

**ARTICLE VIII**

**FEES AND FORMALITIES CONNECTED WITH IMPORTATION  
AND EXPORTATION**

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**I. TEXT OF ARTICLE VIII AND INTERPRETATIVE NOTE AD ARTICLE VIII**

Article VIII

*Fees and Formalities connected with Importation  
and Exportation\**

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

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

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

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

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

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

- (a) consular transactions, such as consular invoices and certificates;
- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation.

#### Interpretative Note *Ad* Article VIII from Annex I

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

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

## II. INTERPRETATION AND APPLICATION OF ARTICLE VIII

### A. SCOPE AND APPLICATION OF ARTICLE VIII

#### 1. Paragraph 1

The Panel on “United States - Customs User Fee” examined complaints by Canada and the EC concerning the “merchandise processing fee” levied by the United States Customs Service. This *ad valorem* charge was imposed for the processing of commercial merchandise entering the United States, and receipts from the fee were used to fund certain “commercial operations” of the Customs Service. The Panel findings note the following generally regarding Article VIII:1.

“... Article VIII:1(a) states a rule applicable to all charges levied at the border, except tariffs and charges which serve to equalize internal taxes. It applies to all such charges, whether or not there is a

tariff binding to the product in question. The rule of Article VIII:1(a) prohibits all such charges unless they satisfy the three criteria listed in that provision:

- (a) the charge must be ‘limited in amount to the approximate cost of services rendered’;
- (b) it must not ‘represent an indirect protection to domestic products’;
- (c) it must not ‘represent ... a taxation of imports ... for fiscal purposes’.<sup>1</sup>

**(1) “All fees and charges ... on or in connexion with importation or exportation”**

In discussions at the Havana Conference it was agreed that “this Article relates to all payments of any character required by a Member on or in connexion with importation or exportation, other than import and export duties, and other than taxes within the purview of Article 18 [III] of the Geneva draft”.<sup>2</sup>

The Panel Report on “United States - Customs User Fee” notes in its findings, regarding the nature of the fees covered by Article VIII:1(a):

“... it was necessary to determine what type of fees were incorporated within the basic concept of ‘services rendered’ in Articles II:2(c) and VIII:1(a). The Panel concluded that there was a rather well established general understanding of this concept, demonstrated more by practice than by the actual text of the General Agreement. In its original form, as found in Article 13 of the United States’ Suggested Charter of September, 1946, Article VIII was explicitly addressed to ‘fees, charges, formalities and requirements relating to all customs matters’, and this definition was followed by an illustrative list which is virtually the same as the list now included in Article VIII:4. The illustrative list includes various aspects of the customs process such as ‘consular transactions’, ‘statistical services’, and ‘analysis and inspection’. The text of Article VIII was later changed to enlarge the scope of that provision. Notwithstanding the fact that the enlarged scope gave a different meaning to the illustrative list in paragraph 4, GATT practice since 1948 has tended to interpret that illustrative list according to its original meaning, as a list of those customs-related government activities which the draftsmen meant when they referred to ‘services rendered’. Thus, GATT proceedings have treated the following types of import fees as being within Articles II:2(c) or VIII:1(a): consular fees (CP.2/SR.11 (pages 7-8); 1S/25), customs fees (L/245; SR.9/28 (pages 4-5)), and statistical fees (18S/89).

“In referring to these customs-related government activities as ‘services rendered’, the drafters of Articles II and VIII were clearly not employing the term ‘services’ in the economic sense. Granted that some government regulatory activities can be considered as ‘services’ in an economic sense when they endow goods with safety or quality characteristics deemed necessary for commerce, most of the activities that governments perform in connection with the importation process do not meet that definition. They are not desired by the importers who are subject to them. Nor do they add value to the goods in any commercial sense. Whatever governments may choose to call them, fees for such government regulatory activities are, in the Panel’s view, simply taxes on imports. It must be presumed, therefore, that the drafters meant the term ‘services’ to be used in a more artful political sense, i.e., government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic licence accorded to taxing authorities, be called a ‘service’ to the importer in question. No other interpretation can make Articles II:2(c) and VIII:1(a) conform to their generally accepted meaning”.<sup>3</sup>

**(a) Customs processing fees**

See generally the Panel Report on “United States - Customs User Fee”.

<sup>1</sup>L/6264, adopted on 2 February 1988, 35S/245, 273 para. 69.

<sup>2</sup>Havana Reports, p. 76, para. 35. See also discussion below of preliminary work and subsequent modifications of Article VIII.

<sup>3</sup>L/6264, adopted on 2 February 1988, 35S/245, 275-276, paras. 76-77.

In the 1990 Report of the Working Party on the “Accession of Venezuela”, one member noted that “Article VIII of the General Agreement covered all fees and charges imposed by governmental authorities in connection with importation and exportation” and said that “in the view of her Government, the 5 per cent fee on imports, the 2 per cent postal import fee established in Article 37 of the Regulations of the Customs Law, and the 1 per cent fee on imports into the free trade zones, consistent with a 1987 panel recommendation concerning customs user fees, are customs charges which should conform to Article VIII of the General Agreement”.<sup>4</sup>

(b) *Consular fees*

See the 1948 Chairman’s ruling on consular taxes excerpted below on page 282, and the discussion beginning on page 278 regarding work in the GATT on consular fees and formalities.

(c) *Minimum import prices and associated security systems*

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, the Panel examined the EEC system under which the issue of an import certificate for the goods in question was conditional on the lodging of a security to guarantee that imports would take place during the period of validity of the certificate.

“The Panel noted the argument by the United States representative that, when a security was forfeited because importation did not take place within the seventy-five day validity of the certificate, this forfeiture should be considered as a ‘charge in connexion with importation’ in violation of Article VIII:1(a), since the importation would likely take place later under a new licence. The Panel further noted the argument by the United States representative that the forfeiture of all or part of this security imposed ‘substantial penalties for minor breaches of customs regulations or procedural requirements’ in violation of Article VIII:3. The Panel considered that such a forfeiture could not logically be accepted as a charge ‘in connection with importation’ within the meaning of Article VIII:1(a), since no importation had occurred, but only as a penalty to the importer for not fulfilling his obligation to complete the importation within the seventy-five day time-limit. The Panel further considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality ‘in connexion with importation’ within the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the provision for the forfeiture of the security associated with the import certificate could not be inconsistent with the obligations of the Community under Article VIII.

“... The Panel noted that the importer, when applying for the certificate, must agree to complete the importation within the seventy-five day validity limit of the certificate and to import the quantity stated on the certificate plus or minus 5 per cent. The Panel further noted that the importer was not required to obtain an import certificate when a contract was signed, but could wait until the product was approaching the Community frontier. The Panel ... considered that these obligations, which had to be assumed by the importer, were not onerous enough to violate Article VIII.”<sup>5</sup>

The same Panel also examined the aspects of the EEC programme which provided for a minimum import price, and enforced this price by making the issuance of an import certificate conditional on the lodging of an additional security to guarantee that the duty-paid c.i.f. price of the goods would be greater than or equal to the minimum price; the security would be forfeited in proportion to quantities imported below the minimum price. The Panel concluded that the minimum import price and associated additional security system for tomato concentrates was inconsistent with Article XI<sup>6</sup> and concluded that the interest charges and costs associated with the lodging of the additional security associated with the minimum import price for tomato concentrate were inconsistent with Article II:1(b).<sup>7</sup>

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<sup>4</sup>L/6696, adopted on 11 July 1990, 37S/43, para. 24.

<sup>5</sup>L/4687, adopted on 18 October 1978, 25S/68, 96-97, paras. 4.3-4.4.

<sup>6</sup>*Ibid.*, 25S/103, para. 4.14.

<sup>7</sup>*Ibid.*, 25S/103, para. 4.15.

“The Panel ... examined the status of the interest charges and costs associated with the lodging of the additional security which enforced the minimum import price for tomato concentrates ... The Panel noted the complaint by the representative of the United States that the interest charges and costs associated with the lodging of the additional security were imposed as protection for domestic products contrary to the provisions of Article VIII:1(a). The Panel recalled its earlier conclusions with regard to Article XI and Article II. As a result of these previous conclusions, the Panel considered that this minimum import price and associated additional security system could not also be considered merely as an administrative formality or fee falling under the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the interest charges and costs associated with the lodging of the additional security could not be inconsistent with the obligations of the Community under Article VIII.

“The Panel next examined the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates in relation to the obligations of the Community under Article VIII. The Panel noted the argument by the representative of the United States that such a forfeiture, if importation took place at a price below the minimum, imposed a substantial penalty for minor breaches of customs regulations or procedural requirements in violation of Article VIII:3. The Panel noted that the forfeiture of the additional security was a penalty imposed on the importer for not fulfilling an obligation which he had undertaken when he applied for the import certificate. The Panel considered that such a penalty should be considered as part of an enforcement mechanism and not as a fee or formality ‘in connexion with importation’ within the purview of Article VIII. As a result, the Panel considered that Article VIII was not relevant, and therefore concluded that the provision for the forfeiture of all or part of the additional security associated with the minimum import price for tomato concentrates could not be inconsistent with the obligations of the Community under Article VIII.”<sup>8</sup>

See also in this connection the unadopted panel report on “EEC - Import Régime for Bananas”.<sup>9</sup>

(d) *Multiple exchange rates*

See paragraph 1 of the Interpretative Note *Ad* Article VIII.

(2) ***“shall be limited in amount to the approximate cost of services rendered”***

(a) *General: the ‘cost of services’ limitation in Article VIII:1(a)*

In the Panel Report on “United States - Customs User Fee”:

“The Panel began its consideration of the legal issues by addressing the primary issue raised by Canada and the European Economic Community: whether the structure of the United States merchandise processing fee, in the form of an *ad valorem* charge without upper limits, was consistent with the ‘cost of services’ limitation in Articles II and VIII... . The aspect of the United States fee the complainants wished to challenge was its tendency to impose fees exceeding the average cost of processing an individual entry. When the rate of an *ad valorem* fee is calculated by dividing the total costs of customs processing by the total value of the imports processed, the fee will, when imposed without upper limits, automatically exceed the average cost of processing whenever it is applied to entries of greater-than-average value.

“The Panel agreed with the parties that the GATT consistency of this type of *ad valorem* fee turned on the meaning of the ‘cost of services’ limitation in Article II:2(c) and Article VIII:1(a). The Panel understood the central contentions of the parties to be as follows: Canada and the EEC had argued that ‘cost of services rendered’ should be interpreted to mean the cost of the customs processing activities (‘services’) actually rendered to the individual importer with respect to the customs entry in question, or, at least, the average cost of such processing activities for all customs entries of a similar kind. Both complainants had stressed that the normal practice with respect to service fees was to require persons to pay only for the services rendered to them. The United States had argued that the ‘cost of services’ limitation did not

<sup>8</sup>*Ibid.* 25S/104-105, paras. 4.17-4.18.

<sup>9</sup>DS38/R, dated 11 February 1994, para. 150.

require exact conformity between fees and costs, but only that the fee be 'commensurate with' the cost (Article II:2(c)), or limited to the 'approximate' cost (Article VIII:1(a)). It had argued that, stated in these terms, the 'cost of services' requirements would be satisfied if the total revenues from the fee did not exceed the total cost of the government activities in question, and if the fee were otherwise fair and equitable in its application. The United States had stressed that the *ad valorem* structure of the merchandise processing fee was the most equitable and least protective method by which such a fee could be imposed.

"The Panel agreed with Canada and the EEC that the ordinary meaning of the term 'cost of services rendered' would be the cost of those services rendered to the individual importer in question. That meaning was also in keeping with general practice when 'services' are charged for, which is to charge the same fee for the same service received. And, finally, the origins of these provisions in the 'cost of issue' requirements of the 1923 Convention pointed to this meaning as well.

"The United States interpretation, by contrast, presented serious problems. Granted that the terms 'commensurate with' and 'approximate' were intended to confer a certain degree of flexibility in the requirement that fees not exceed costs, the range of fees permitted under the US merchandise processing fee could by no stretch of language be considered a matter of mere flexibility. Moreover, the United States contention that 'cost of services rendered' referred only to the total cost of the relevant government activities would leave Articles II:2(c) and VIII:1(a) without any express standard for apportioning such fees among individual importers, thereby committing the issue of apportionment, at best, to an implied requirement of equitable (or non-protective) apportionment that would be neither predictable nor capable of objective application. Finally, if 'cost of services rendered' meant the total cost of customs operations, the 'fiscal purposes' criterion of Article VIII:1(a) would be rendered largely redundant.

"While the Panel thus found that the text of the General Agreement supported the interpretation advocated by Canada and the EEC, it recognized that this interpretation did not yield a result that was completely satisfying from a policy standpoint. A standard which requires the same fee for the same service would be an appropriate method of charging for government activities which were actually 'services' in the economic sense. As noted above, however, most of the import fees covered by these provisions do not involve any such services. They are ordinary taxes on imports. ...

"The Panel was of the view, however, that the interpretation proposed by the United States presented an equally serious problem with regard to the policy objectives of the General Agreement. The problem was that the United States interpretation would enlarge the 'service fee' authority granted by Articles II:2(c) and VIII:1(a) ... In the Panel's view, the interpretation advocated by the United States would expand the scope of Articles II:2(c), as well as VIII:1(a). It would permit a broader variety of import fees to be imposed, and the greater availability and convenience of such fees would, the Panel believed, lead to an increase in both the number and the level of such fees. The Panel was convinced that the attainment of GATT policy objectives would not be furthered by such an interpretation. Thus, even though the requirement that import fees not exceed the cost of individual entries might increase the protective effect of such fees in a particular case, the Panel was unable to accept the United States argument that such consequences justified a more flexible interpretation. The Panel was satisfied that the text of the General Agreement did impose such a requirement, and that it would not promote the objectives of the General Agreement to relax it in the manner proposed by the United States.

"The Panel concluded that the term 'cost of services rendered' in Articles II:2(c) and VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question and accordingly that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with the obligations of Articles II:2(c) and VIII:1(a) to the extent that it caused fees to be levied in excess of such costs."<sup>10</sup>

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<sup>10</sup>L/6264, adopted on 2 February 1988, 35S/245, 276-279, paras. 78-82, 84-86.

b) “*Services rendered*”

The Panel Report on “United States - Customs User Fee” further notes:

“... the Panel ... considered several additional arguments by Canada and the European Economic Community claiming that various costs included in the ‘commercial operations’ budget of the US Customs Service could not be considered ‘services rendered’ to those commercial importers who were required to pay the fee. These arguments and the conclusions following from them were separate from the issue raised in the previous section. They would apply to any fee based on a calculation of total costs of customs processing, whether the fee was levied on an ad valorem basis or as a flat charge per entry. For convenience of analysis, the present report divides the arguments relating to different costs into three categories.

“(a) *The cost of certain Customs Service activities.* The first category of costs to be challenged were the costs of certain Customs Service operations which, in the view of the complainant governments, could not be considered as ‘services rendered’ within the meaning of Articles II:2(c) and VIII:1(a), and thus could not be charged to commercial importers under these provisions. ...

“As noted in the previous section of this report, the Panel was of the view that Articles II:2(c) and VIII:1(a) contained a limitation upon the type of charges that could be imposed under these two provisions, a limitation to be found in the term ‘services rendered.’ Stated generally, the type of government activities deemed to be ‘services’ were those activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic license accorded to taxing authorities, be called ‘services’ to the importer in question.

“The Panel was aware that, in applying this standard, its capacity to make judgments about the nature and functioning of particular government operations would of necessity be limited by the quality of the information presented to it. The Panel was of the view that the government imposing the fee should have the initial burden of justifying any government activity being charged for. Once a *prima facie* satisfactory explanation had been given, it would then be upon the complainant government to present further information calling into question the adequacy of that explanation. ... the Panel was of the view that, where affected governments consider particular cost items important enough to be challenged, the better solution would be to adhere to the legal requirements and to recommend that the government in question make the necessary budgetary correction. If costs were known well enough to support a claim of *de minimis*, they should be known well enough to permit moving the estimated cost of the challenged activity to another budget item.

“The remaining ‘commercial operations’ activities questioned by the complainants were all activities that had some relationship to the processing of commercial imports, but in each case one or both of the complainants had raised a question whether the activity was of sufficient proximity to the normal process of customs clearance to be considered a ‘service’ rendered to the importer. A second and related issue raised by the complainants was whether, assuming that a particular activity (e.g., a customs fraud investigation) were considered a ‘service’ to the directly affected importer, that activity could also be considered a ‘service’ to all other importers who were not in fact directly affected by it.

“With respect to all but one of these remaining activities, the Panel was satisfied that the challenged activities were both proximate enough, and of sufficiently general applicability, that their costs could be included in the fee applicable to all commercial importers. In reaching these conclusions, the Panel gave considerable weight to the United States explanation that customs processing in the United States had increasingly moved away from hands-on processing of incoming shipments, towards a highly centralized process which focused on identifying problem transactions and concentrating on them. Under such a system, centralized and specialized activities far removed from the ordinary importer were in fact an essential ingredient to the more rapid handling of the ordinary entry, the ultimate objective of the ‘service’ that importers were being made to pay for. ...

“The Panel’s conclusion under this first category of challenged costs was that the cost of passenger processing and the cost of handling export documentation could not be included in the cost base of the merchandise processing fee, and that the inclusion of the cost of International Affairs had not been justified.”<sup>11</sup>

“(b) *The cost of customs processing for exempt imports.* The second category of costs challenged by the complainants was the cost of customs processing for imports that were exempt from the merchandise processing fee. ... In the Panel’s view ... none of the reasons for exempting a particular class of imports could provide any justification for the decision to make other importers pay the costs attributable to those imports. *The Panel concluded that processing exempted imports could not be considered as ‘services rendered’ to the commercial importers paying the merchandise processing fee.*”<sup>12</sup>

“(c) *The cost of ‘commercial operations’ for the first two months of Fiscal Year 1987.* The third category of costs challenged by the complainants concerned the cost of all ‘commercial operations’ during the first two months of Fiscal Year 1987, a period when the fee was not in force. ... The Panel found nothing in Articles II or VIII which would authorize retroactive imposition of customs fees. The only plausible reading of the link required between costs and revenues was that revenues must be measured against the costs of the period in which the revenues are collected.”<sup>13</sup>

In discussions in the Council in 1991, the representative of the United States stated “that its customs user fee had been revised to address the Panel’s findings and recommendations ... and ... met the criteria of Article VIII ... The United States also hoped that other contracting parties currently applying customs fees substantially identical to the US fee, as it had been prior to the changes mentioned, would also alter their own fees to bring them into conformity with Article VIII”.<sup>14</sup>

(c) *Ad valorem fees*

The Panel Report on “United States - Customs User Fee” further notes as follows with regard to *ad valorem* fees.

“In reaching this conclusion [that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with the obligations of Articles II:2(c) and VIII:1(a) to the extent that it caused fees to be levied in excess of the cost of the customs processing for the individual entry in question] the Panel had also given careful consideration to another United States’ argument based on the GATT’s prior legal experience with *ad valorem* customs fees. The United States had argued that *ad valorem* service fees had been widely used throughout GATT’s history, and that the absence of any previous challenge to their *ad valorem* character during this long period demonstrated that most contracting parties considered *ad valorem* fees to be consistent with Articles II and VIII. The United States had cited several instances in which the CONTRACTING PARTIES had examined particular *ad valorem* fees without objecting to their *ad valorem* character, and had placed particular stress upon the fact that, notwithstanding the large number of *ad valorem* fees in force in 1955, the governments maintaining such fees had agreed to make Article VIII:1(a) mandatory in the 1955 Review Session amendments.

“The Panel had examined all of the instances cited by the United States, as well as others that came to light during the course of its research. This examination had persuaded the Panel that the evidence did not support the conclusion advocated by the United States. The Panel believed it would be of assistance to include the results of this examination in its report.

“The Panel first noted that a substantial number of the service fees reported in GATT documents appeared to have had excessively high rates, a problem that would normally have led to legal challenges far more readily than questions of *ad valorem* structure. The fact that, for the most part, these rather obvious

<sup>11</sup>*Ibid.*, 35S/283-286, paras. 95-106.

<sup>12</sup>*Ibid.*, 35S/286, paras. 107-109.

<sup>13</sup>*Ibid.*, 35S/287, para. 111.

<sup>14</sup>C/M/248, p. 8. See also L/6741 (US notification of “a revision of the U.S. customs user fee, in response to the panel report adopted on February 2, 1988”).

legal shortcomings also appeared not to have been challenged suggested that many of these fees had simply not been subject to the rules of Articles II and VIII, or had otherwise escaped attention. The Panel found some support for the former hypothesis in the fact that most service fees existing on the date of a government's accession to GATT were immune from legal scrutiny under both Articles II and VIII. Article II:1(b) states that tariff bindings do not prevent governments from continuing to impose any non-tariff border charges existing at the time tariff concessions were made. Article VIII:1(a) imposed no legal obligations at all from 1947 to 1957 when the Review Session amendments went into force, and thereafter the obligations of Article VIII were subject to the reservation for existing mandatory legislation in the Protocol of Provisional Application. ...

"This same legal immunity would also have made it possible for governments with pre-accession service fees to accept the Review Session amendments making Article VIII:1(a) mandatory for post-accession service fees. Once again, the most evident legal problem at the time would have been the excessive rate of many existing fees, and the fact that the new legal obligation was accepted in spite of these more obvious legal shortcomings would tend to support that conclusion. In addition, it is not accurate to say that all governments accepting the Review Session amendment of Article VIII did so in the belief that their fees were in compliance with it. The working party report recommending the amendment also recommended that "the Agreement ... contain a general provision allowing time for governments to bring their legislation into conformity with the rules." (3S/214-215) The same report went on to note that five governments had reserved their position, proposing instead that the amendment should become effective 'at the earliest practicable date.'

"The Panel found five cases in which individual *ad valorem* service fees had been investigated by the CONTRACTING PARTIES. The Panel found that in three of the cases the *ad valorem* method had not been challenged, but that in each case the failure to challenge it could be accounted for by reasons other than an assumption of its validity, either because the fee was immune from legal attack on that issue, or because the government imposing the fee had promptly agreed to remove it for other reasons.<sup>15</sup> In the fourth case, the report of the working party contained a phrase which could have been a criticism of the *ad valorem* method, although the text was not clear.<sup>16</sup> In the fifth case, the legal consistency of the *ad valorem* method had been expressly questioned.

"The fifth case involved a 1954 complaint by the United States concerning an increase in the rate of a French stamp tax. The stamp tax was calculated as a percentage of the customs duty; the increase in question raised the rate from 1.7% of the customs duty to 2%, an increase said to equal about 0.1% *ad valorem*. France defended the increase on the ground that the tax had been provided for in its consolidated schedule and had not actually been changed in gold or dollar value (in essence, that it was exempt under Article II:1(b)). France also defended the fee on the ground that its current level was commensurate with the cost of customs services rendered, and was thus authorized by Article II:2(c). The reply of the United States delegation was as follows:

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<sup>15</sup>A footnote to this sentence provides as follows: "In 1948, the Netherlands brought a complaint concerning a discriminatory consular tax imposed by Cuba in which a rate of 5 per cent *ad valorem* was charged on goods from the Netherlands while a rate of 2 per cent *ad valorem* was charged on others. Cuba agreed to remove the discriminatory element (CP.2/9; CP.2/SR.11). Given the early date of the complaint, the tax itself almost certainly antedated Cuba's accession, and so would not have been open to challenge under Article II. Article VIII was not then in force.

"In 1952, the United States brought a complaint concerning a French statistical tax of 0.4 per cent *ad valorem*, on the ground that it was being used to fund social payments to agricultural workers. France agreed that this purpose constituted a violation of Article II, and agreed to remove the tax, thereby rendering moot any other claim of legal inconsistency. (L/64; SR.8/7, page 10).

"In 1955, the United States brought a complaint concerning the increase of a French stamp tax, from 2 per cent of the customs duties to 3 per cent; the revenues from the additional 1 per cent were used to fund social payments to agricultural workers. France immediately agreed that the added 1 per cent was inconsistent with GATT obligations because it was not used to fund customs services, thereby rendering moot any other claim of legal inconsistency. (L/410; SR.10/5, pages 51-52). (As is explained more fully below, the United States had already challenged the *ad valorem* character of the original 2 per cent tax in a 1954 proceeding.)"

<sup>16</sup>A footnote to this sentence provides as follows: "A 1971 working party report on the accession of Zaire stated that a statistical tax of 3 per cent *ad valorem* was 'not commensurate with the service rendered and was contrary to the provisions of Article VIII:1(a)'. The report did not specify the specific violation or violations in question. Although Zaire's reply to this finding concentrated on the excessive rate of the tax, the working party's eventual recommendation also asked Zaire to 're-examine its present method of application of the statistical tax ...' a form of expression which was more appropriate to a concern over the form of the tax than to concern over the excessive rate. (18S/89, pages 89-90)."

'Mr. BROWN (United States) thanked the French delegate for his report. The United States Government was particularly concerned with the principle that the maintenance of an *ad valorem* charge alone would not satisfy the requirements of Article II. After the statement and explanation of the intentions and attitude of the French Government, and since there was no substantial injury to United States exports, his delegation was prepared to withdraw the complaint from the Agenda.' (SR.9/28, page 5)

"Finally, to give a more complete view of GATT legal experience on the issue of *ad valorem* service fees, the Panel considered it relevant to note that the *ad valorem* method had in fact been expressly attacked in 1952 and 1957, in two formal recommendations concerning consular fees. (1S/25; 6S/25.) Although these recommendations were initiated at a time when Article VIII:1(a) was merely hortatory, and thus were not a legal ruling as such, they were expressly intended to implement the standards of Article VIII:1(a). In its preamble, the 1952 recommendation noted the 'cost of services' standard stated in Article VIII:1(a), and then observed that 'the [consular] fee charged is in many cases a high percentage of the value of the goods'. The operative part of the recommendation then stated, 'Any consular fee should not be a percentage of the value of the goods but should be a flat charge'. The 1957 recommendation, issued one month after the effective date of the protocol making Article VIII:1(a) mandatory, restated the 1952 recommendation in similar terms. While it is probable that the primary concern with the *ad valorem* method in these recommendations had been its tendency to encourage excessive rates, the text of these recommendations is also consistent with a parallel objection to its cost apportionment consequences. In either event, governments were on notice from an early date that the CONTRACTING PARTIES did not necessarily consider the *ad valorem* method an acceptable structure for the type of fees covered by Article VIII.

"Considering the historical evidence as a whole, the Panel could not agree with the United States argument that the GATT's legal experience with *ad valorem* service fees evidenced a widespread belief that the *ad valorem* method as such was consistent with the obligations of Articles II and VIII. Whether considered individually or as a whole, the events which constitute that history simply do not demonstrate any such understanding. If anything, these events tend to show that the *ad valorem* method has been questioned in those few cases where it has been put in issue."<sup>17</sup>

The 1990 Report of the Working Party on the "Accession of Venezuela" contains, inter alia, a discussion of Venezuela's 5 per cent *ad valorem* customs service fee. The representative of Venezuela stated that this fee "corresponded to the services rendered by the Customs Administration ... With reference to Article VIII:1(a) of the General Agreement, and the 1988 Panel Report on Customs User Fee, the representative of Venezuela indicated that recent experience had shown that the application of any system other than an *ad valorem* fee would be extremely complex and bring in an element of administrative discretion which might lead to undesirable delays or obstacles to imports. Moreover, the administrative cost of operating a transaction-based fee would be very high".<sup>18</sup>

The 1990 Report of the Working Party on the "Accession of Tunisia" contains, inter alia, a discussion of Tunisia's "customs formalities tax".

"A member noted that Article VIII of the General Agreement provides that fees and charges on or in connection with importation and exportation shall be limited in amount to the approximate cost of services rendered. In his view, the customs formalities tax should be levied at a fixed rate. This member reserved his position on the conformity of the 5 per cent customs formalities tax with the General Agreement. The representative of Tunisia said that in the light of the objectives of the VII National Development Plan, the Tunisian authorities had decided to incorporate the customs formalities tax into the customs tariff rates under the framework of the Finance Law of 1988 that will enter into force on 1 January 1988."<sup>19</sup>

<sup>17</sup>L/6264, adopted on 2 February 1988, 35S/245, 279-282, para. 87-94.

<sup>18</sup>L/6696, adopted on 11 July 1990, 37S/43, 49, para. 22.

<sup>19</sup>L/6277, adopted on 12 December 1990, 37S/30, 35, para. 21.

(d) *Various charges*

In a complaint brought against France in 1952, the United States maintained that the French “statistical and customs control” tax on imports and exports infringed Article VIII:1 since the proceeds of this tax were also used for funding social security benefits to farmers.<sup>20</sup> France acknowledged the infringement and subsequently abolished the tax.<sup>21</sup>

In another complaint brought against France in 1955, the United States contended that the French stamp tax violated both Articles II:1 and VIII:1 since proceeds from this tax were used for financing agricultural family allowance and exceeded the “approximate cost of services rendered”.<sup>22</sup> The stamp tax was subsequently reduced.<sup>23</sup>

The 1971 Report of the Working Party on the accession of the Democratic Republic of the Congo (now known as Zaire) notes that “Members of the Working Party pointed out that the statistical tax of 3 per cent *ad valorem* applied by the Congolese authorities on imports was not commensurate with the service rendered and was contrary to the provisions of Article VIII:1(a). The representative of the Congo recognized that this tax exceeded the cost of the service, and explained that the surplus revenue from the tax would be employed toward improving the service. His authorities were prepared to consider the adjustment of the statistical tax, in the light of the provisions of Article VIII as soon as they would be in a position to afford it”.<sup>24</sup>

In the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, the Panel examined the argument that the interest charges and costs associated with the lodging of the security were imposed as protection for domestic products contrary to the provisions of Article VIII:1(a). “The Panel also noted the contention by the Community representative that the incidence of these charges did not exceed 0.005 per cent. The Panel considered that these interest charges and costs were limited in amount to the approximate costs of administration. The Panel further considered that the term ‘cost of services rendered’ in Article VIII:1(a) would include these costs of administration. Therefore, the Panel concluded that the interest charges and costs associated with the lodging of the security were not inconsistent with the Community’s obligations under Article VIII:1(a).”<sup>25</sup>

The 1990 Report of the Working Party on the “Accession of El Salvador” contains, *inter alia*, a discussion of the tax system for imports. In response to questions the representative of El Salvador

“said that these charges which related to services rendered by the customs administration were modest, would have no effect on the agreed bound levels, did not constitute severe sanctions, and were consistent with Article VIII of the General Agreement. He added that the 30 per cent surcharge contemplated in the San José Protocol was not applicable. A member stated that, in his opinion, these charges are not related to the cost of services rendered, and therefore may be inconsistent with the provisions of Article VIII. This member urged El Salvador to state clearly that its customs penalties and charges applied to imports will be applied in accordance with Article VIII from the date of accession and reserved its rights on this point, in light of the findings and recommendations of a GATT panel that examined United States practices in this area”.<sup>26</sup>

See also various references to charges on imports in accession Working Party reports;<sup>27</sup> references to *ad valorem* charges for preshipment inspection;<sup>28</sup> and examination of various charges under Article XXIV:8(a) in working party reports on agreements under Article XXIV:8(a).<sup>29</sup>

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<sup>20</sup>L/238, SR.8/7, SR.8/10.

<sup>21</sup>SR.9/28.

<sup>22</sup>L/410, L/569, L/720.

<sup>23</sup>L/1412.

<sup>24</sup>L/3541, adopted on 29 June 1971, 18S/89, para. 5.

<sup>25</sup>L/4687, adopted on 18 October 1978, 25S/68, 95-96, para. 4.2.

<sup>26</sup>L/6771, adopted on 12 December 1990, 37S/9, 17, para. 23.

<sup>27</sup>See, e.g., report on “Provisional Accession of the United Arab Republic”, L/1876, adopted on 13 November 1962, 11S/75, 77, para. 7.

<sup>28</sup>L/7170, dated 28 Jan 1993, memorandum on foreign trade of Zaire.

<sup>29</sup>See the reports cited in this work under Article XXIV:8(a).

**(3) “an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes”**

In the Panel Report on “United States - Customs User Fee”

“... the Panel then considered whether the arguments of the parties had raised any further issues concerning the US merchandise processing fee under the second and third criteria stated in Article VIII:1(a).

“The only issue raised by the parties under the third criterion prohibiting ‘taxation of imports ... for fiscal purposes’ was the question of whether total revenues exceeded total attributable costs, an issue which the Panel dealt with fully under the ‘cost of services’ requirement.

“The only specific issue raised by the parties under the second criterion was whether the 0.22 and 0.17 per cent *ad valorem* charges constituted ‘an indirect protection to domestic products’ due to their effect on certain classes of price-sensitive imports. It was not necessary for the Panel to decide whether the ‘indirect protection’ criterion actually involved a requirement of no adverse trade effects. The Panel concluded that, even if it did, it had not been demonstrated that these *ad valorem* charges had had a trade distorting effect”.<sup>30</sup>

See also the discussion of the Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, on page 271 above, concerning the claim that the interest charges and costs associated with the lodging of the additional security which enforced the minimum import price for tomato concentrates were imposed as protection for domestic products contrary to Article VIII:1(a).

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

In the early years of the GATT, work was undertaken on matters relating to customs formalities, including documentary requirements, temporary admission for samples, and certification of origin. This work, which built on the work that had been carried out under the auspices of the League of Nations in the interwar years, included the drafting of recommendations for adoption by the CONTRACTING PARTIES and of Conventions on certain of these subjects. See, for instance, the 1951 Report on “Customs Treatment of Samples and Advertising Material, Documentary Requirements for the Importation of Goods, and Consular Formalities: Resolutions of the International Chamber of Commerce”,<sup>31</sup> and the 1952 Report on “Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities connected with Quantitative Restrictions”.<sup>32</sup>

See also in this connection the unadopted 1994 panel report on “EEC - Import Régime for Bananas”.<sup>33</sup>

**(a) Origin of imported goods and requirement of certificates of origin**

During the second session of the Preparatory Committee in 1947, a Sub-Committee studying this issue considered “it to be clear that it is within the province of each importing member country to determine, in accordance with the provisions of its law, for the purposes of applying the most-favoured-nation provision whether goods do in fact originate in a particular country”.<sup>34</sup>

Concerning consideration in the early years of the GATT of proposals on harmonization of origin rules, see the 1951 and 1952 Reports cited directly above, and the 1953 Report of a Working Party in the Eighth Session of

<sup>30</sup>L/6264, adopted on 2 February 1988, 35S/245, 289, paras. 118-120.

<sup>31</sup>GATT/CP.6/36, adopted 24 October 1951, II/210.

<sup>32</sup>G/28, adopted 7 November 1952, 1S/100.

<sup>33</sup>DS38/R, dated 11 Feb. 1994, para. 151.

<sup>34</sup>EPCT/174, p. 3-4.

the CONTRACTING PARTIES on “Nationality of Imported Goods”,<sup>35</sup> which examined both the definition of origin and proof of origin. The Report also includes Recommendations regarding proof of origin, and includes as an annex Article II on Certificates of Origin of the 1923 International Convention Relating to the Simplification of Customs Formalities. These Recommendations were amended in 1956; see the Report of the Working Party on “Certificates of Origin, Marks of Origin and Consular Formalities”<sup>36</sup> and the Recommendation on “Certificates of Origin” as amended.<sup>37</sup>

The Report of a Working Party in the Ninth Session on “Definition of Origin” presents the views of governments regarding a proposed definition submitted to governments by the CONTRACTING PARTIES for review and study.<sup>38</sup> Interpretative Note 2 to Article VIII, which deals with the production of certificates of origin, was added as a result of the Review conducted during the Ninth Session.

Rules of origin for the purpose of eligibility for preferential treatment have been extensively discussed in the context of agreements under Article XXIV: see the material on this subject under Article XXIV in this Index. Such rules of origin were also discussed in the context of the Protocol Relating to Trade Negotiations Among Developing Countries, which contains provisions dealing with this issue,<sup>39</sup> and in the context of discussions of the implementation of the Generalized System of Preferences. A 1981 Note by the Secretariat summarizes the concept and main criteria of rules of origin which form part of trade agreements and arrangements where it is essential to establish the preferential (or non-preferential) origin of goods.<sup>40</sup>

Rules of origin have also been discussed in the context of the administration of textile agreements.<sup>41</sup>

The November 1982 Ministerial Declaration requests the Council “to make arrangements for studies of dual-pricing practices and rules of origin; and to consider what further action may be necessary with regard to these matters when the results of these studies are available.”<sup>42</sup>

A 1988 Note by the Secretariat on “Rules of Origin” discusses the administration of rules of origin, related provisions of the General Agreement and past discussions on the subject in the GATT.<sup>43</sup>

See generally the Agreement on Rules of Origin reached in the Uruguay Round.

*(b) Documentary requirements for importation of goods*

The Working Party in the Seventh Session on “Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities connected with Quantitative Restrictions” drew up a Code of Standard Practices for Documentary Requirements for the Importation of Goods, which was adopted by the CONTRACTING PARTIES.<sup>44</sup>

See also the various Secretariat Notes prepared in the Tokyo Round on this and related subjects.<sup>45</sup>

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<sup>35</sup>G/61 adopted on 23 October 1953, 2S/53-59.

<sup>36</sup>L/595, adopted 17 November 1956, 5S/102-103.

<sup>37</sup>Recommendation of 23 October 1953 as amended by the Recommendation of 17 November 1956, 5S/33.

<sup>38</sup>G/92 adopted on 2 March 1955, 3S/94-99.

<sup>39</sup>18S/11, Annex A at 18S/17. Information concerning certification of origin in developing countries participating in the Protocol is circulated in CPC/10 and Addenda thereto.

<sup>40</sup>CG.18/W/48, dated 6 March 1981, and Suppl.1; see also discussion at CG.18/13, CG.18/14.

<sup>41</sup>See 31S/324-339, C/M/181.

<sup>42</sup>L/5424, Declaration adopted by Ministers 29 November 1982, 29S/9, 21; see follow-up discussion at C/M/165.

<sup>43</sup>MTN.GNG/NG2/W/12, dated 21 June 1988. This Note also states that detailed information on the rules of origin maintained by a number of countries can be found in the Customs Co-operation Council’s “Compendium of Origin of Goods” and, for the GSP, the “Digest of Rules of Origin” prepared by UNCTAD and UNDP.

<sup>44</sup>G/28, Report adopted 7 November 1952, 1S/100-101; Decision of 7 November 1952, 1S/23.

<sup>45</sup>“Part 2 of the Inventory of Non-Tariff Measures - Customs and administrative entry procedures”, MTN/3B/2; “Import documentation (Task 14 of MTN/2)”, MTN/3B/8; “Import documentation - Information required by Countries for Customs Entry Purposes”, MTN/3B/13; “Import Documentation - Note on the Work being carried out by other International Organizations”, MTN/3B/14; Note on Meeting of May 1974, MTN/3B/11; “Customs Matters background note by the Secretariat”, MTN/NTM/W/7; Note on import documentation requirements from various contracting parties, MTN/NTM/W/22+Rev.1+Add.1; “Aligned invoice layout key for international trade”, MTN/NTM/W/34; “Import documentation and customs procedures - work of the international organizations”, MTN/NTM/W/60; “Customs Co-operation Council”, MTN/NTM/W/238.

(c) *Formalities associated with administration of quantitative restrictions*

During their fifth session at Torquay in 1950, the CONTRACTING PARTIES adopted a Code of Standard Practices for the Administration of Import and Export Restrictions and Exchange Controls; concerning this Code see under Article XIII.<sup>46</sup>

In the Tokyo Round of trade negotiations the Agreement on Import Licensing Procedures was negotiated, the preamble of which refers *inter alia* to the desire “to simplify, and bring transparency to, the administrative procedures and practices used in international trade, and to ensure the fair and equitable application and administration of such procedures and practices”.<sup>47</sup> Further concerning this Agreement, see under Article XIII.

(d) *Abolition of consular formalities*

The Report of the Working Party in the Seventh Session on “Documentary Requirements for Imports, Consular Formalities, Valuation for Customs Purposes, Nationality of Imported Goods and Formalities connected with Quantitative Restrictions” also proposed a “Recommendation on the Abolition of Consular Formalities”, providing for abolition of consular invoices and consular visas not later than 31 December 1956; annexed to this Recommendation is a Code of Standard Practices for Consular Formalities.<sup>48</sup> Later working parties from 1953 through 1962 examined reports from contracting parties on steps taken towards the abolition of consular formalities, and resulted in Decisions on “Consular Formalities” reaffirming the 1952 Recommendation.<sup>49</sup> See the discussion of the 1952 Recommendation and these reports in the Panel Report on “United States - Customs User Fee”, excerpted above at page 276.<sup>50</sup>

The 1971 Report of the Committee on Trade in Industrial Products discusses, *inter alia*, possible solutions for the further liberalization of consular formalities and documentation.<sup>51</sup> See also a Secretariat Note from the Tokyo Round on “Consular formalities and fees”.<sup>52</sup>

(e) *Customs conventions*

In 1951, a proposal of the International Chamber of Commerce for a convention to facilitate importation of commercial samples and advertising material was referred to the CONTRACTING PARTIES by the United Nations Economic and Social Council, and was examined by a working party in the Sixth Session.<sup>53</sup> A working party in the Seventh Session then redrafted the text of the Convention, entitled the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material; the Convention was adopted by the CONTRACTING PARTIES on 7 November 1952<sup>54</sup> and entered into force on 20 November 1955.<sup>55</sup>

A Group of Experts in 1960 examined and amended a Draft Customs Convention on the Temporary Importation of Packings as transmitted by the Customs Co-operation Council (CCC). The CCC accepted all of the suggestions of the GATT group, together with a series of agreed interpretations, and opened the Convention as amended for signature.<sup>56</sup> The Group of Experts in 1960-1961 also examined and amended Draft Customs

<sup>46</sup>GATT/CP.5/30/Rev.1; see also supplementary recommendation regarding contract sanctity at 1S/105-106.

<sup>47</sup>26S/154.

<sup>48</sup>G/28, Report adopted 7 November 1952, 1S/100, 101-102; Recommendation of 7 November 1952, 1S/25.

<sup>49</sup>Reports at 2S/59, 3S/91, 5S/108, 11S/214; Decisions or Recommendations at 5S/33, 6S/25, 11S/59.

<sup>50</sup>L/6264, adopted on 2 February 1988, 35S/245, 282, para. 93.

<sup>51</sup>L/3496, adopted on 22 February 1971, pp. 43-46; see also COM.IND/W/79 + Add.1, Background Note by the Secretariat (1972).

<sup>52</sup>MTN/NTM/W/36 and Rev.1, Corr.1-2 and Add.1-3.

<sup>53</sup>GATT/CP.6/36, adopted on 24 October 1951, II/210; ECOSOC proposal appears in resolution 347(XII) of 7 March 1951, E/1987, p. 7.

<sup>54</sup>G/33, Report on “International Convention to Facilitate the Importation of Commercial Samples and Advertising Material”, adopted 7 November 1952, 1S/94. For later GATT work on interpretation of this Convention, see L/466, SR.10/11 p. 119, SR.10/16 p. 175, and L/601.

<sup>55</sup>Text of Convention at 221 UNTS 255. As of November 1994, the Convention was in force in 61 countries: see list in L/7538, dated 8 November 1994, and list of acceptances and reservations in yearly editions of *Multilateral Treaties Deposited with the Secretary-General*, United Nations Publication ST/LEG/SER.E/11 (1993).

<sup>56</sup>L/1208, adopted 2 June 1960, 9S/201; text of Convention and agreed interpretations at 9S/205ff.

Conventions on the Temporary Importation of Professional Equipment, and on the ATA Carnet for the Temporary Admission of Goods, as transmitted by the CCC, and arrived at agreed interpretations of these Conventions.<sup>57</sup>

(f) *Facilitation of trade in cultural or health-related products*

During the Third Session, the United Nations Educational, Scientific and Cultural Organization (UNESCO) submitted a number of proposals for facilitating international trade in books, newspapers and periodicals.<sup>58</sup> A Working Party during the Annecy trade negotiations drafted an international Agreement on the Importation of Educational, Scientific and Cultural Materials and communicated the text to UNESCO for sponsorship.<sup>59</sup> The Agreement was subsequently adopted and opened for signature by the Fourth Session of the General Conference of UNESCO at Florence, and entered into force on 21 May 1952.<sup>60</sup>

During the Fifth Session, the World Health Organization requested the assistance of the CONTRACTING PARTIES with respect to a draft agreement reducing trade barriers to basic insecticides and apparatus and materials necessary for campaigns against insects carriers of human diseases. While the Working Party drafted an agreement, its Report concluded that views were divided as to the utility of such an approach; one problem cited was the difficulty of limiting the duty-free treatment to be provided, since equipment used in making insecticides was usable for other purposes.<sup>61</sup>

(g) *Preshipment inspection*

Notes by the Secretariat of 1988 and 1989 on “Preshipment Inspection” provide background on the subject, summarize relevant discussions in various GATT bodies, and outline relevant provisions in the GATT and other international agreements.<sup>62</sup>

See generally the Agreement on Preshipment Inspection reached in the Uruguay Round.

(h) *Testing fees for imported products*

Article 5.1.3 of the Agreement on Technical Barriers to Trade provides that

“Parties shall ensure that, in cases where a positive assurance is required that products conform with technical regulations or standards ... any fees imposed for testing imported products shall be equitable in relation to any fees chargeable for testing like products of national origin or originating in any other country”.<sup>63</sup>

## 2. Paragraph 2

The Report of the Balance-of-Payments Committee on its work in the period 1970-1974 notes: “Without specifically referring to Article VIII:2 the Committee, in its conclusions in a large number of cases, urged the consulting country to reduce the complexity of its import procedures. In one case (1973, India) the Committee suggested the adoption of a uniform nomenclature for import control and tariff purposes”.<sup>64</sup>

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<sup>57</sup>Draft Convention on Temporary Importation of Professional Equipment: L/1366, Report adopted 18 November 1960 including draft text, 9S/212; L/1476, Report adopted 17 May 1961, 10S/211, including interpretations at 10S/212ff, revised text as opened for signature by CCC at 10S/216ff. Draft Convention on the ATA Carnet for the Temporary Admission of Goods, L/1476, Report adopted 17 May 1961, 10S/211, including interpretations at 10S/214ff, text as opened for signature by the CCC at 10S/226ff.

<sup>58</sup>UNESCO Memorandum and list of items for consideration in negotiations, GATT/CP/12 and Add.1; Draft Agreement submitted by UNESCO, GATT/CP/12/Add.2 and Rev.1; UNESCO Notes on relevant practices in various countries, GATT/CP/12/Add.3-14.

<sup>59</sup>Working Party papers, GATT/TN.1/C/1; Working Party Report, GATT/TN.1/27 and Corr.1.

<sup>60</sup>Letter from Director-General of UNESCO concerning draft Agreement, GATT/TN.1/34, GATT/CP.4/19; discussion, GATT/CP.4/SR.4, 17; letter from UNESCO regarding adoption and signature of Agreement, GATT/CP/81 and Add.1-2; letter on entry into force, L/137.

<sup>61</sup>Letter at GATT/CP/79; Report of WP “D” on the Request of the WHO concerning Insecticides GATT/CP.5/47 and Amend.1; discussion at GATT/CP.5/SR.5 p. 3-5, SR.6 p. 2-3, SR.23 p. 3-4, SR.24 p. 1.

<sup>62</sup>MTN.GNG/NG2/W/11 dated 20 April 1988 and Add.1 dated 19 October 1989.

<sup>63</sup>26S/8, 13, 14.

<sup>64</sup>L/4200, para. 48.

### 3. Paragraph 3: penalty charges

See the discussion of paragraph 3 in the 1978 Panel Report on “EEC - Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables”, on page 271 above.

The 1990 Report of the Working Party on the “Accession of Venezuela” contains, inter alia, a discussion of *ad valorem* storage charges levied by Venezuelan customs authorities. “A member said that having regard to the fee structure described in the Regulation to the Customs Law no distinction could be made in practice between the *ad valorem* warehouse charges and the penalties applied for non-expeditious customs clearance; both charges were customs charges and should conform to Article VIII of the General Agreement concerning correspondence with the approximate cost of services rendered. Furthermore, in setting the level of penalty charges, the provisions of Article VIII:3 concerning substantial penalties should be observed.”<sup>65</sup>

### 4. Paragraph 4

During discussions of this provision at the Geneva session of the Preparatory Committee in 1947, it was agreed that the provisions of sub-paragraph 4(d) were “without prejudice to the provisions of the Charter relating to safeguarding balance of payments and to exchange control”.<sup>66</sup>

## B. RELATIONSHIP BETWEEN ARTICLE VIII AND OTHER ARTICLES

### 1. Article I

During the Second Session of the CONTRACTING PARTIES in 1948, in response to a request for an interpretation of the phrase “charges of any kind” in Article I:1 with respect to consular fees, “The Chairman ruled that consular taxes would be included in ‘charges of any kind’; Article VIII merely dealt with the magnitude of such taxes in relation to the cost of services rendered, whereas Article I embodies the principle of non-discrimination”.<sup>67</sup>

See also the discussion in paragraphs 121-124 of the Panel Report on “United States - Customs User Fee” concerning the question of whether the exemptions from the US merchandise processing fee granted to imports from certain countries were inconsistent with the MFN obligation of Article I:1.<sup>68</sup>

### 2. Article II:2(c)

The 1988 Panel Report on “United States - Customs User Fee” notes as follows:

“... the Panel ... addressed the general meaning of Articles II:2(c) and VIII:1(a), and their relationship to each other. Article VIII:1(a) states a rule applicable to all charges levied at the border, except tariffs and charges which serve to equalize internal taxes. It applies to all such charges, whether or not there is a tariff binding on the product in question. The rule of Article VIII:1(a) prohibits all such charges unless they satisfy the three criteria listed in that provision:

- (a) the charge must be ‘limited in amount to the approximate cost of services rendered’ ;
- (b) it must not ‘represent an indirect protection to domestic products’;
- (c) it must not ‘represent ... a taxation of imports ... for fiscal purposes’.

The first requirement is actually a dual requirement, because the charge in question must first involve a ‘service’ rendered, and then the level of the charge must not exceed the approximate cost of that ‘service’.

<sup>65</sup>L/6696, adopted on 11 July 1990, 37S/43, 50, paras. 25-26.

<sup>66</sup>EPCT/103, p. 25.

<sup>67</sup>GATT/CP.2/SR.11 p. 7, reprinted in abridged form at II/12; see GATT/CP.2/9 for request for ruling.

<sup>68</sup>L/6264, adopted on 2 February 1988, 35S/245, 289-290.

“Article II:2(c) is a provision of somewhat narrower scope. Its function is to permit the imposition of certain non-tariff border charges on products which are subject to a bound tariff. Paragraph 1(b) of Article II establishes a general ceiling on the charges that can be levied on a product whose tariff is bound; it requires that the product be exempt from all tariffs in excess of the bound rate, and from all other charges in excess of those (i) in force on the date of the tariff concession, or (ii) directly and mandatorily required by legislation in force on that date. Article II:2 permits governments to impose, above this ceiling, three types of non-tariff charges, of which the third, permitted by sub-paragraph (c), is ‘fees or other charges commensurate with the cost of services rendered’.

“In order to help clarify the meaning of Articles II:2(c) and VIII:1(a), the Panel examined the origins and the drafting history of these provisions. ...<sup>69</sup> [See discussion excerpted below on page 284]

“Two questions of general interpretation had to be answered before addressing the specific issues raised by the complainants. First, it was necessary to decide whether there was any legal significance in the slight difference in wording between the two ‘cost of services’ limitations stated in Articles II:2(c) and VIII:1(a), i.e. ‘commensurate with the cost of services rendered’ and ‘limited in amount to the approximate cost of services rendered.’ The words themselves suggested no immediately apparent difference in meaning. After reviewing both the drafting history and the subsequent application of these provisions, the Panel concluded that no difference of meaning had been intended. The difference in wording appears to be explained by the somewhat different paths by which each provision entered the General Agreement. The text which was to become Article VIII:1(a) appeared in the very first draft submitted to the negotiating conference by the United States, whereas the text of Article II:2(c) originated as a standard term to be incorporated in each contracting party’s schedule of concessions (see E/PC/T/153) and was not raised to the text of Article II until sometime later (E/PC/T/201).

“Second, it was necessary to determine what type of fees were incorporated within the basic concept of ‘services rendered’ in Articles II:2(c) and VIII:1(a) ...”.<sup>70</sup> [See discussion above, page 269.]

### 3. Article III

In the 1994 panel report on “United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco”, the panel examined a fee charged for inspection of tobacco:

“The Panel ... noted that Article VIII does not apply to taxes within the purview of Article III. The Panel then recalled that no party to the dispute had requested the Panel to examine the consistency of these inspection fees with Article III. Indeed, all parties had argued that the Section 1106(c) inspection fees should be examined in the light of Article VIII. The Panel noted that the consistency of Section 1106(c) could present itself differently under Article III in that the focus of the examination would then be on the inspection fees as internal charges and on whether or not national treatment was accorded in respect of such charges. However, in view of the fact that the parties to the dispute had argued the Section 1106(c) inspection fees in terms of Article VIII, the Panel proceeded to examine this legislative provision under that Article.”<sup>71</sup>

### C. EXCEPTIONS AND DEROGATIONS

The 1988 Panel Report on “United States - Customs User Fee” further notes:

“... Article VIII:1(a) imposed no legal obligations at all from 1947 to 1957 when the Review Session amendments went into force, and thereafter the obligations of Article VIII were subject to the reservation for existing mandatory legislation in the Protocol of Provisional Application. The relative importance of such legal immunity was indicated in a 1962 working party report on customs formalities:

<sup>69</sup>*Ibid.*, 35S/273, paras. 69-71.

<sup>70</sup>*Ibid.*, 35S/275, paras. 75-76.

<sup>71</sup>DS44/R, adopted on 4 October 1994, para. 117.

'The question was raised whether the levying of substantial consular fees by the importing country was in conformity with the obligations of Article VIII of GATT since the rates exceeded the costs of the services rendered and were not the equivalent of an internal charge. It was noted, however, that Article VIII being in Part II of GATT involved obligations only within the arrangements for provisional application of the Agreement. [11S/216],<sup>72</sup>

See also the Interpretative Note *Ad* Article VIII.

### III. PREPARATORY WORK AND SUBSEQUENT MODIFICATIONS

*Differences between the General Agreement and the Havana Charter:* The corresponding provisions in the Havana Charter are contained in Article 36; in the US Proposals in Chapter III-5; in the US Draft in Article 13; in the New York Draft in Article 19; and in the Geneva Draft in Article 35.

In discussions at the Havana Conference on Article 36, "It was ... agreed that paragraph 1 should be revised and care should be taken in the translation to show definitively that this Article relates to all payments of any character required by a Member on or in connexion with importation or exportation, other than import and export duties, and other than taxes within the purview of Article 18 [III] of the Geneva draft".<sup>73</sup> Accordingly paragraph 1 was revised to include the phrase, "all fees and charges of whatever character (other than import and export duties, and other than taxes within the purview of Article 18)". This wording was later brought into the General Agreement in the Review Session amendments; see below.

Paragraph 2 was amended in Havana to provide that a Member need respond to a request to undertake the review of its laws and regulations only if such a request were made by another Member "directly affected"; this change was not retained in the General Agreement. Paragraph 4 provided for studies by the ITO on measures to simplify and standardize customs formalities, and was not included in the General Agreement, as it related to functions of the ITO. Paragraph 6 of the Charter article relating to tariff discrimination based on the use of regional or geographical names in tariff descriptions is not included in the General Agreement as it did not appear in the Geneva draft. The order of the paragraphs was changed at Havana.<sup>74</sup> The Interpretative Note in the Charter reads "not inconsistent with the Articles of Agreement of the International Monetary Fund", instead of "with the approval of the International Monetary Fund"; the change was made because "the express approval of the Fund was not required in all cases covered by the Note".<sup>75</sup>

*Antecedents and drafting history:* The Panel Report on "United States - Customs User Fee" includes the following discussion of the antecedents and drafting history of Articles VIII:1 and II:2(c).

"In order to help clarify the meaning of Articles II:2(c) and VIII:1(a), the Panel examined the origins and the drafting history of these provisions. During the drafting of the General Agreement, the previous legal instrument referred to most frequently in connection with these provisions was the *International Convention Relating to the Simplification of Customs Formalities* of 3 November 1923<sup>76</sup>. One of the major purposes of the 1923 convention had been to reduce the number and the level of fees imposed in connection with importation. Governments had agreed to limit certain fees to the actual cost of the government activity in question. Article 10 stated, 'When a visa [for commercial travellers] is required, its cost shall be as low as possible and shall not exceed the cost of the service.' Article 11(8) stated, 'The cost of the [consular] visa must be as low as possible, and must not exceed the cost of issue, especially in the case of consignments of small value.' Article 12 stated, 'The cost of a visa for Consular invoices shall be a fixed charge, which should be as low as possible.' The Convention's two provisions on

<sup>72</sup>*Ibid.*, 35S/280, para. 89, referring to the Declaration of 15 November 1957 (6S/13) stating that Review Session amendments to Part II of the General Agreement are subject to the reservation for existing mandatory legislation in the Protocol of Provisional Application or applicable protocols of accession; see discussion of this Declaration in the chapter of this Index on provisional application.

<sup>73</sup>Havana Reports, p. 76, para. 35.

<sup>74</sup>Havana Reports, pp. 77-78, paras. 43-45.

<sup>75</sup>Havana Reports, p. 77, para. 41.

<sup>76</sup>A footnote to this sentence provides: "League of Nations Treaty Series vol. 30, p. 372 (1925). The treaty, which was negotiated under League of Nations auspices, entered into force on 27 November 1924".

consular fees were reaffirmed in the recommendations of the World Economic Conference of 1927, which restated them as follows:

- ‘(1) Consular fees should be a charge, fixed in amount and not exceeding the cost of issue, rather than an additional source of revenue. Arbitrary or variable consular fees cause not only an increase of charges, which is at times unexpected, but also an unwarrantable uncertainty in trade.’<sup>77</sup>

“The Panel was unable to find specific antecedents to Articles II:2(c) and VIII:1(a). In particular, no such provisions could be found in the United States bilateral trade agreements of 1934-1942, from which the United States had drawn many of the texts proposed for adoption in the General Agreement. Those bilateral agreements had contained no general limitation on non-tariff charges as in Article VIII:1(a), nor had their definition of tariff bindings permitted the imposition of new ‘service’ fees as in Article II:1(c).

“According to the detailed negotiating history of GATT Articles II:2(c) and VIII:1(a) provided by the United States, proposals to permit such fees, characterized as fees for ‘services rendered’, appeared in the earliest stages of the GATT/ITO negotiations.<sup>78</sup> The criteria stated in the initial draft texts submitted to the negotiating conference<sup>79</sup> were almost identical to those adopted in the final texts, with the result that the actual negotiations presented no occasions for further elaboration of their meaning.

“When the General Agreement was first adopted in 1947, the requirements of Article VIII:1(a) were merely hortatory, reading ‘should’ rather than ‘shall’. Article VIII:1(a) was made mandatory in the Review Session amendments to Part II of the General Agreement (3S/214), which were adopted in March 1955 and which entered into force in October 1957. Article II:2(c) was included in the original 1947 text of the General Agreement in its present form.”<sup>80</sup>

The Report of the Review Working Party on Schedules and Customs Administration, which recommended the Review Session amendments to Article VIII, provided the following explanation of the changes.

“Paragraphs 1 and 2 have been redrafted in order (i) to separate the provisions relating to fees and charges from those relating to formalities, (ii) to make it clear that the expression ‘fees and charges’ does not pertain to import and export duties or to taxes which fall within the purview of Article III, and (iii) to render the provisions of paragraph 1(a) obligatory by changing the word ‘should’ to ‘shall’ and by deleting the qualification that contracting parties need take action in accordance with the principles and objectives of that sub-paragraph only ‘at the earliest practicable date’. These amendments are recommended on the assumption that the Agreement will contain a general provision allowing time for governments to bring their legislation into conformity with the rules and on condition that the amendment proposed to the interpretative note is adopted.”<sup>81</sup>

These changes, including changes to the title and paragraphs 1 and 2 of Article VIII, were implemented by the Protocol Amending the Preamble and Parts II and III of the General Agreement, and entered into effect on 7 October 1957.

#### IV. RELEVANT DOCUMENTS

See below at the end of Article X.

<sup>77</sup>A footnote to this sentence provides: “League of Nations Document C.356.M.129.1927.II, paragraph 5(1)”.

<sup>78</sup>A footnote to this sentence provides: “According to negotiation records in the United States archives, the earliest reference occurred in a document titled ‘Agenda Resulting from Informal Exploratory Discussions between officials of the United Kingdom and of the United States...’, dated 16 October 1943”.

<sup>79</sup>A footnote to this word provides: “Article VIII:1(a) first appeared as Article 13, *Suggested Charter for an International Trade Organization of the United Nations*, submitted by the United States in September 1946. The first document found by the Panel containing the text of what was to become Article II:2(c) was E/PC/T/153 of August 1947. See also E/PC/T/201 of September 1947”.

<sup>80</sup>L/6264, adopted on 2 February 1988, 35S/245, 273-274, paras. 71-74.

<sup>81</sup>L/329, adopted 26 February 1955, 3S/205, 214, para. 20.