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1 ARTICLE VIII

1.1 Text of 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 connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.

(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (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 connection 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.

1.2 Text of note *ad* Article VIII

Ad Article VIII

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.

1.3 Article VIII:1(a)

1. In *Argentina – Textiles and Apparel*, the Panel addressed a 3 per cent *ad valorem* "statistical tax" on imports, described by Argentina as designed to cover the cost of providing trade statistics. The Panel found that this statistical tax was inconsistent with Article VIII:1(a). (Argentina did not appeal this finding, but claimed that the Panel had failed to take properly into account Argentina's IMF obligations.) The Panel emphasized that an *ad valorem* tax, by design, is not "limited in amount to the approximate cost of services rendered", as required by Article VIII:1(a):

"The meaning of Article VIII was examined in detail in the Panel Report on *United States – Customs User Fee*.¹ The panel found that Article VIII's requirement that the charge be 'limited in amount to the approximate cost of services rendered' is 'actually a dual requirement, because the charge in question must first involve a 'service' rendered, and then the level of the charge must not exceed the approximate cost of that 'service'.² According to the panel report, the term 'services rendered' means 'services rendered to the individual importer in question'.³ In the present case Argentina states that the service is not rendered to the individual importer, or to the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity per se.

An *ad valorem* duty with no fixed maximum fee, by its very nature, is not 'limited in amount to the approximate cost of services rendered'. For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited *ad valorem* charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered. For example, in the *Customs User Fee* report, the panel examined the consistency with Article VIII of 0.22 and 0.17 per cent *ad valorem* customs merchandise processing fees with no upper limits. The panel concluded that 'the term 'cost of services rendered' ... in Article VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question and accordingly that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with Article VIII:1(a) to the extent that it caused fees to be levied in excess of such costs'.^{4, 5}

¹ (footnote original) Panel Report on *US – Customs User Fee*.

² (footnote original) Panel Report on *US – Customs User Fee*, para. 69.

³ (footnote original) Panel Report on *US – Customs User Fee*, para. 80.

⁴ (footnote original) Panel Report on *US – Customs User Fee*, para. 86.

⁵ Panel Report, *Argentina – Textiles and Apparel*, paras. 6.74-6.75. The Panel also referred to the GATT Working Party Report, *Accession of the Democratic Republic of the Congo* (BISD 18S/89, para. 5).

2. The Panel also rejected Argentina's argument that its tax had been enacted for "fiscal purposes":

"Argentina's statistical tax is levied on an *ad valorem* basis with no ceiling. As described in paragraph 6.70 above, Argentina's tax is clearly not related to the cost of a service rendered to the specific importers concerned. The tax as assessed on many goods is not in proportion to the cost of any service rendered. The tax purportedly raises revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports. While the gathering of statistical information concerning imports may benefit traders in general, Article VIII bars the levying of any tax or charge on importers to support the related costs 'for the individual entry in question' since it will also benefit exports and exporters.⁶

As to Argentina's argument that it was collecting this tax for 'fiscal' purposes in the context of its undertakings with the IMF, we note that not only does Article VIII of GATT expressly prohibit such measures for fiscal purposes but that clearly a measure for fiscal purposes will normally lead to a situation where the tax results in charges being levied in excess of the approximate costs of the statistical services rendered."⁷

3. The Panel in *US – Certain EC Products* examined increased bonding requirements imposed by the United States on imports from the European Communities on 3 March 1999, in order to secure the collection of additional import duties that were authorized by the DSB on a later date. The Panel considered that Article VIII:1 could not provide a justification for the costs relating to the bonding requirements:

"The meaning of Article VIII was examined in the adopted Panel Report on *United States – Customs Users Fee*⁸ and in the adopted Appellate Body and Panel Reports on *Argentina – Textiles*. It was found that Article VIII's requirement that the charge be 'limited in amount to the approximate cost of services rendered' is 'actually a dual requirement, because the charge in question must first involve a 'service' rendered, and then the level of the charge must not exceed the approximate cost of that 'service'.⁹ The term 'services rendered' means 'services rendered to the individual importer in question.'¹⁰

Although very briefly in its rebuttals, the United States argued that bonding requirements could be viewed as a form of fee for services rendered (the services being the 'early release of merchandise') and therefore should benefit from the carve-out of Article II:2(c) of GATT, the United States has not submitted any data on the second requirement. There is no evidence that what was required from importers represented any such approximate costs of any service. It is also difficult to understand why the costs of such service would have suddenly increased on 3 March (did the United States provide more services to importers on 3 March?), and then only for listed imports from the European Communities."¹¹

4. The Panel in *China – Raw Materials* examined an Article VIII:1(a) claim in relation to China's auctioning of export quotas for certain minerals, under which enterprises seeking to export must pay a bid-winning price, equal to the bid price multiplied by the bid quantity, for the right to export under the quota. The Panel first considered the meaning of Article VIII:1(a) and concluded:

"Article VIII:1(a) applies to fees and charges imposed 'on or in connection with importation or exportation' and requires that such fees and charges are solely applied in exchange for a 'service rendered'. As such fees, charges, formalities or

⁶ (footnote original) Panel Report on *US – Customs User Fee*, paras. 84-86.

⁷ Panel Report, *Argentina – Textiles and Apparel*, paras. 6.77-6.78.

⁸ (footnote original) Panel Report on *US – Customs User Fee*.

⁹ (footnote original) Panel Report on *US – Customs User Fee*, para. 69.

¹⁰ (footnote original) Panel Report on *US – Customs User Fee*, para. 80.

¹¹ Panel Report, *US – Certain EC Products*, paras. 6.69-6.70.

requirements that are typically imposed when providing customs-related documentation, certification and inspection, and statistical matters are covered."¹²

5. Regarding the charge at issue, the Panel concluded that "the bid-winning price collected by China in connection with quota allocation does not constitute a 'fee or charge of whatever character ... imposed ... in connection with ... exportation' within the meaning of Article VIII:1(a). In particular, the Panel finds that the collection of the bid-winning prices does not amount to the imposition of a fee or charge on or in connection with exportation.¹³ Finally, we observe that a finding otherwise would mean that all quota allocation through bidding or auctioning would be prohibited."¹⁴ The Panel observed:

"[T]he bid-winning price is initially a proposal submitted by an enterprise. The actual price is determined and assigned to the applicant enterprise at a point well before the exporter enters into a binding commitment to export the good subject to a quota. ... In the Panel's view, this type of arrangement does not amount to the imposition of a fee or charge on or in connection with exportation."¹⁵

...the bid-winning fee is a price offered in expectation of a future return. ... a bid-winning price approach generally allows a more efficient allocation of quotas than would be possible through quota allocation based on request, or based on historical quota allocation proportions, or on some arbitrary basis.... The bidding process described above determines the enterprises that will be permitted to export, but it does not affect the price ultimately received by the seller for the goods. Rather it is the total volume permitted for export that generally will determine the export price in the market.

Finally, it is clear that the assessed bid-winning price is not in any way related to the approximate cost of a service rendered. ... By their very nature, prices submitted through bidding are variable, which would always violate the requirement in Article VIII:1(a) that fees must approximate the cost of a particular service rendered – in this case, the allocation of a quota."¹⁶

1.4 Relationship with other GATT provisions

1.5.1 Article II:1(b) and recording of changes in Schedules pursuant to the Understanding on Article II:1(b)

6. In *Argentina – Textiles and Apparel*, Argentina argued that the 3 per cent ad valorem statistical tax was included in its Schedule LXIV, and was therefore not in violation of GATT rules. The Panel cited paragraph 1 of the Understanding on the Interpretation of Article II:1(b), providing that recording in a Schedule "does not change the legal character of 'other duties or charges'", paragraph 5 providing that such recording "is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the consistency of any 'other duty or charge' with such obligations", and the provisions in paragraph 6 ensuring the right to dispute settlement. The panel held as follows:

"The provisions of the WTO Understanding on the Interpretation of Article II:1(b) of GATT 1994, dealing with 'other duties and charges', make clear that including a charge in a schedule of concessions in no way immunizes that charge from challenge as a violation of an applicable GATT rule. ... This provision is consistent with GATT and WTO jurisprudence dealing with conflicts between non-tariff provisions included in the Member's Schedules and general GATT and WTO rules.

¹² Panel Report, *China – Raw Materials*, paras. 7.839.

¹³ (*footnote original*) The Panel notes that this method of allocation is economically desirable and is not otherwise prohibited under the GATT 1994 or WTO Agreement.

¹⁴ Panel Report, *China – Raw Materials*, para. 7.851.

¹⁵ Panel Report, *China – Raw Materials*, para. 7.847.

¹⁶ Panel Report, *China – Raw Materials*, paras. 7.849-7.850.

Therefore, we consider that the fact that Argentina's statistical tax is included in its Schedule is not a defence to its inconsistency with the provisions of Article VIII of GATT."¹⁷

1.5.2 Article XI

7. In *Argentina – Import Measures*, the Appellate Body disagreed with Argentina's argument that the Panel had failed to establish and apply a "proper analytical framework" for distinguishing between the scope and disciplines of Article VIII and Article XI:1, respectively.¹⁸ The Appellate Body held:

"[T]o the extent that Argentina's argument may imply the existence of a conflict between Articles VIII and XI:1 of the GATT 1994, Argentina has identified no specific obligation or language in Article VIII that allegedly conflicts with the general obligation in Article XI:1 to eliminate quantitative restrictions. Nor has Argentina explained its understanding of such a conflict. As the Appellate Body has held in previous disputes, and as noted by the Panel, the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously.

For all of these reasons, we agree with the Panel that formalities or requirements under Article VIII of the GATT 1994 are not excluded *per se* from the scope of application of Article XI:1 of the GATT 1994, and that their consistency could be assessed under either Article VIII or Article XI:1, or under both provisions. Thus, we reject Argentina's argument that Articles VIII and XI:1 have mutually exclusive spheres of application."¹⁹

8. In reaching that conclusion, the Appellate Body in *Argentina – Import Measures* closely examined Argentina's argument that Article VIII "creates, or operates as a form of, derogation or carve-out from the scope of the obligations under Article XI:1"²⁰ and noted, *inter alia*, that:

"We also accept that Article VIII:1(c) constitutes context for the interpretation of Article XI:1 of the GATT 1994, and for what amounts to a restriction on importation within the meaning of the latter provision. Yet, such language does not suffice to establish the type of carve-out or derogation from Article XI:1 that Argentina seems to envisage for formalities and requirements referred to in Article VIII of the GATT 1994. To the contrary, the general and hortatory language of Article VIII:1(c) stands in contrast to, for example, the language of Article VIII:1(a) of the GATT 1994."²¹

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

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

¹⁷ Panel Report, *Argentina – Textiles and Apparel*, paras. 6.81-6.82.

¹⁸ Appellate Body Report, *Argentina – Import Measures*, para. 5.223.

¹⁹ Appellate Body Reports, *Argentina – Import Measures*, paras. 5.236-5.237.

²⁰ Appellate Body Reports, *Argentina – Import Measures*, para. 5.222.

²¹ Appellate Body Reports, *Argentina – Import Measures*, para. 5.233.

the GATT 1994. Instead, only those that have a limiting effect on the importation of products will do so."²²

1.5 Relationship with other WTO Agreements

10. In *Argentina – Textiles and Apparel*, the Appellate Body responded to an argument by Argentina that the Panel's interpretation of Article VIII should have taken into account a Memorandum of Understanding between Argentina and the IMF providing for fiscal measures to be adopted including "... increases in import duties, including a temporary 3 per cent surcharge on imports". The Appellate Body ruled that:

"Argentina did not show an irreconcilable conflict between the provisions of its 'Memorandum of Understanding' with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel's implicit finding that Argentina failed to demonstrate that it had a legally binding commitment to the IMF that would somehow supersede Argentina's obligations under Article VIII of the GATT 1994."²³

Current as of: December 2020

²² Appellate Body Reports, *Argentina – Import Measures*, para. 5.243.

²³ Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 69-70. See also the discussion on relations between the WTO and the IMF in the Sections on the WTO Agreement, and Article XV of the GATT 1994.