that "the impugned measures have in fact meant a suspension of the most-favoured-nation treatment in Article I:1 of the GATT 1994 and therefore represent the suspension of an obligation incurred by the Dominican Republic under GATT 1991 within the meaning of Article XIX:1(a) of the GATT 1994."<sup>159</sup>

#### **1.5.8 Article XXIV**

95. In *Canada – Autos*, the Panel found that a Canadian duty exemption was inconsistent with Article I:1 and Canada raised Article XXIV as a defence. The Panel rejected this defence, because, on the one hand, Canada was not granting the import duty exemption to *all* NAFTA manufacturers and because, on the other hand, manufacturers from countries *other* than the United States and Mexico were being provided duty-free treatment.<sup>160</sup> Canada did not appeal this finding of the Panel. In this regard, the Appellate Body noted:

"The drafters also wrote various exceptions to the MFN principle into the GATT 1947 which remain in the GATT 1994.<sup>161</sup> Canada invoked one such exception before the Panel, relating to customs unions and free trade areas under Article XXIV. This justification was rejected by the Panel, and the Panel's findings on Article XXIV were not appealed by Canada. Canada has invoked no other provision of the GATT 1994, or of any other covered agreement, that would justify the inconsistency of the import duty exemption with Article I:1 of the GATT 1994."<sup>162</sup>

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<sup>155</sup> Panel Report, *EU – Poultry Meat (China)*, para. 7.448.

<sup>156</sup> (footnote original) Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 343.

<sup>157</sup> Panel Report, *EU – Poultry Meat (China)*, paras. 7.449-7.450.

<sup>158</sup> Panel Report, *Dominican Republic – Safeguard Measures*, para. 7.52.

<sup>159</sup> Panel Report, *Dominican Republic – Safeguard Measures*, paras. 7.64 and 7.73.

<sup>160</sup> Panel Report, *Canada – Autos*, paras. 10.55-10.56.

<sup>161</sup> (footnote original) Such as in Articles XX (general exceptions), XXI (security exceptions) and XXIV (customs unions and free trade areas).

<sup>162</sup> Appellate Body Report, *Canada – Autos*, para. 83.

### 1.5.9 Article XXVIII

96. In *EC – Poultry*, the Appellate Body addressed a complaint against the allocation of tariff quotas for certain poultry products by the European Communities, and rejected Brazil's appeal that Articles I and XIII of the GATT 1994 were not applicable to the allocation of tariff quota resulting from negotiations under Article XXVIII of the GATT 1994. The Appellate Body first confirmed its finding in *EC – Bananas III* according to which Members may, in their concessions and commitments set out in their schedules annexed to the GATT 1994, yield rights but may not diminish their obligations.<sup>163</sup> The Appellate Body then held that: "[t]herefore, the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry meat must be consistent with Article I and XIII of the GATT 1994."<sup>164</sup>

## 1.6 Relationship with other WTO Agreements

### 1.6.1 SCM Agreement

97. In *Indonesia – Autos*, the Panel rejected Indonesia's argument that the SCM Agreement was exclusively applicable to measures involving subsidies and referred to its finding on the relationship between the SCM Agreement and Article III of the GATT 1994. With respect to the exemption of customs duties and domestic taxes, the Panel indicated:

"The customs duty benefits of the various Indonesian car programmes are explicitly covered by the wording of Article I. As to the tax benefits of these programmes, we note that Article I:1 refers explicitly to 'all matters referred to in paragraphs 2 and 4 of Article III'. We have already decided that the tax discrimination aspects of the National Car programme were matters covered by Article III:2 of GATT. Therefore, the customs duty and tax advantages of the February and June 1996 car programmes are of the type covered by Article I of GATT."<sup>165</sup>

### 1.6.2 Anti-Dumping Agreement

98. In *EU – Footwear (China)* the respondent, the European Union, argued that "various provisions in the AD Agreement explicitly provide for differing treatment of products from different Members, and that these do not violate Article I:1. In the European Union's view, imports from market and [non-market economy (NME)] countries may be subject to different treatment in anti-dumping investigations because they are different in nature, and therefore no discrimination can arise."<sup>166</sup> The Panel stated that, in its view:

"[I]mports from NMEs may be treated differently from imports from market economy countries only to the extent that the AD Agreement or another relevant WTO agreement allows for such differentiated treatment.<sup>167</sup> The European Union, however, has failed to demonstrate that any provision of the AD Agreement, or of any other relevant WTO agreement, would allow the different treatment of imports from NMEs provided for in Article 9(5) of the [challenged measure].

Nor has the European Union demonstrated that there is any relevant difference in the nature of imports from NMEs that justifies different treatment. While the European

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<sup>163</sup> Appellate Body Report, *EC – Poultry*, para. 98. (citing Appellate Body Report, *EC – Bananas III*, para. 154.)

<sup>164</sup> Appellate Body Report, *EC – Poultry*, para. 99.

<sup>165</sup> Panel Report, *Indonesia – Autos*, para. 14.139.

<sup>166</sup> Panel Report, *EU – Footwear (China)*, para. 7.101.

<sup>167</sup> (*footnote original*) For example, the second *Ad Note* to Article VI:1 of the GATT 1994, concerning special difficulties in determining price comparability in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State. Similarly, Paragraph 15 of China's Accession Protocol permits different treatment with respect to the determination of normal value in anti-dumping investigations against Chinese imports, provided certain conditions are met. We also note Article 15 of the AD Agreement, which requires "special regard" to be given by developed country Members to the special situation of developing country Members when considering the application anti-dumping measures, and that possibilities of constructive remedies provided for by the AD Agreement be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

Union alleges this to be the case, in our view it has not established a sufficient factual basis on which we could conclude that there is a relevant difference in the nature of imports from NMEs and those from market economy countries."<sup>168</sup>

### 1.6.3 GATS

99. In *Argentina – Financial Services*, in interpreting the MFN principle in the context of the GATS the Appellate Body noted that the language of Article II:3 of the GATS refers to "advantages", similarly to Article I:1 of the GATT 1994. The Appellate Body found:

"While Article II:1 refers to 'treatment no less favourable', we note that Article II:3 refers to 'advantages'. An 'advantage' is '[t]he fact or state of being in a better position with respect to another'. Being in a better position as compared to another is closely related to the concept of competition. This suggests that, also in the context of Article II of the GATS, the determination of 'likeness' of services and service suppliers must focus on the competitive relationship of the services and service suppliers at issue. We note that, similarly, with regard to Articles I:1 and III:4 of the GATT 1994, the Appellate Body has held that, notwithstanding their textual differences, both of these provisions are concerned with 'prohibiting discriminatory measures' and ensuring 'equality of competitive opportunities' between products that are in a competitive relationship."<sup>169</sup>

### 1.6.4 TBT Agreement

100. In *US – Tuna II (Mexico)*, the Appellate Body faulted the Panel for exercising judicial economy on the parties' claim under Article I:1 of the GATT 1994. The Appellate Body explained:

"To us, it seems that the Panel's decision to exercise judicial economy rested upon the assumption that the obligations under Article 2.1 of the *TBT Agreement* and Articles I:1 and III:4 of the GATT 1994 are substantially the same. This assumption is, in our view, incorrect. In fact, as we have found above, the scope and content of these provisions is not the same. Moreover, in our view, the Panel should have made additional findings under the GATT 1994 in the event that the Appellate Body were to disagree with its view that the measure at issue is a 'technical regulation' within the meaning of the *TBT Agreement*. As a result, it would have been necessary for the Panel to address Mexico's claims under the GATT 1994 given that the Panel found no violation under Article 2.1 of the *TBT Agreement*. By failing to do so, the Panel engaged, in our view, in an exercise of 'false judicial economy' and acted inconsistently with its obligations under Article 11 of the DSU."<sup>170</sup>

101. In the first round of Article 21.5 compliance proceedings in *US – Tuna II (Mexico)*, the Appellate Body clarified that:

"[U]nlike Article 2.1 of the TBT Agreement, Articles I:1 and III:4 do not require a panel to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction.<sup>171</sup> Moreover, unlike in Article 2.1 of the TBT Agreement, the most-favoured nation obligation in Article I:1 is not expressed in terms of 'treatment no less favourable', but rather through an obligation to extend *any* 'advantage' granted by a Member to *any* product originating in or destined for *any* other country 'immediately and unconditionally' to the 'like product' originating in or destined for all other countries.<sup>172</sup>

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<sup>168</sup> Panel Report, *EU – Footwear (China)*, paras. 7.101-7.102.

<sup>169</sup> Appellate Body Report, *Argentina – Financial Services*, para. 6.24. (referring to Appellate Body Report, *EC – Seal Products*, para. 5.82)

<sup>170</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 405. (referring to Appellate Body Report, *Australia – Salmon*, para. 223)

<sup>171</sup> (footnote original) Appellate Body Reports, *EC – Seal Products*, paras. 5.93 and 5.105.

<sup>172</sup> (footnote original) Appellate Body Reports, *EC – Seal Products*, para. 5.81.



These differences notwithstanding, important parallels exist between the non-discrimination provisions contained in Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. In particular, the inquiry under these provisions hinges on the question of whether the measure at issue modifies the conditions of competition in the responding Member's market to the detriment of products imported from the complaining Member vis-à-vis like domestic products or like products imported from any other country.<sup>173</sup> Accordingly, in assessing whether a measure affects competitive conditions under Article I:1 and/or Article III:4 of the GATT 1994, it may be reasonable for a panel to rely on any relevant findings it made in examining that measure's detrimental impact under Article 2.1 of the TBT Agreement. For these reasons, we do not see that the Panel's reliance, in its analyses under Articles I:1 and III:4 of the GATT 1994, on certain reasoning and findings from its analysis of detrimental impact under Article 2.1 of the TBT Agreement was, in itself, inappropriate."<sup>174</sup>

102. In the second round of Article 21.5 compliance proceedings in *US – Tuna II (Mexico)*, the parties agreed that the measure violated Article I:1 of the GATT 1994.<sup>175</sup> The Panels highlighted the Appellate Body's previous findings on the relationship between Article 2.1 of the TBT Agreement and Article I:1 of the GATT 1994, and found that:

"Bearing in mind the legal standards under these provisions, as explained by the first compliance panel, the approach to these provisions by the Appellate Body in the first compliance proceedings, and our finding above that the 2016 Tuna Measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market, we agree with the parties and find that the 2016 Tuna Measure is inconsistent with Articles I:1 and III:4 of the GATT 1994."<sup>176</sup>

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<sup>173</sup> (footnote original) See e.g. Appellate Body Reports, *EC – Seal Products*, paras. 5.88 and 5.101; *Thailand – Cigarettes (Philippines)*, para. 129; *Korea – Various Measures on Beef*, para. 137; *US – Clove Cigarettes*, para. 180; *US – Tuna II (Mexico)*, para. 215; and *US – COOL*, para. 268.

<sup>174</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.277-7.278.

<sup>175</sup> Reports of the Panels, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.729.

<sup>176</sup> Reports of the Panels, *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*, para. 7.729.