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1 PREAMBLE

1.1 Text of the Preamble

The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,

Have through their Representatives agreed as follows:

1.2 First recital

1. The Appellate Body Report on *EC – Tariff Preferences*, discussing the history of Part IV and the Enabling Clause, observed:

"When the GATT 1947 entered into force, the Contracting Parties stated that one of its objectives was to 'rais[e] standards of living'. However, this objective was to be achieved in countries at all stages of economic development through the *universally-applied* commitments embodied in the GATT provisions."¹

2. In *US – Shrimp*, the Appellate Body contrasted the phrase "developing the full use of the resources of the world" in the preamble to the GATT with the language subsequently included in the preamble to the WTO Agreement. The Appellate Body stated:

"At the end of the Uruguay Round, negotiators fashioned an appropriate preamble for the new *WTO Agreement*, which strengthened the multilateral trading system by establishing an international organization, *inter alia*, to facilitate the implementation, administration and operation, and to further the objectives, of that Agreement and the other agreements resulting from that Round. In recognition of the importance of continuity with the previous GATT system, negotiators used the preamble of the GATT 1947 as the template for the preamble of the new *WTO Agreement*. Those negotiators evidently believed, however, that the objective of 'full use of the resources of the world' set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's. As a result, they decided to qualify the original objectives of the GATT 1947 with the following words:

¹ Appellate Body Report, *EC – Tariff Preferences*, para.107.

... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development ... [.]²

1.3 Second recital

1.3.1 "entering into reciprocal and mutually advantageous arrangements"

3. The wording of the second recital of the preamble to the GATT 1994 is mirrored in the preamble to the WTO Agreement. Panels and the Appellate Body have considered one or both of these similarly-worded recitals in a number of cases, including but not limited to the following:

4. In *EC – Computer Equipment*, the Appellate Body stated that:

"[T]he security and predictability of 'the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994."³

5. In *EC – Chicken Cuts*, the Panel stated that:

"Taken together, the relevant aspects of the WTO Agreement and the GATT 1994 indicate that concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs. It is also clear that such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous. In other words, the terms of a concession should not be interpreted in such a way that would disrupt the balance of concessions negotiated by the parties. Finally, the interpretation must ensure the security and predictability of the reciprocal and mutually advantageous arrangements manifested in the form of concessions."⁴

6. In *US – Gambling*, the Panel referred to several objectives of the covered agreements, including the objective of "entering into reciprocal and mutually advantageous arrangements", in the context of interpreting the US Schedule to the GATS. On appeal, the Appellate Body stated that:

"We agree with the Panel's characterization of these objectives, along with its suggestion that they reinforce the importance of Members' making clear commitments. Yet these considerations do not provide specific assistance for determining where, in the United States' Schedule, 'gambling and betting services' fall. Accordingly, it is necessary to continue our analysis by examining other elements to be taken into account in interpreting treaty provisions."⁵

7. In *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, the Panel found that when the Banana Framework Agreement expired on 31 December 2002, the EC's tariff quota concession necessarily also expired. The Appellate Body disagreed with the Panel, and discussed the Preamble in the course of its analysis:

"We agree with the Panel that 'concessions made by WTO Members should be interpreted so as to further the general objective of expanding trade in goods and services and reducing barriers to trade, through the negotiation of reciprocal and mutually advantageous arrangements.' We also consider that the 'objective of promoting security and predictability in international trade' is furthered 'through the exchange of concessions', which are subject to conditions and qualifications inscribed

² Appellate Body Report, *US – Shrimp*, para. 152.

³ Appellate Body Report, *EC – Computer Equipment*, para. 82.

⁴ Panel Reports, *EC – Chicken Cuts*, para. 7.320.

⁵ Appellate Body Report, *US – Gambling*, para. 189.

in Members' Schedules. However ... it is not consistent with the objective of promoting security and predictability in international trade through the exchange of concessions if terms, conditions, and temporal limitations relating to an agreement on quota allocation are improperly read to qualify a tariff quota concession that is bound as the 'final quota quantity and in-quota tariff rate'.

... If the Panel's interpretation that paragraph 9 of the Bananas Framework Agreement "extinguished" the tariff quota concession from Part I, Section I-B of the European Communities' Schedule were accepted, only the out-of-quota tariff rate bound in Part I, Section I-A at a level of at €680/mt would remain, coupled with a requirement to consult on a rebinding. In our view, this would not provide security or predictability of tariff concessions and would not promote the objective of expanding trade and reducing barriers to trade through the negotiation of reciprocal and mutually advantageous concessions and arrangements."⁶

8. The Panel in *EU – Poultry (China)* referred to the third recital of the Preamble in the context of describing Article XXVIII, concerning the modification of Schedules. The Panel stated that:

"On the other hand, one of the specific objects and purposes of Article XXVIII is to allow Members to make tariff concessions by providing them with flexibility to withdraw or modify those concessions subsequently, if necessary, in accordance with the procedures provided for therein. In this way, the right to modify or withdraw concessions supports the overarching object and purpose, which finds reflection in the preambles of both the GATT 1994 and the WTO Agreement, of Members '*entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade*'.⁷"

9. In *EU – Poultry (China)*, the Panel also referred to the Preamble in the context of interpreting the term "reciprocal" in Article XXVIII:2 of the GATT 1994, which provides that negotiations to modify or withdraw a concession in a Schedule must "endeavour to maintain a general level of reciprocal and mutually advantageous concessions". The Panel observed that:

"Other provisions of the GATT 1994 refer to 'reciprocal and mutually advantageous' concessions and arrangements. Notably, the preamble to both the GATT 1994 and the WTO Agreement recognize the objective of entering into 'reciprocal and mutually advantageous arrangements' directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.⁸ It seems to us that they basically convey the notion of balanced concessions and arrangements. As the Panel in *EC – Chicken Cuts* observed:

Taken together, the relevant aspects of the WTO Agreement and the GATT 1994 indicate that concessions made by WTO Members should be interpreted so as to further the general objective of the expansion of trade in goods and the substantial reduction of tariffs. It is also clear that such an interpretation is limited by the condition that arrangements entered into by Members be reciprocal and mutually advantageous. In other words, the terms of a concession should not be interpreted in such a way that would disrupt the balance of concessions negotiated by the parties."⁹

1.3.2 "the elimination of discriminatory treatment in international commerce"

10. The Panel in *Turkey – Textiles* also referred to the Preamble in the context of finding that GATT Article XXIV does not constitute a shield from other GATT/WTO prohibitions, or the introduction of measures considered to be ipso facto incompatible with GATT/WTO:

⁶ Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, paras. 433-434.

⁷ Panel Report, *EU – Poultry (China)*, para. 7.512.

⁸ (footnote original) We also note that Article XVII:3 of the GATT 1994 and Article XXVIII*bis* both refer to negotiations on a "reciprocal and mutually advantageous basis" to reduce obstacles to trade.

⁹ Panel Report, *EU – Poultry (China)*, para. 7.297.

"At the conclusion of the Uruguay Round Members reiterated the same general objective and principles in the GATT 1994 Understanding on Article XXIV:

'*Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;'

and in the Preamble to the WTO Agreement:

'Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of *discriminatory treatment* in international commerce ...'
(emphasis added)

We also recall the Singapore Ministerial Declaration:

'7. ... We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules'

From the above cited provisions, we draw two general conclusions for the present case. Firstly, the objectives of regional trade agreements and those of the GATT and the WTO have always been complementary, and therefore should be interpreted consistently with one another, with a view to increasing trade and not to raising barriers to trade, thereby arguing against an interpretation that would allow, on the occasion of the formation of a customs union, for the introduction of quantitative restrictions. Secondly, we read in these parallel objectives a recognition that the provisions of Article XXIV (together with those of the GATT 1994 Understanding on Article XXIV) do not constitute a shield from other GATT/WTO prohibitions, or a justification for the introduction of measures which are considered generally to be ipso facto incompatible with GATT/WTO. In our view the provisions of Article XXIV on regional trade agreements cannot be considered to exempt constituent members of a customs union from the primacy of the WTO rules."¹⁰

11. The Panel in *US – Line Pipe* found that the rules in Article XIII of the GATT 1994, regarding the non-discriminatory administration of quantitative restrictions, apply to safeguard measures. In the Panel's view, the alternative interpretation would be contrary to the object and purpose of eliminating discriminatory treatment as reflected in the third recital:

"[I]f Article XIII did not apply to tariff quota safeguard measures, such safeguard measures would escape the majority of the disciplines set forth in Article 5 [of the Safeguards Agreement]. This is an important consideration, given the quantitative aspect of a tariff quota. For example, if Article XIII did not apply, quantitative criteria regarding the availability of lower tariff rates could be introduced in a discriminatory manner, without any consideration to prior quantitative performance. In our view, the potential for such discrimination is contrary to the object and purpose of both the Safeguards Agreement, and the WTO Agreement. In this regard, the preamble of the Safeguards Agreement refers to the 'need to clarify and reinforce the disciplines of GATT 1994' in the context of safeguards."¹¹

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¹⁰ Panel Report, *Turkey – Textiles*, paras. 9.161-9.163.

¹¹ Panel Report, *US – Line Pipe*, para. 7.49.