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1 ARTICLE IX

1.1 Text of Article IX

Article IX

Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.¹ Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States² which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.³

(footnote original) ¹ The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

(footnote original) ² The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

(footnote original) ³ Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

2. The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article X.

3. In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths⁴ of the Members unless otherwise provided for in this paragraph.

(footnote original) ⁴ A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.

- (a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths⁴ of the Members.
- (b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

4. A decision by the Ministerial Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Ministerial Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Ministerial Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Ministerial Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

5. Decisions under a Plurilateral Trade Agreement, including any decisions on interpretations and waivers, shall be governed by the provisions of that Agreement.

1.2 Article IX:2: Interpretations by the Ministerial Conference and the General Council

1. In *Japan – Alcoholic Beverages II*, the Appellate Body rejected the Panel's finding that panel reports adopted by the GATT 1947 CONTRACTING PARTIES and the DSB constitute "subsequent practice" within the meaning of Article 31 of the Vienna Convention on the Law of Treaties, by virtue of the decision to adopt them.¹ In support of this conclusion, the Appellate Body referred to the exclusive authority of the Ministerial Conference and General Council to adopt interpretations of the WTO Agreement under Article IX:2:

"We do not believe that the CONTRACTING PARTIES, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the *WTO Agreement*. Article IX:2 of the *WTO Agreement* provides: 'The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements'. Article IX:2 provides further that such decisions 'shall be taken by a three-fourths majority of the Members'. The fact that such an 'exclusive authority' in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.

Historically, the decisions to adopt panel reports under Article XXIII of the GATT 1947 were different from joint action by the CONTRACTING PARTIES under Article XXV of the GATT 1947. Today, their nature continues to differ from interpretations of the GATT 1994 and the other Multilateral Trade Agreements under the *WTO Agreement* by the WTO Ministerial Conference or the General Council. This is clear from a reading of Article 3.9 of the *DSU*, which states:

The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered

¹ Appellate Body Report, *Japan – Alcoholic Beverages II*, pp. 12-15.

agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement."²

2. In *US – Wool Shirts and Blouses*, the Appellate Body, in support of the Panel's exercise of judicial economy referred to the exclusive authority of the Ministerial Conference and the General Council to adopt interpretations of the WTO Agreement:

"As India emphasizes, Article 3.2 of the *DSU* states that the Members of the WTO 'recognize' that the dispute settlement system 'serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' (emphasis added). Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."³

We note, furthermore, that Article IX of the *WTO Agreement* provides that the Ministerial Conference and the General Council have the 'exclusive authority' to adopt interpretations of the *WTO Agreement* and the Multilateral Trade Agreements.⁴⁵

3. In *US – FSC*, the Appellate Body noted the difference between an authoritative interpretation and an interpretation in dispute settlement:

"Under the *WTO Agreement*, an authoritative interpretation by the Members of the WTO, under Article IX:2 of that Agreement, is to be distinguished from the rulings and recommendations of the DSB, made on the basis of panel and Appellate Body Reports. In terms of Article 3.2 of the *DSU*, the rulings and recommendations of the DSB serve only 'to clarify the existing provisions of those agreements' and 'cannot add to or diminish the rights and obligations provided in the covered agreements.'"⁶

4. In *Chile – Price Band System*, the Panel rejected an argument that Chile's position was supported by a letter from the GATT Secretariat, and stated that:

"The WTO Agreement gives the Ministerial Conference and the General Council the exclusive right to adopt interpretations of the WTO Agreement. While the Secretariat has in the past, and will in the future be requested to provide advice to Members of the WTO, we believe the general rule of reserving the legal right to adopt interpretations to the Members to be the appropriate standard in this context, while, of course, recognizing that the WTO rules were not in force at the time in question."⁷

5. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body discussed methods that Members may use to interpret or modify WTO law provided for in the WTO Agreement, and considered that a multilateral interpretation under Article IX:2 can be likened to a "subsequent agreement" in the sense of Article 31(3)(a) of the Vienna Convention (addressed in the Section on the *DSU*):

"Article IX:2 of the *WTO Agreement* sets out specific requirements for decisions that may be taken by the Ministerial Conference or the General Council to adopt interpretations of provisions of the Multilateral Trade Agreements. Such multilateral interpretations are meant to clarify the meaning of existing obligations, not to modify their content. Article IX:2 emphasizes that such interpretations "shall not be used in a

² Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13.

³ (footnote original) The "matter in issue" is the "matter referred to the DSB" pursuant to Article 7 of the *DSU*.

⁴ (footnote original) *Japan – Taxes on Alcoholic Beverages*, AB-1996-2, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 13.

⁵ Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 19-20.

⁶ Appellate Body Report, *US – FSC*, fn. 127.

⁷ Panel Report, *Chile – Price Band System*, para. 7.94.

manner that would undermine the amendment provisions in Article X". A multilateral interpretation should also be distinguished from a waiver, which allows a Member to depart from an existing WTO obligation for a limited period of time. We consider that a multilateral interpretation pursuant to Article IX:2 of the *WTO Agreement* can be likened to a subsequent agreement regarding the interpretation of the treaty or the application of its provisions pursuant to Article 31(3)(a) of the *Vienna Convention*, as far as the interpretation of the WTO agreements is concerned."⁸

6. In *US – Clove Cigarettes*, the Appellate Body considered the interpretative value of Paragraph 5.2 of the Doha Ministerial Decision on Implementation-Related Issues and Concerns, which provides that the phrase "a reasonable interval" in the context of Article 2.12 of the TBT Agreement shall be understood to mean normally a period of at least six months.⁹ The Appellate Body found that, in the absence of a specific recommendation from the Council for Trade in Goods concerning the interpretation of Article 2.12 of the TBT Agreement made in accordance with Article IX:2 of the *WTO Agreement*, Paragraph 5.2 of the Doha Ministerial Decision did *not* constitute a multilateral interpretation adopted pursuant to Article IX:2 of the *WTO Agreement*. Regarding the procedural requirements of Article IX:2, the Appellate Body stated that:

"Multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* have a pervasive legal effect. Such interpretations are binding on all Members. As we see it, the broad legal effect of these interpretations is precisely the reason why Article IX:2 subjects the adoption of such interpretations to clearly articulated and strict decision-making procedures.

...

While Article IX:2 of the *WTO Agreement* confers upon the Ministerial Conference and the General Council the exclusive authority to adopt multilateral interpretations of the *WTO Agreement*, this authority must be exercised within the defined parameters of Article IX:2. It seems to us that the view expressed by the Panel does not respect a specific decision-making procedure established by Article IX:2 of the *WTO Agreement*. In our view, to characterize the requirement to act on the basis of a recommendation by the Council overseeing the functioning of the relevant Agreement as a 'formal requirement' neither permits a panel to read that requirement out of a treaty provision, nor to dilute its effectiveness.

Although the Panel's reasoning may be read as suggesting that the Ministerial Conference could dispense with a specific requirement established by Article IX:2 of the *WTO Agreement*, the terms of Article IX:2 do not suggest that compliance with this requirement is dispensable. In this connection, we recall that, pursuant to Article IX:2 of the *WTO Agreement*, the Ministerial Conference or the General Council 'shall' exercise their authority to adopt an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement* 'on the basis of a recommendation' by the Council overseeing the functioning of that Agreement. We consider that the recommendation from the relevant Council is an essential element of Article IX:2, which constitutes the legal basis upon which the Ministerial Conference or the General Council exercise their authority to adopt interpretations of the *WTO Agreement*. Thus, an interpretation of a Multilateral Trade Agreement contained in Annex 1 to the *WTO Agreement* must be adopted on the basis of a recommendation from the relevant Council overseeing the functioning of that Agreement."¹⁰

7. However, the Appellate Body agreed with the Panel that Paragraph 5.2 of the Doha Ministerial Decision nonetheless constitutes a "subsequent agreement between the parties" within the meaning of Article 31(3)(a) of the *Vienna Convention on the Law of Treaties*. In the course of its analysis, the Appellate Body offered the following observations on the relationship between multilateral interpretations made under Article IX:2 of the *WTO Agreement*, and those which were

⁸ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 393. See also Panel Report, *US – Clove Cigarettes*, paras. 7.569-7.576.

⁹ Appellate Body Report, *US – Clove Cigarettes*, paras. 241-275.

¹⁰ Appellate Body Report, *US – Clove Cigarettes*, paras. 250, 253-254.

not, but which nonetheless qualified as a "subsequent agreement" under Article 31(3)(a) of the Vienna Convention:

"We observe that multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement*, on the one hand, and subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the other hand, serve different functions and have different legal effects under WTO law. Multilateral interpretations under Article IX:2 of the *WTO Agreement* provide a means by which Members—acting through the highest organs of the WTO—may adopt binding interpretations that clarify WTO law for all Members. Such interpretations are binding on all Members, including in respect of all disputes in which these interpretations are relevant.

On the other hand, Article 31(3)(a) of the *Vienna Convention* is a rule of treaty interpretation, pursuant to which a treaty interpreter uses a subsequent agreement between the parties on the interpretation of a treaty provision as an interpretative tool to determine the meaning of that treaty provision. Pursuant to Article 3.2 of the DSU, panels and the Appellate Body are required to apply the customary rules of interpretation of public international law—including the rule embodied in Article 31(3)(a) of the *Vienna Convention*—to clarify the existing provisions of the covered agreements. Interpretations developed by panels and the Appellate Body in the course of dispute settlement proceedings are binding only on the parties to a particular dispute. Article IX:2 of the *WTO Agreement* does not preclude panels and the Appellate Body from having recourse to a customary rule of interpretation of public international law that, pursuant to Article 3.2 of the DSU, they are required to apply.

We also recall that, in *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body stated that 'multilateral interpretations are meant to clarify the meaning of existing obligations', and that 'multilateral interpretations adopted pursuant to Article IX:2 of the *WTO Agreement* are *most akin* to subsequent agreements within the meaning of Article 31(3)(a) of the *Vienna Convention*'. Thus, given the specific function of multilateral interpretations adopted pursuant to Article IX:2, and the fact that these interpretations are adopted by Members sitting in the form of the highest organs of the WTO, such interpretations are most akin to, but *not exhaustive of*, subsequent agreements on interpretation within the meaning of Article 31(3)(a) of the *Vienna Convention*."¹¹

1.3 Article IX:3: Waivers

1.3.1 Interpretation of waivers

1.3.1.1 Exceptional nature of waivers

8. In *EC – Bananas III*, the European Communities argued that a certain waiver on its import regime for bananas should be interpreted so as to justify a deviation from Article XIII of the GATT 1994 although it waived only compliance with Article I of the GATT 1994 in its terms. The Panel accepted this argument to the extent that "the scope of Article XIII is identical with that of Article I"¹², but the Appellate Body rejected this finding, stating:

"The wording of the Lomé Waiver is clear and unambiguous. By its precise terms, it waives only 'the provisions of paragraph 1 of Article I of the *General Agreement* ... to the extent necessary' to do what is 'required' by the relevant provisions of the Lomé Convention. The Lomé Waiver does not refer to, or mention in any way, any other provision of the GATT 1994 or of any other covered agreement. Neither the circumstances surrounding the negotiation of the Lomé Waiver, nor the need to interpret it so as to permit it to achieve its objectives, allow us to disregard the clear and plain wording of the Lomé Waiver by extending its scope to include a waiver from the obligations under Article XIII. Moreover, although Articles I and XIII of the GATT

¹¹ Appellate Body Report, *US – Clove Cigarettes*, paras. 257-259.

¹² Panel Report, *EC – Bananas III*, para. 7.107.

1994 are both non-discrimination provisions, their relationship is not such that a waiver from the obligations under Article I implies a waiver from the obligations under Article XIII.¹³

The Panel's interpretation of the Lomé Waiver as including a waiver from the GATT 1994 obligations relating to the allocation of tariff quotas is difficult to reconcile with the limited GATT practice in the interpretation of waivers, the strict disciplines to which waivers are subjected under the *WTO Agreement*, the history of the negotiations of this particular waiver and the limited GATT practice relating to granting waivers from the obligations of Article XIII.

There is little previous GATT practice on the interpretation of waivers. In the panel report in *United States – Sugar Waiver*, the panel stated:

'The Panel took into account in its examination that waivers are granted according to Article XXV:5 only in 'exceptional circumstances', that they waive obligations under the basic rules of the General Agreement and that their terms and conditions consequently have to be interpreted narrowly.'¹⁴

Although the WTO Agreement does not provide any specific rules on the interpretation of waivers, Article IX of the WTO Agreement and the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994, which provide requirements for granting and renewing waivers, stress the exceptional nature of waivers and subject waivers to strict disciplines. Thus, waivers should be interpreted with great care.

With regard to the history of the negotiations of the Lomé Waiver, we have already noted that the CONTRACTING PARTIES limited the scope of the waiver by replacing 'preferential treatment *foreseen* by the Lomé Convention' with 'preferential treatment *required* by the Lomé Convention' (emphasis added). This change clearly suggests that the CONTRACTING PARTIES wanted to restrict the scope of the Lomé Waiver.

Finally, we note that between 1948 and 1994, the CONTRACTING PARTIES granted only one waiver of Article XIII of the GATT 1947.¹⁵ In view of the truly exceptional nature of waivers from the non-discrimination obligations under Article XIII, it is all the more difficult to accept the proposition that a waiver that does not explicitly refer to Article XIII would nevertheless waive the obligations of that Article. If the CONTRACTING PARTIES had intended to waive the obligations of the European Communities under Article XIII in the Lomé Waiver, they would have said so explicitly."¹⁶

1.3.1.2 Waivers cannot modify or add to obligations

9. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body reviewed a finding of a panel under Article 21.5 that an EC tariff concession had expired on 31 December 2002 but that in adopting a waiver decision in respect of EC measures on bananas, the WTO Members had agreed to extend the duration of that tariff concession. The Appellate Body referred to the requirements for requests for new waivers in the Understanding in Respect of Waivers of Obligations under the GATT 1994, as demonstrating the exceptional nature of waivers:

"The need to state the exceptional circumstances, to specify the terms and conditions governing the application of the waiver, and to describe the specific policy objectives that a Member seeks to pursue, make clear that a waiver is a specific and exceptional instrument subject to strict disciplines." These elements do not suggest that a waiver

¹³ Appellate Body Report, *EC – Bananas III*, para. 183.

¹⁴ (footnote original) Panel Report on *US – Sugar Waiver*, para. 5.9.

¹⁵ (footnote original) Waiver Granted in Connection with the European Coal and Steel Community, Decision of 10 November 1952, BISD 1S/17, para. 3.

¹⁶ Appellate Body Report, *EC – Bananas III*, paras. 184-187.

should be construed as an agreement on issues not explicitly reflected in its terms and conditions, justifying circumstances, and stated policy objectives. ...

In our view, the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision. Its purpose is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care." ¹⁷

10. The Appellate Body also reversed a finding by the Panel in the same compliance proceeding, that the waiver in question qualified as a "subsequent agreement" (in the sense of Article 31(3)(a) of the Vienna Convention on the Law of Treaties) regarding interpretation or application of the EC Schedule. The Appellate Body found that waivers were not "akin to" subsequent agreements in this sense.¹⁸ The Appellate Body also found that the waiver at issue "does not constitute an amendment of the European Communities' Schedule ... Extending an obligation with a temporal limitation is a modification that 'alter[s] the rights and obligations of the Members'. Therefore, if implemented by means of an amendment" the procedural provisions of Article X would apply; the waiver at issue "is a decision taken by the Ministerial Conference, which did not require formal acceptance by the Membership as foreseen under Article X:7." ¹⁹

1.3.1.3 Limited duration of waivers

11. In *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, the Appellate Body noted that under the WTO Agreement, waivers are inherently limited in duration:

"Article IX:4 requires that the decision granting the waiver state the date on which the waiver shall terminate, thus ensuring that waivers are granted for limited periods of time." ²⁰

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¹⁷ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, paras. 381-382.

¹⁸ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 390.

¹⁹ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 394..

²⁰ Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 380.