

12 August 1994

**UNITED STATES - MEASURES AFFECTING THE IMPORTATION,
INTERNAL SALE AND USE OF TOBACCO**

*Report of the Panel adopted by the Council on 4 October 1994
(DS44/R)*

List of Contents

I.	INTRODUCTION	3
	Terms of Reference	3
	Composition	3
II.	FACTUAL ASPECTS	4
	General	4
	Domestic Marketing Assessment (Section 1106(a))	5
	Budget Deficit Assessment (Section 1106(b)(1))	5
	No Net Cost Assessment (Section 1106(b)(2))	6
	Fees for Inspecting Imported Tobacco (Section 1106(c))	6
III.	MAIN ARGUMENTS	7
	General	7
	Domestic Marketing Assessment (Section 1106(a))	7
	Budget Deficit Assessment (Section 1106(b)(1))	10
	No Net Cost Assessment (Section 1106(b)(2))	14
	Fees for Inspecting Imported Tobacco (Section 1106(c))	17
IV.	INTERESTED THIRD CONTRACTING PARTIES	20
V.	FINDINGS	24
	Introduction	24
	Domestic Marketing Assessment ("DMA")	24
	<i>Article III:5</i>	24
	<i>Article III:4</i>	26
	<i>Article III:2</i>	27
	Budget Deficit Assessment ("BDA")	29
	No Net Cost Assessment ("NNCA")	33
	Fees for Inspecting Imported Tobacco	35
VI.	CONCLUSIONS AND RECOMMENDATIONS	38
	ANNEX	39

I. INTRODUCTION

1. On 7 September 1993, Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand, Venezuela and Zimbabwe requested the United States to hold consultations, pursuant to Article XXIII:1 of the General Agreement, on the amendments to the "Tobacco Program" in the U.S. Omnibus Budget Reconciliation Act of 1993 ("the 1993 Budget Act") (DS44/1 and DS44/2). On 22 and 30 September 1993, respectively, Canada and the European Community ("EC") also requested consultations pursuant to Article XXIII:1 with respect to the same matter (DS44/4 and DS44/3, respectively). Consultations were held on 4 October 1993 but did not result in a mutually satisfactory solution of the matter. At the Council meeting of 17 December 1993, Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe requested that, in accordance with the provisions of Article XXIII:2 of the General Agreement, a panel be established to examine the matter. At the forty-ninth session of the CONTRACTING PARTIES on 25 January 1994, Canada also requested that, in accordance with the provisions of Article XXIII:2 of the General Agreement, a panel be established to examine the matter. These requests were followed by that of Argentina at the meeting of the Council on 22 February 1994.

2. At their forty-ninth session on 25 January 1994, the CONTRACTING PARTIES established a panel in accordance with paragraph F(a) of the Decision of the CONTRACTING PARTIES of 12 April 1989 concerning Improvements to the GATT Dispute Settlement Rules and Procedures (BISD 36S/61) pursuant to the complaints of Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe. At its meeting on 22-23 February 1994, the Council agreed that the matter referred to the CONTRACTING PARTIES by Argentina in document DS44/8 also be examined by this Panel. Australia, the EC, India, New Zealand and Turkey reserved their rights to make a submission to the Panel. The Chairman of the Council was to designate the Chairman and the members of the Panel in consultation with the parties concerned.

Terms of Reference

3. The following standard terms of reference applied to the work of the Panel:

"To examine, in the light of the relevant provisions of the General Agreement, the matter referred to the CONTRACTING PARTIES by Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe in document DS44/5 and Corr.1, by Canada in document DS44/6 and Corr. 1 and by Argentina in document DS44/8, and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

Composition

4. The Panel was composed as follows:

Chairman: Joseph W.P. Wong
Members: Abdelkader Lecheheb
Kim Luotonen

5. The Panel met with the parties on 25 and 27 April 1994 and on 24 May 1994. It submitted its report to the parties to the dispute on 15 July 1994.

II. FACTUAL ASPECTS

General

6. On 10 August 1993, the United States enacted the 1993 Budget Act¹ which included the Agricultural Reconciliation Act of 1993 containing, in Section 1106, the four measures concerning tobacco challenged in this dispute: a Domestic Marketing Assessment ("DMA"); a Budget Deficit Assessment ("BDA"); a No Net Cost Assessment ("NNCA"); and an Inspection Fee provision ("Inspection Fee") (described below).² The U.S. tobacco programme had for many years comprised production controls and price supports for tobacco produced in the United States. Control of the domestic supply of tobacco was provided for to the extent that producers of an individual kind or type of tobacco had approved such controls. Production controls had been approved for 98 per cent of all tobacco grown in the United States, including the two principal kinds, burley and flue-cured tobacco. However, according to law, a group of growers could, by majority vote, decide not to form a producer co-operative and could thereby "opt out" of both the price-support and the production-control provisions of the law. For instance, Maryland tobacco was not subject to production controls or price supports, because its producers voted to eliminate controls in 1966. Production controls were currently enforced through the use of poundage quotas, which limited the number of pounds that could be marketed both nationally and from a particular domestic farm. Only those farms with a poundage quota could market without penalty tobacco of the kind or type to which the quota applied. The U.S. Secretary of Agriculture set a national poundage quota under formulas established by law and differing by tobacco kind. Poundage quotas acted as licenses to market tobacco. These "licenses" were strictly limited, and generally held only by farms with a production history.

7. The current tobacco programme also provided for price support, the level of which was set by the Secretary of Agriculture on an annual basis and which was available only to producers who had approved production controls. Price support was provided through non-recourse government loans.³ Instead of selling their tobacco to a private buyer, farmers subject to production controls could pledge their tobacco as collateral for a price support loan under the price support programme. Because the farmer would not normally sell the tobacco for less than the loan amount, the loan value of the tobacco acted as a floor price for domestic tobacco. The price support programme operated through special "area marketing associations", first created in 1938, which maintained the inventory of the pledged tobacco. The producer owned area marketing associations existed solely to perform functions connected with the price support interests of producers. The loans were made available through funds supplied by the Commodity Credit Corporation (CCC) of the United States Department of Agriculture ("USDA"). CCC tobacco outlays were repaid by the proceeds of the sale of inventory tobacco by the area marketing associations. With the inauguration of the "no-net-cost program" (see paragraph 10 below), producers and purchasers had to pay "assessments" to cover any losses incurred by the CCC.

¹Pub. L. No. 103-66.

²The legislation concerning these measures is annexed.

³These loans were referred to as "non-recourse" since the tobacco was always retained in satisfaction of the loan amount and there was no further recourse against the producer.

Domestic Marketing Assessment (Section 1106(a))

8. Beginning after the end of 1994, the 1993 Budget Act required that designated "Domestic Manufacturers of Cigarettes", *i.e.* those manufacturers that individually contributed at least 1 per cent of all cigarettes produced and sold in the United States, certify the percentage of domestic tobacco used in the cigarettes they had produced in the United States for the year. Six companies in the United States were considered as Domestic Manufacturers of Cigarettes under the Act, and these manufacturers accounted for more than 99 per cent of all cigarettes produced in the United States in the period 1986-1990. If a Domestic Manufacturer of Cigarettes failed to certify the quantity used, it was presumed to have used only imported tobacco. If a Domestic Manufacturer of Cigarettes' use of domestic tobacco was less than 75 per cent of its total tobacco use per year, it had to pay to the CCC a non-refundable marketing assessment and make supplementary purchases from the burley and flue-cured tobacco area marketing associations up to the amount of the shortfall, which could be used in the following year. The requirement applied equally to cigarettes that were exported. The assessment per pound was equivalent to the difference between: (1) the average of domestic burley and flue-cured tobacco market prices during the preceding calendar year; and (2) the average market prices for imported unmanufactured tobacco during the preceding calendar year. Penalties were due from Domestic Manufacturers of Cigarettes which failed to pay an outstanding assessment, or which did not make the purchases from the area marketing associations.

Budget Deficit Assessment (Section 1106(b)(1))

9. The U.S. Congress enacted a series of Budget Deficit Assessments ("BDA") in Section 1105 of the Omnibus Budget Reconciliation Act of 1990 ("1990 Budget Act").⁴ Domestic tobacco⁵, as well as other domestic commodities such as dairy and peanuts, were subject to these assessments. The 1990 Budget Act established the BDA for tobacco by tobacco type, so that, for example, the BDA for burley was different from that for flue-cured tobacco. However, the formula was the same for all types: one per cent of the average support value established by law. For private sales, the 1990 Budget Act provided that one half would be paid by the producer, and the other half by the purchaser. For loan tobacco, the buyer of inventory tobacco paid the purchaser BDA. For the 1993 crop year, the price support level for *burley tobacco* was \$1.683 per pound.⁶ The total domestic BDA, therefore, was \$.0168 per pound (1 per cent), divided between producers and purchasers, each paying \$.008415 per pound. The domestic support level for *flue-cured tobacco* was \$1.577 per pound, so that the total BDA was \$.01577 per pound (1 per cent), with the producer and purchaser each paying \$.007885 per pound (half of the total). The 1993 Budget Act, Section 1106(b)(1), effective for each of the 1994 through 1998 crops of tobacco, subjected all imported unmanufactured tobacco to the BDA, the assessment calculated as half the BDA paid on domestic burley (0.5 per cent of the domestic support rate) plus half of the BDA paid on domestic flue-cured (0.5 per cent of the domestic support rate), with the full one per cent payable by the importer (*i.e.* a total of \$.0163 cents). Penalties for non-payment of BDAs applied equally to imported and domestic tobacco.⁷ The BDAs for both domestic and imported tobacco were remitted to the CCC and were non-refundable.

⁴Pub. L. No. 101-508.

⁵7 U.S.C. 1445.

⁶58 C.F.R. 68018 (December 23, 1993).

⁷7 U.S.C. 1445.

No Net Cost Assessment (Section 1106(b)(2))

10. For crops prior to the 1982 crop year, all net losses at the time of the final accounting for a crop year's inventory were absorbed by the CCC. In 1982, a No Net Cost Assessment ("NNCA") was introduced⁸ to make the domestic price support programme for tobacco independent of government funding. As a result of the 1982 reforms, the Secretary of Agriculture was required to compute the possible loss the CCC would incur for the crop in each crop year. That amount, plus any amount needed to adjust for shortfalls or surpluses in previous assessments, was then converted to a per pound basis to constitute the NNCA payable on each pound of tobacco marketed or placed for price support, calculated in such a way that the Government would experience no net cost in operating the loan programme. NNCAs were applied to *all* United States tobacco covered by price support programmes. As a result of the large stocks of price support burley and flue-cured tobacco accumulated by the area marketing associations, domestic manufacturers of burley and flue-cured tobacco agreed in 1985⁹ that purchasers and producers of these types of tobacco should split the cost of the NNCA.¹⁰ As originally promulgated, the NNCA was not assessed on imports. The 1993 Budget Act, Section 1106(b)(2), introduced NNCAs for imported flue-cured and burley tobacco as from 1 January 1994. The 1993 legislation mandated the same levy for domestic and imported burley tobacco (\$0.02817 per pound) and for domestic and imported flue-cured tobacco (\$0.02423 per pound), respectively. The assessment funds were deposited in an account used to reimburse the Government for any financial losses resulting from tobacco loan operations.

Fees for Inspecting Imported Tobacco (Section 1106(c))

11. All tobacco sold in the United States, whether domestic or imported, was subject to inspection in the United States.¹¹ By statute, domestic tobacco was inspected at the warehouse for grade and quality, and required inspection of each individual lot. Imported tobacco was inspected for grade and quality at the point of entry into the United States and before it entered domestic commerce. The inspection of imported tobacco took place on the basis of samples. By statute, importer fees and charges for inspection "shall, as nearly as practicable, cover the costs of such services, including the administrative and supervisory costs customarily included by the Secretary in user fee calculations".¹² Section 1106(c) of the 1993 Budget Act amended this cost of services requirement by adding a requirement that inspection fees for imported tobacco "be comparable to the fees and charges fixed and collected for services provided in connection with tobacco produced in the United States".

⁸The "No Net Cost Tobacco Program Act of 1982, Pub. L. 97-218, 96 Stat. 197.

⁹Consolidated Omnibus Budget Reconciliations Act of 1985, Pub. L. 99-272, 100 Stat. 86, April 7, 1986.

¹⁰As a practical matter, purchaser NNCAs were identical to producer NNCAs, with one exception. For the 1993 crop, there was a technical correction to reflect that producers had more money in the account because they did not start contributing until after the 1985 Budget Act.

¹¹Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, 100 Stat. 86, April 7, 1986.

¹²7 U.S.C. 511r(d).

III. MAIN ARGUMENTS

General

12. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** requested the Panel to find that provisions of the 1993 Budget Act, specifically the DMA (Section 1106(a)), the BDA (Section 1106(b)(1)), the NNCA (Section 1106(b)(2)) as well as the fees for inspecting imported tobacco (Section 1106(c)), were not consistent with U.S. obligations under Articles III:5, III:2 and VIII:1 of the General Agreement. Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe also requested the Panel to find that the provisions of Section 1106(a) of the 1993 Budget Act were inconsistent with Article III:4 of the General Agreement. The complainants submitted that the above-mentioned provisions nullified or impaired benefits accruing to them under the General Agreement. Accordingly, the complainants requested that the Panel recommend that the United States bring its laws into conformity with its obligations under the General Agreement.

13. The **United States**, submitting that the burden was on the complainants in this dispute to establish that there was inconsistency between the U.S. measures in dispute and the General Agreement, was of the view that the complainants had not met that burden. Further, the United States considered that the BDA and the NNCA were border tax adjustments and therefore consistent with Article III, that the price support programme was covered by Article III:8(b), and that the inspection fee provision did not require administrative action inconsistent with Article VIII of the General Agreement. Accordingly, the United States requested the Panel to find that the measures were consistent with the General Agreement.

Domestic Marketing Assessment (Section 1106(a))

14. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that the U.S. domestic tobacco content requirements of Section 1106(a) (the DMA¹³) of the 1993 Budget Act conflicted with paragraph 5 of Article III of the General Agreement. The United States had established and maintained an internal regulation (*i. e.* the DMA) that was imposed on domestic manufacturers of cigarettes within the United States. The DMA contained a "quantitative" regulation requiring that domestic manufacturers certify that they used in the manufacture of cigarettes at least 75 per cent domestic tobacco on an annual basis. Failure to comply with this condition subjected the manufacturer to pecuniary penalties and the requirement to buy additional domestic tobacco. This provision was thus related to "the mixture, processing or use" of tobacco so as to require "directly or indirectly", that a "specified amount or proportion" of tobacco "be supplied from domestic sources".¹⁴ The complainants submitted that at least one GATT panel had interpreted the provisions of Article III:5 to apply to provisions that specifically required the "mixture, processing or use" of a product "in specified amounts or proportions".¹⁵ Section 1106(a) of the Budget Act was such a provision. By imposing strict financial penalties on companies that failed to meet these requirements, the DMA effectively prohibited domestic manufacturers from using more than 25 per cent imported tobacco on an annual basis in the manufacture of cigarettes. The complainants referred to the U.S. arguments in the Animal Feed panel in which the U.S. representative had stated that "Article III:5 prohibits regulations which require, directly or indirectly, that any specified amount or proportion of a domestic product be mixed,

¹³See paragraph 8 above.

¹⁴Article III:5 of the General Agreement.

¹⁵Report of the panel on EEC Measures on Animal Feed Proteins, ("Animal Feed" panel), adopted on 14 March 1978, BISD 25S/49.

processed or used".¹⁶ Following the logic of the United States in that case, its current law restricting the use of imported tobacco in cigarettes was inconsistent with Article III:5. In addition to the above, in the proposed rules to implement the DMA, this statutory provision was referred to as a "domestic content requirement" no less than 13 times, including in a definition of the 75/25 ratio. In the same proposed rules, the DMA was specifically referred to as the "domestic content marketing assessment". Finally, an analysis by the USDA referred to the DMA as providing "for a minimum domestic content".

15. The **United States** considered that the burden of establishing an inconsistency with the General Agreement rested on the complainants, noting that the DMA provisions did not require that a product **sold** in the United States contain any particular mix of tobacco. Nor did the DMA limit imports of products. According to the United States, its price support programme created a high price, artificially, for domestic tobacco. This high, government-mandated, support price for domestic tobacco (well above world market prices) permitted importers to gain very significant net profits while still underselling U.S. tobacco. The United States submitted that the DMA provisions were essentially an effort to adjust the cost of the domestic price support programme for tobacco. Elimination of the programme would result in lower prices and greater production. Larger, but fewer, producing units with attendant economies of scale would result. Marketing costs would be lower. All variable and fixed input costs except labour - chemicals, seedlings, fertilizers, energy, machinery and interest - were already as low or lower than costs among the most efficient foreign competitors. Land costs would decline with removal of quota rent. Other economic factors - transportation efficiencies, relative proximity to major consuming markets and growing conditions conducive to producing quality leaf - would enhance demand for U.S. cigarette tobacco in the domestic and export markets. Ultimately, a more market-driven programme would be likely to reduce incentives for most imported tobacco to be sold in the United States. The abrogation of the programme would also probably increase the competitiveness of U.S. tobacco in its own market. In the end, this would greatly reduce the share of competing trade in the market.

16. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that the U.S. assertion that the DMA did not require that a product in the United States contain any particular mix of tobacco was not an accurate or reasonable interpretation of Section 1106(a) of the Budget Act. Section 1106(a) *directly* required the use of U.S. produced tobacco. The statute stated that a domestic manufacturer of cigarettes had to certify the percentage of tobacco *used* by the manufacturer to produce cigarettes. Heavy penalties were imposed on domestic manufacturers of cigarettes that failed to *use* at least 75 per cent U.S. grown tobacco. In any event, the DMA *indirectly* required the use of domestic products in certain specified amounts or proportions through the imposition of assessments and mandatory purchase requirements. This was contrary to Article III:5, which provided that a contracting party could not establish any internal quantitative regulation which required, "directly or indirectly", that any specified amount or proportion of any product be supplied from domestic sources. The complainants did not dispute that the United States had the right to promote rural economies, but as a contracting party to the GATT, the United States had to pursue these goals in a manner that did not violate its obligations under the General Agreement. This principle was made clear in the 1958 panel decision on Italian Discrimination Against Imported Machinery¹⁷, a principle recognized by the United States in the arguments it advanced in the 1984 panel on Japanese Measures on Imports of Leather.¹⁸

¹⁶*Idem*, paragraph 3.6.

¹⁷Report of the panel on Italian Discrimination against Imported Agricultural Machinery, adopted on 23 October 1958, BISD 7S/60.

¹⁸Report of the panel on Japanese Measures on Imports of Leather, adopted on 15/16 May 1984, BISD 31S/94.

17. The complainants submitted that even if this panel adopted a narrow reading of Article III:5, first sentence, the second sentence was a broad requirement that the quantitative regulations not be contrary to the general principles of Article III:1. The DMA's minimum domestic content requirement was, according to the complainants, contrary to the principles of Article III:1. That Article required that domestic mixing and use provisions "not be applied to imported or domestic products so as to afford protection to domestic production". The minimum domestic use requirements of the United States, however, violated this principle since they permitted unlimited use of domestic tobacco without penalty, while providing substantial penalties for use of imported tobacco above the 25 per cent ceiling. Also, they required a manufacturer exceeding the 25 per cent ceiling to purchase specified quantities of domestic tobacco.

18. In addition, **Canada** submitted that, according to the USDA, 41 per cent of tobacco used to manufacture cigarettes in the United States in 1992¹⁹ had been provided from foreign sources. With the passage of the 1993 Budget Act, this figure would have to decrease to 25 per cent annually while the use of domestic tobacco would rise from 59 per cent to 75 per cent, thus benefitting domestic production at the expense of imported tobacco. Imported tobacco had been defined in the proposed regulations to include Oriental tobacco. In 1992²⁰, U.S. cigarette manufacturers had used 14 per cent Oriental tobacco and, according to Canada, this was likely to continue, given long-established consumer preferences. Since the 1993 Budget Act limited imported tobacco to 25 per cent of all tobacco used to manufacture cigarettes in the United States, only 11 per cent was left for other types of tobacco. The law thus disadvantaged exporters of flue-cured and burley tobaccos. Flue-cured tobacco leaf accounted for virtually all Canadian tobacco leaf exports to the United States. Canada also exported a significant quantity of tobacco refuse to the United States. With 14 per cent of the 25 per cent limit on imported tobacco expected to be taken by Oriental tobacco, the access of Canadian tobacco to the U.S. market would be severely restricted. Canada further submitted that the DMA undermined the competitive relationship between imported and domestic tobacco, contrary to a fundamental component of the national treatment obligation of Article III:2. The law had eliminated the price competitiveness of imports in the U.S. market by requiring domestic manufacturers of cigarettes to use 75 per cent U.S. grown tobacco, regardless of the price relationship between imported and domestic tobacco. No matter what the price of foreign tobacco, foreign producers would be unable to improve their competitive position vis-à-vis domestic tobacco producers. Thus, the DMA, by violating Article III of the General Agreement, nullified or impaired benefits accruing to Canada under the General Agreement.

19. **Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that the U.S. minimum domestic content requirement for cigarette manufacturers was also inconsistent with paragraph 4 of Article III of the General Agreement. According to the complainants, this provision generally prohibited contracting parties from discriminating against imported products and had been interpreted by panels in broad terms. For example, a panel had recently determined that internal regulations which merely posed a "risk" of discrimination against imported products were inconsistent with Article III:4.²¹ Other GATT panels had determined that internal regulations which created a "preference" for the domestic product, or otherwise provided an "incentive" to purchase the domestic product, were inconsistent with Article III:4.²² The minimum domestic tobacco content

¹⁹"Preliminary Regulatory Impact Analysis", Robert Miller, Tobacco and Peanut Analysis Division, United States Department of Agriculture, 1 December, 1993.

²⁰*Idem*, page 1; and USDA "Tobacco Situation and Outlook Report", September 1993, cover page.

²¹Report of the panel on European Economic Community Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins, adopted on 25 January 1990, BISD 37S/86.

²²Report of the panel on European Economic Community Regulation on Import of Parts and Components, adopted on 16 May 1990, BISD 37S/132; report of the panel on Canada - Administration of the Foreign Investment Review Act, adopted on 7 February 1984, BISD 30S/140.

requirement of the United States was inconsistent with the requirements of Article III:4 since it discriminated between domestic and imported products after the imports had entered the customs territory of the United States. Section 1106(a) of the 1993 Budget Act created an incentive not to import any tobacco other than what was essential for flavour requirements. The United States had itself, in the past, argued that other countries' domestic content restrictions on cigarettes were inconsistent with the General Agreement. It had explicitly accepted the proposition that charges imposed by a government on the use of imported tobacco in the manufacture of cigarettes violated the General Agreement. A similar situation existed here. As described in paragraph 16 above, domestic manufacturers were subject to substantial penalties if they used more than 25 per cent imported tobacco in their products. This was discriminatory treatment which could not be justified under Article III:4.

20. **Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that the U.S. domestic content requirement (i.e. Section 1106(a) of the 1993 Budget Act) was also inconsistent with the prohibition in paragraph 2 of Article III, first sentence, against discriminatory internal taxes or charges since it imposed an "internal charge" in the form of monetary penalties and domestic purchase requirements when a manufacturer used more than 25 per cent imported tobacco in its cigarettes. A manufacturer that used 75 per cent or more of domestic tobacco in its cigarettes was not subject to these charges. The complainants considered that the penalties were *internal*, because they occurred well after the product had entered the customs territory of the United States. They were also *charges*, because they imposed monetary penalties that went directly to the U.S. Treasury. And they were *discriminatory*, because they were not applied to purchases of domestic tobacco. Concurrently, the complainants were of the view that the additional assessment and the purchase requirement could be seen as enforcement measures to *use* 75 per cent domestic tobacco. **Canada** noted and supported the arguments based on Article III presented by the co-complainants.

21. The **United States** considered that the DMA provision's additional assessment and purchase requirements should be viewed as enforcement measures for the underlying measure, and not as a form of tax or internal charge on a product within the meaning of Article III:2. Article III:2 did not include all enforcement measures involving civil fines or fees. Here, the assessments at issue were levied based on manufacturer liability, not on the basis of a "product", within the meaning of Article III:2. The United States referred to the report of the panel on Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies²³ which had decided to examine the underlying measure at issue first, making the examination of certain charges on beer containers unnecessary. According to the United States, in the current case an assessment under Section 1106(a) was not a charge on an import as such, but a charge applied to large U.S. manufacturers on the basis of their overall tobacco purchases. The complainants' concern appeared to be directed at the underlying treatment set forth in the provision, not the assessments which enforced the provision.

Budget Deficit Assessment (Section 1106(b)(1))

22. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that the BDA²⁴ was contrary to U.S. obligations under Article III:2 of the General Agreement since the tobacco products from the complainants and other contracting parties imported into the United States were thereby directly subject to internal taxes or other internal charges in excess of those applied to like domestic U.S. tobacco products. The Agricultural Act of 1949, as amended, imposed a marketing assessment on tobacco grown in the United States of one per cent of the national

²³Report of the panel on Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, paragraph 5.33, adopted on 18 February 1992, BISD 39S/27.

²⁴See paragraph 10 above.

price support level for those tobacco crops for which price support was available. This assessment was divided equally between producers and purchasers of such tobacco. The 1993 Budget Act extended the assessment to imports of unmanufactured tobacco, regardless of type, the calculation of which resulted in the imposition of an internal tax or other internal charge, on imports of flue-cured tobacco in excess of those applied to like domestic flue-cured tobacco. While the budget deficit fee on imported burley tobacco (1.63 cents per pound) was less than the fee on domestic burley tobacco (1.683 cents per pound), the fee on imported flue-cured tobacco (1.63 cents per pound) was higher than the fee on domestic flue-cured tobacco (1.577 cents per pound). This was because the BDA on all types of imported tobacco was the sum of one-half of the domestic BDA on domestic burley and flue-cured tobacco. Mathematically, the assessment would always be higher on imported tobacco than on one type of domestic tobacco so long as there was any price differential between the average support price of burley and flue-cured tobacco. Citing prior panel decisions, the complainants were of the view that an internal tax on imported products that was higher than the internal tax on any like domestic products, was inconsistent with Article III of the General Agreement.²⁵ Moreover, even if the lower assessment on imported burley tobacco, as compared to the assessment on domestic burley, were somehow considered to offset the higher import assessment on flue-cured tobacco, which, referring to prior panel findings²⁶, the complainants contested, the assessment on imported tobacco would necessarily always be higher than the assessment on some domestic tobacco since not all domestic tobacco was subject to a BDA. Domestic Maryland tobacco, for example, which was not subject to a price support programme, paid no BDA. Yet all imported tobacco was subject to the BDA. The complainants thus submitted that the BDA was an internal tax which was inherently higher on imported tobacco than on domestic tobacco, and it was consequently inconsistent with Article III:2 of the General Agreement.²⁷

23. In addition, **Canada**, referring to *Ad Article III:2*, considered that Canadian flue-cured tobacco was a directly competitive or substitutable product with flue-cured tobacco from the United States. It competed in the same market as, and could be directly substituted for, U.S. flue-cured tobacco without any alteration in the manufacturing of cigarettes. Since importers of Canadian tobacco paid a BDA which was the *sum* of the assessment levied on purchasers of U.S. burley and flue-cured tobaccos, the imported tobacco was not "similarly" taxed, as purchasers of U.S. flue-cured tobacco paid only one assessment. This double taxation provided protection to the domestic product. By thus violating Article III:2, second sentence, benefits accruing to Canada under the General Agreement were being nullified or impaired. Further, Canada argued, the BDA on certain *domestic* tobaccos was limited by statute to each of the 1991 through 1995 crops²⁸, while Section 1106(b) of the 1993 Budget Act imposed a BDA on all imported unmanufactured tobacco for each of the 1994 through 1998 tobacco crops. Regardless of whether the "like domestic product" to imported flue-cured tobacco was domestic flue-cured tobacco or all unmanufactured tobacco, the application of a tax to imported products during a period when *no* domestic tax was applied to the like domestic product constituted, in Canada's view, discriminatory taxation inconsistent with Article III:2, first sentence.

24. The **United States** responded that the changes in the 1993 Budget Act with respect to the BDA were designed to equalize, at least in some small part, the competitive conditions for domestic and foreign tobacco, so as to ensure fair competition and not prejudice the continuation of the domestic price support programme and system of production controls. The BDAs as applied to imported tobacco were simply border tax adjustments to internal taxes or other charges, consistent with Article III:2

²⁵Report of the panel on EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Proteins, 125, paragraphs 140-141, adopted on 25 January 1990, BISD 37S/86. See also report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 387.

²⁶Report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345.

²⁷Report of the panel on United States - Taxes on Petroleum and Certain Imported Substances ("Superfund panel"), 155-159, adopted on 17 June 1987, BISD 34S/136.

²⁸Section 106(g) of the Agricultural Act of 1949, 7 United States C. 1445(g)(1).

of the General Agreement. Since the BDA was "directly levied" on similar domestic tobacco, it was therefore eligible for border adjustment under the criteria described in a report of a GATT working party on border tax adjustments in 1970²⁹. The United States explained, as concerned the exclusion from the assessment of certain types of domestic tobacco referred to in paragraph 22 above, that this reflected, in contrast to flue-cured and burley tobaccos, that those types of tobacco did not participate in the price support programme. However, 98 per cent of US-grown tobacco was currently covered by support and control programmes. Although the actual BDA differed depending on the kind of tobacco involved, the difference was very small. Further, averaging of the BDA charges for two types of domestic tobacco in order to arrive at a single charge for imports was, according to the United States, a reasonable method of arriving at an assessment for the competing imported tobacco. As concerned the difference in termination dates for the BDAs for domestic and imported tobacco, the United States submitted that this was an anomaly resulting only from the legislative time-table surrounding the U.S. budget process and farm legislation. It could be expected that the BDA on domestic tobacco, enacted in connection with the 1990 Farm Bill, would be extended in the 1995 Farm Bill.

25. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** did not agree with the U.S. contention that the BDA differential was so small as to be of no commercial consequence to the tobacco market and that under the circumstances the difference was reasonable. The complainants referred to previous GATT panel rulings which had repeatedly rejected any notion that it was permissible for contracting parties to impose higher taxes on imported products, even if the difference was minimal or of no commercial consequence.³⁰ On the contrary, GATT panels had made clear that any differential in internal charges levied on domestic and imported products, no matter how small, violated Article III:2.³¹ Once it was shown that the tax levied on imported products was higher than the tax levied on the like domestic product, nullification or impairment was presumed.³² This presumption was, according to the complainants, "irrefutable".³³ Thus, the fact that the United States levied a higher tax on imported flue-cured tobacco than on some sales of the like domestic product compelled the conclusion that the budget deficit assessment violated Article III:2 of the General Agreement.

26. **Canada** added that the level of the BDA on US-grown burley tobacco was of no relevance to the national treatment obligations that the United States owed to Canada. The obligations of the United States under Article III:2 was attached to each individual pound of flue-cured tobacco imported from Canada, none of which could be subject to internal taxes or charges in excess of those applied to a like pound of domestic US flue-cured tobacco. Referring to the findings of the Superfund panel³⁴, Canada was of the view that Article III:2 protected expectations on the competitive relationship between imported and domestic products, not export volumes. Also, as stated above, there could be no balancing of a higher tax against a lower one to reach an average.³⁵

27. **The United States** submitted that the General Agreement firmly supported the right of contracting parties to extend taxes imposed on domestic products to imports at the border; there was no obligation to provide a competitive advantage to imports by exempting them from domestic taxes. The United States referred to the 1970 report of the working party on Border Tax Adjustments³⁶, which noted that

²⁹Report of the working party on Border Tax Adjustments, paragraph 14, adopted on 2 December 1970, BISD 18S/97.

³⁰Report of the panel on United States Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136.

³¹*Idem.*

³²*Idem.*

³³*Idem*, page 158.

³⁴See footnote 27 above.

³⁵Report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 17 November 1989, BISD 36S/345.

³⁶Report of the working party on Border Tax Adjustments, adopted on 2 December 1970, BISD 18S/97.

taxes which were directly applied to domestic products could also be applied at the border to imports. The purpose of border tax adjustments was to ensure equal conditions of competition with respect to taxation.

28. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** responded that although the BDA might indeed be *eligible* for border tax adjustments as claimed by the United States, any such border tax adjustments had nonetheless to conform to the national treatment provisions of Article III:2. That provision specified that any such tax had to be levied on imports at the same or a lower rate than that levied on the like domestic product, and that no such border tax adjustment should provide protection to the domestic industry in violation of Article III:1. However, the BDA levied on certain types of imported tobacco was *higher* than that levied on the like domestic product.

29. The complainants submitted that the United States was in breach of its Article III:2 obligations regardless of whether the Panel considered that the "like domestic product" was flue cured tobacco or all kinds of unmanufactured tobacco. The "like domestic products" could be either (i) flue-cured tobacco, or (ii) all kinds of unmanufactured tobacco. Whichever comparison was used, the United States was, in the opinion of the complainants, in breach of Article III:2. If the Panel considered that U.S. flue-cured tobacco was the "like domestic product" to imported flue-cured tobacco, then the BDA was inconsistent with Article III:2 since it was applied at a higher rate on imported than on domestic flue-cured tobacco. Moreover, the application of the BDA to imports afforded protection to domestic production. If the Panel concluded that the appropriate comparison between imported and "like domestic products" was all unmanufactured tobacco rather than just flue-cured tobacco, the BDA still violated Article III:2. The complainants noted that the BDA was imposed on every pound of tobacco imported into the United States, regardless of type, while certain varieties of US-grown tobacco paid *no* BDA of any kind. A number of other US-grown tobaccos were assessed a BDA in an amount that was less than that assessed on imports. According to the complainants, this constituted discriminatory taxation, contrary to Article III:2.

30. The **United States** explained that flue-cured, light air-cured burley, Maryland and Turkish (oriental) tobaccos were distinct types which imparted distinct flavour characteristics to the American blend cigarette. Each type was valued differently by the manufacturers for its individual qualities. The three main leaf components were flue-cured, burley and Turkish, the proportional use of which had varied very little over the years. Burley tobacco had certain burning characteristics which distinguished it from other tobacco. Flue-cured tobacco had a lightness of taste that made it different from the heavier oriental tobaccos. Maryland tobacco also had a mild taste and distinct burning characteristics, but was considered a distinct type by manufacturers; a manufacturer's switch from burley to Maryland would definitely change the character of the cigarettes produced. Cigarette tobaccos, as a group, tended to have different markets in general from cigar tobaccos.

No Net Cost Assessment (Section 1106(b)(2))

31. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that the NNCA³⁷ was an internal tax or charge on imported tobacco that exceeded the internal charge on comparable domestic tobacco. It was therefore inconsistent with Article III:2, first sentence. Unlike the situation presented by the BDA, the NNCA did not apply a rate to imported tobacco that was higher than the rate applied to comparable domestic tobacco. First, the NNCA was applied only to imported burley and flue-cured tobacco, not to other imported tobacco. Second, the rate used for the imported tobacco was the *sum* of the producer and purchaser assessments that applied

³⁷See paragraph 10 above.

to the same type of tobacco grown in the United States. However, while the rate used for imported burley and flue-cured tobacco was the same as the rate applied to the same type of domestic tobacco, the *net charge* to imported tobacco was greater than the charge for the same type of domestic tobacco. Domestic burley and flue-cured tobacco were subject to price support programmes in which the producer was offered a minimum price for his tobacco. These programmes were not available to the importer of these tobaccos. The value of the tobacco at the appropriate support price was "loaned" to the producer by the producer-owned cooperative if the farmer could not obtain that price at auction. The cooperative retained the tobacco as "collateral". The 1993 Budget Act levied an identical NNCA on each pound of imported tobacco, for which importers (and imported tobacco) received no benefits at all. Indeed, the proceeds of the NNCA on imported tobacco were used to fund the costs of the domestic price support programme. Since the price support programme provided benefits only to domestic tobacco, the NNCA operated as a true "tax" on imported tobacco, and as a payment (fee) for services for domestic products.

32. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that by giving the proceeds of the NNCA on imports directly to the cooperatives, the law benefited and protected domestic production. It indirectly reduced the cost of the price support programme to the domestic producer, without providing any benefit at all to imported tobacco. The application of the law was thus inconsistent with paragraph 1 of Article III, thereby also creating an inconsistency with Article III:2, second sentence.

33. The **United States** submitted that, like the BDA, the NNCA was simply a border tax adjustment consistent with Article III:2. The 1970 report of the working party on Border Tax Adjustments and the more recent revisitation of the issue by the panel in United States - Taxation on Petroleum and Certain Imported Products supported two principles: first, that taxes applied to domestic products could be applied equally at the border to imports and secondly, that the ultimate use of the revenues was not relevant in determining whether a border tax adjustment was consistent with Article III. Unlike the BDA, imports of flue-cured and burley tobacco were assessed charges identical to those levied on domestic flue-cured and burley tobacco. No other tobacco imports were charged the NNCA, even though other varieties of *domestic* tobacco were assessed NNCAs and were affected by imports. In the United States' view, no argument had been offered to suggest that there were unequal fiscal burdens between imported and domestic burley and flue-cured tobacco. According to the United States, the complainants also appeared to overlook the fact that Article III referred to the treatment of products, not to individual importers or enterprises. Here, imports and domestic products were charged identical amounts, in conformity with Article III:2. The full amount of the NNCA was a charge on the tobacco, no matter how the payment obligation was divided. The fact that, for domestic tobacco, the NNCA was split between producer and purchaser did not make it ineligible for border tax adjustment. This interpretation was supported by the language of the General Agreement, the 1970 working party on Border Tax Adjustments and prior panel reports. In particular, the assessments were taxes "directly levied" on a product. The same working party made an observation with regard to value-added taxes, noting that the fact that a tax's collection was "fractured" - split across several points along the production chain - did not prevent the tax *as a whole* from being eligible for border tax adjustment. Moreover, the purpose of the charge was not relevant in determining the conformity of a border tax adjustment with Article III:2. The United States referred to the Superfund report³⁸ which considered the argument by the EC that a U.S. excise tax on chemicals was not eligible for a border tax adjustment because its underlying purpose was to tax polluting activities occurring only in the United States and to finance environmental programmes benefitting only U.S. producers. The Panel declined even to examine this argument, concluding that the only determination to be made concerning the applicability of border tax adjustments was whether the domestic tax was applied directly to a product.³⁹ The United States

³⁸ Report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136.

³⁹ *Idem*, paragraph 5.2.4.

explained that the NNCA was such a direct tax assessed on the marketing of *all* tobacco grown in the United States subject to the price support programme.

34. The United States rejected the claim that benefits received by domestic tobacco growers through the tobacco programme amounted to a tax remission of the NNCA. The provision of a loan to a farmer was a transaction entirely separated from the farmer's payment of the NNCA in that year or subsequent years. Producers who grew price support tobacco had a choice at marketing time. They could sell the tobacco to a private buyer, or they could place the tobacco for a price support loan with the appropriate area marketing association. (About one quarter of the tobacco crop currently went under loan and was placed with an association.) In either case, the tobacco was assessed the producer portion of the NNCA. If the tobacco was sold to a private buyer, that buyer was liable to pay the purchaser NNCA's at the same time as well. For the farmer, the loan received from the CCC was not a loan in the normal sense but was rather as though the farmer had sold the tobacco to the government. The tobacco was never returned, and the marketing associations took up to eight years to sell it. The money went directly into the U.S. Treasury and could never be returned or refunded. The sufficiency of past assessments to cover losses regulated how large the current assessment would be, i.e. if there should be a surplus of NNCA receipts for a particular crop, when compared with the actual losses incurred on that crop by the area marketing associations, that surplus was not paid back to producers or purchasers, but simply reduced the amount needed to be collected in subsequent years. Simply put, the charges a farmer paid in one year did not predetermine either his decision to sell to either the market or the government, or the amount of money he received for the tobacco. Rather, the NNCA's remained uniform each year for all producers regardless of what they had done in the past.

35. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** considered that the United States had mischaracterized the findings of the Superfund panel report. That panel stated only that the underlying policy of the tax in that case was not relevant to the consideration of whether or not the tax was *eligible* for a border tax adjustment. Notwithstanding this finding, the panel nonetheless went on to consider whether the border tax adjustment was consistent with "the national treatment requirement of Article III:2". Thus, even though the underlying policy of the NNCA might not be relevant for purposes of determining whether the tax was *eligible* for border tax adjustment, a panel still had to examine the effect of the border tax adjustment to ensure that it was not being imposed in a manner inconsistent with Article III:2 and the principles of Article III:1. Since the NNCA provided benefits only to domestic producers and since the fees collected on imports reduced the assessment on domestic production, the NNCA afforded protection to domestic producers in a manner contrary to the General Agreement.

36. The **United States** considered that there was no disagreement on the fundamental principles with respect to the eligibility of a domestic tax for border tax adjustment. First, a domestic tax could be extended to imports equally at the border. Second, eligibility for border tax adjustment was independent of the purpose or the ultimate use of the revenue derived from the tax. The purpose of border tax adjustment was to ensure equal conditions of competition with respect to taxation. All taxes would accrue to the benefit of resident taxpayers, directly or indirectly. That the use of the revenue derived from the tax might ultimately benefit domestic rather than imported tobacco was simply not relevant to the Panel's analysis under Article III:2. It was not within the province of the General Agreement to second-guess domestic tax policies to ensure that imports also ultimately obtained some kind of benefit from government revenue. In the United States' view, the NNCA met the criteria of a border tax adjustment consistent with Article III.

37. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** argued that the NNCA could not be considered as a valid border adjustment measure. U.S. tobacco producers who participated in the domestic price support programme were eligible to receive a minimum support price, which was usually higher than the market price. The difference

between the market price and the support price lowered the effective NNCA imposed on participating domestic tobacco. Consequently, the net or actual NNCA imposed on imported burley or flue cured tobacco was higher than the assessment on domestic burley or flue cured tobacco, in violation of Article III:2. Given this inconsistency between the NNCA and Article III, the NNCA could not be considered to be a valid border adjustment.

38. The **United States** submitted that paragraph 8(b) of Article III further supported the view that any indirect benefit ultimately received by U.S. tobacco farmers in the form of a more sustainable price support programme could not make the border tax adjustment inconsistent with Article III:2. Thus, Article III:8(b) supplemented the general principle that the purpose of the tax was irrelevant in the analysis of a border tax adjustment, by specifically providing that the use of tax revenues to grant domestic subsidies was permissible where taxes were equally applied. The non-recourse loans given by the CCC to U.S. tobacco farmers from government funds did not make the application of the same taxes to foreign imports inconsistent with Article III.

39. **Argentina, Brazil, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** were of the view that Article III:8(b) had nothing to do with the case at issue here. Paragraph 8(b) provided only that Article III should not "prevent the payment of subsidies" exclusively to domestic producers. In this case, however, the complainants raised no arguments that would in any way prevent payments of subsidies to anyone. They simply objected to being required to help pay for benefits available only to U.S. domestic producers. Further, the complainants argued that they did not question the right of the United States to develop a programme to pay farmers higher-than-market prices. Nor did they question in any way the right of the United States to transfer the costs of these subsidies to tobacco farmers and domestic purchasers, through the imposition of an NNCA. What the complainants did object to was the imposition of levies on imports that received no benefits from the tobacco price support programme. Article III:8(b) by its own terms permitted subsidies to continue only so long as the internal taxes which financed them were applied "consistently with the provisions of this Article". If the provisions of the tobacco price support programme were consistent with Article III:8(b), they were consistent only so long as they did not impose a burden on imports that was greater than the burden on domestic tobacco, and only so long as they did not afford protection to domestic tobacco. In this case, the NNCA imposed a greater burden on imports than on domestic tobacco, because domestic tobacco received a benefit for the assessment it was charged whereas imported tobacco did not. Thus, the assessment was not only discriminatory, it afforded protection to domestic tobacco, in violation of both sentences of Article III:2. Finally, the complainants disputed that the loan programme to support tobacco prices was a "government purchase" since the domestic producers had the option to sell their tobacco to private purchasers or place it "under loan" with the producer-owned area marketing associations. These cooperatives then took title to the tobacco. Therefore, the second part of Article III:8(b) was not applicable in the case of the U.S. tobacco support programme.

40. **Canada** submitted, in addition, that the receipt of the support price by domestic producers was a tax remission of the NNCA otherwise payable, not a subsidy to which Article III:8(b) applied. Canada argued that unlike subsidies that were disbursed from general revenues, often in respect of persons and products unrelated to the source of the funds, moneys collected under the NNCA and disbursed from this account were administered separately from general revenues. Under the new law, taxes were collected on domestic and imported tobacco. These taxes were already earmarked for reducing the costs otherwise payable on a domestic support programme available only for the benefit of domestic tobacco. Since the NNCA fees could only be used for this purpose, receipt of a support price lowered the net or effective tax paid on each pound of domestic tobacco, while imported tobacco carried a higher fiscal burden and was thus subject to internal charges in excess of those applied to domestic tobacco. Canada referred to the report of the panel on United States - Measures Affecting Alcoholic and Malt

Beverages⁴⁰ which considered the drafting history of Article III:8(b), noting that the Havana Reports stated:

"This sub-paragraph [III:8(b)] was redrafted in order to make it clear that nothing in Article [III] could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes."

In Canada's opinion, the drafting history thus made clear that tax remissions were specifically excluded from the benefits of Article III:8(b). Further, paragraph 8(b) referred to "taxes or charges applied consistently with the provisions of this Article." The NNCA was not applied consistently with Article III.

41. The **United States** disagreed that any benefit accruing to domestic producers deriving from government revenue was a tax remission. According to the United States, Article III:8(b) provided that the national treatment provisions of the General Agreement did not inhibit contracting parties from the use of taxes as the source of funds for even direct payments to domestic producers, so long as those taxes were applied evenly to imported and domestic goods. If Canada's broad definition was accepted, then the types of governmental assistance derived from tax revenue described in Article III:8(b) also amounted to "tax remissions", in which case the complainants were also wrong to claim that taxes for which such remissions were unavailable could not be applied to imported products. In the opinion of the United States, the complainants had not distinguished the case at hand from the specific provisions of Article III:8(b).

Inspection Fee for Importing Tobacco (Section 1106(c))

42. **Argentina, Brazil, Canada, Chile, Colombia, El Salvador, Guatemala, Thailand and Zimbabwe** submitted that the 1993 Budget Act (Section 1106(c)) imposed inspection fees which were inconsistent with paragraph 1(a) of Article VIII of the General Agreement since Section 1106(c) did not impose fees on imports in an amount equal to the cost of inspecting imported tobacco. Although the USDA had not yet issued regulations implementing Section 1106(c), it had issued regulations for inspecting imported tobacco pursuant to pre-existing law.⁴¹ Section 1106(c) of the Budget Act required that inspection fees on imported tobacco "be comparable" to the fees charged on domestic tobaccos. It made no reference to the cost of inspection of imported tobacco. On its face, the imposition of a fee without regard to the cost of inspecting imported tobacco was inconsistent with the terms of Article VIII:1(a). Indeed, if the cost of inspecting domestic tobacco was higher than the cost of inspecting imported tobacco, Section 1106(c) nevertheless required that the inspection fee charged on the imported tobacco be comparable to the cost of inspecting the domestic tobacco.

43. The complainants argued that Article VIII of the General Agreement applied only to fees and charges imposed "on or in connection with importation". It differed from the provisions of Article III of the General Agreement, which applied to "internal taxes" or charges. Both by statute and by government regulation, the inspection of imported tobacco had to take place before the tobacco entered domestic commerce. As such, it was an activity "in connection with importation" within the meaning of Article VIII and not an internal charge within the meaning of Article III. The complainants recognized that the amount of the fee ultimately imposed by the United States could well be commensurate with the cost of inspection. However, Section 1106(c) required that the inspection fee be imposed commensurate with the cost of inspecting *domestic* tobacco, not with the cost of inspecting imported tobacco. Only if the costs of inspecting domestic and imported tobacco happened to be the same would

⁴⁰Report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206.

⁴¹7 U.S.C. paragraph 511r 7 C.F.R. 400 *et seq.*

the requirement of Section 1106(c) be consistent with the General Agreement. The complainants were of the view that if a provision had not yet gone into effect, it did not mean that it could not be inconsistent with the General Agreement. As the report of the Superfund panel noted, the objectives of the General Agreement "could not be attained if contracting parties could not challenge existing legislation mandating actions at variance with the General Agreement until the administrative acts implementing it had actually been applied to their trade".⁴² Section 1106(c), according to the complainants, required inspection fees to be imposed commensurate with something other than the cost of inspecting imported tobacco. As such, it was inconsistent with the terms of Article VIII:1(a).

44. **Canada**, in addition, referred to the report of the panel on the United States - Customs User Fee⁴³ which stated that the words "cost of services rendered" in Articles II:2(c) and VIII:1(a) had to be interpreted to refer to the cost of the customs processing for *the individual entry in question*.⁴⁴ This panel was also of the view that the government imposing the fee should have the initial burden of justifying any government activity for which charges were imposed. The 1993 Budget Act did not require that the fees for inspecting imported tobacco be set at a level commensurate with the cost of services rendered. Rather, it stated that the fees should be *comparable* to fees collected for services provided in connection with tobacco produced in the United States. This might not be commensurate with the cost of the actual service rendered.⁴⁵ In Canada's view, the only way for the U.S. government to comply with the requirement of the 1993 Budget Act, making fees for inspecting imported tobacco *comparable* to fees imposed on domestic tobacco, would be to increase the import inspection fees to the domestic level. This would raise the fees for inspecting imported tobacco above the cost of services actually rendered, contrary to Article VIII:1(a). Canada considered that the United States' fees for inspecting imported tobacco, by violating Article VIII, nullified or impaired benefits accruing to Canada under the General Agreement. Further, Canada's complaint was limited to the fact that the fee for inspection of imported tobacco could not be restricted to the costs of services rendered, as required by Article VIII:1(a), and still be consistent with the requirements of U.S. law. Canada did not question the level of the fee that the United States was free to establish for domestic inspection, nor the nature of such inspections. The only relevance of the fee for inspection of domestic tobacco was that, under U.S. law, the level of that fee effectively pre-determined the level of the fee for inspection of imported tobacco, regardless of the actual cost of services rendered for such inspection.

45. The **United States** submitted that the inspection fee was consistent with the provisions of Article VIII and noted that the consistency of the measure with Article III had not been at issue in this dispute. The United States considered that the complainants' assumption that the fees for inspection of imported tobacco were not commensurate with the costs of services rendered was not only a misreading of the statute, but also speculative, since to date there had been no change in the USDA inspection fee structure. The provision did not require a GATT-inconsistent administrative response, and the complainants' speculation was insufficient to meet the burden placed on them to establish an inconsistency with the General Agreement. There was no basis for concluding that fees for inspecting imported tobacco would not be commensurate with the costs of services rendered. It was the intention of the U.S. Government, and the requirement of U.S. law, that any new inspection fees promulgated by USDA would be commensurate with the costs of the services rendered. Prior to the 1993 Budget Act, the provision in question read: "the importer fees and charges for inspection . . . shall, as nearly as practicable, cover the costs of such services."⁴⁶ Section 1106(c) of the 1993 Budget Act amended

⁴²Report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, 160, adopted on 17 June 1987, BISD 34S/136.

⁴³Report of the panel on United States Customs User Fee, adopted on 2 February 1988, BISD 35S/245.

⁴⁴*Idem*, paragraph 86.

⁴⁵The regulations setting the fees had yet to be published.

⁴⁶7 U.S.C. 511r(d).

this provision to require also that these fees "be comparable to fees and charges fixed and collected for services provided in connection with tobacco produced in the United States". In the opinion of the United States, there was nothing contradictory between these provisions, and nothing that required fees to exceed the cost of services rendered.

46. The United States further submitted that although Section 1106(c) required USDA to ensure that inspection fees imposed on imports be "comparable" to those imposed on domestic products, it did not require USDA to impose fees on imports that were not commensurate with the cost of services rendered, *i.e.* it did not require that the *same* fees be imposed. Most importantly, it did not preclude a fee structure under which the fee for inspection of imports was *less than* that imposed on domestic products, *and* commensurate with the cost of services rendered. Applying the same criterion to assess the fee (cost of services rendered), for example, could make the two fees "comparable". The etymology of the word "comparable" was "capable of being compared". This meant only that there must be enough similar characteristics or qualities to make comparison appropriate. Although the statutory provision on inspection fees for tobacco had not been interpreted by a court, U.S. jurisprudence confirmed that in U.S. legal interpretation, the word "comparable" was to be distinguished from the words "equal" and "identical". In sum, because the word "comparable" in the inspection fee provision did not mean "same" or "identical", the statute left USDA free to assess a fee on imports that was less than the fee on domestic products, and was in keeping with the statutory requirement that the fee be commensurate with the cost of services rendered. The United States further explained that the difference in inspection fees resulted from the fact that domestic tobacco was inspected in small lots brought by farmers to auctions. By contrast, imported tobacco arrived in large containers and the practice had been to inspect only a few boxes in the container. Thus, despite the fact that inspection of imports required a greater degree of expertise, the fee for inspection had been kept lower than that for domestic tobacco.

IV. INTERESTED THIRD CONTRACTING PARTIES

47. **Australia** considered that the U.S. regulations governing the importation, internal sale and use of tobacco contained in section 1106 of the 1993 Budget Act violated its obligations under the General Agreement. While Australia had negligible export interests in the US market for unmanufactured tobacco (exports of A\$44,000 in 1992), the DMA and BDA resulted in clear interference with the importation of tobacco into the United States, and if unchallenged, could encourage the imposition of similar measures on products of direct trade interest to Australia. Australia submitted that the requirement imposed by section 1106(a) of the 1993 Budget Act was an unambiguous violation of Article III:5, first and second sentences. The requirement that cigarette manufacturers had to purchase additional, domestically produced tobacco if the domestic content rule was not met, meant that compliance with the 75 per cent domestic content requirement was unavoidable. Australia considered that the compulsory purchase of domestically produced tobacco, together with the imposition of financial penalties for failure to comply, was sufficient to demonstrate inconsistency with Article III:5, first sentence. That the DMA provisions did not require that any product contained a particular mix of tobacco was, in Australia's opinion, irrelevant. The 75 per cent domestic purchase requirement was also inconsistent with Article III:5, second sentence, as it was applied in a manner contrary to Article III:1. This was because the domestic content requirement reserved a portion of the domestic market for domestically grown tobacco. The 1978 Animal Feed panel⁴⁷ provided a relevant precedent with the conclusion that "the measures ... with a view to ensuring the sale of a given quantity of [domestic product] protected this product in a manner contrary to the principles of Article III:1 and to the provisions of Article III:5, second sentence".

48. If, for any reason, the Panel were to determine that the DMA provisions were not within the purview of Article III:5, the provisions would still be inconsistent with Article III:4 which, in Australia's opinion, the DMA violated *inter alia* because the U.S. Government had made the granting of an advantage (avoidance of penalties) dependent on undertakings to use domestically produced tobacco at the expense of imported tobacco. Australia believed that a finding that the creation of a preference or incentive for the purchase or use of domestic products over imported products was inconsistent with Article III:4 would be supported by several GATT precedents. For example, the report of the panel on Canada - Administration of the Foreign Investment Review Act⁴⁸ noted that purchase requirements which "tend to tip the balance in favour of [domestic] products" were inconsistent with Article III:4.

49. Australia also considered that the BDA, as currently calculated and applied to imported tobacco, resulted in differential tax treatment for imported and domestic tobacco, in violation of the provisions of Article III:2. The use of an average of burley and flue-cured tobacco prices for the assessment of all imports of these two types meant that at least one type of imported tobacco would be subject to taxes in excess of those applied to the like domestic product, inconsistently with Article III:2. The argument that disadvantage to one product (in this case flue-cured tobacco) could be offset by advantage to another (burley tobacco) had been rejected by past GATT panels. Australia referred to the report of the panel on United States - Section 337 of the Tariff Act of 1930⁴⁹ which concluded that "the 'no less favourable' treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of other imported products". Australia believed this interpretation applied equally to Article III:2. Any defence of the tax differential between domestic and imported products by citing

⁴⁷Report of the panel on EEC Measures on Animal Feed Proteins, paragraph 4.8, adopted on 14 March 1978, BISD 25S/49.

⁴⁸Paragraph 6.3, adopted on 7 February 1984, BISD 30S/140.

⁴⁹Paragraph 5.14, adopted on 7 November 1989, BISD 36S/345.

its small size had also been rebutted by previous dispute settlement panels⁵⁰. Australia observed that the United States could bring the BDA into conformity with the General Agreement simply by removing the averaging provision and instead calculate the assessment on imported product on the same basis as the assessment levied on the like domestic product. While the trade effects of this change might be minimal, Australia considered that acceptance of *de minimis* arguments as defence for measures which were on their face inconsistent with the General Agreement would undermine the effectiveness of the national treatment obligations of Article III and of the General Agreement in general.

50. The **European Community** ("EC") submitted that the DMA was the main trade distorting measure among those implemented by the United States with respect to tobacco within the framework of the 1993 Budget Act, infringing a number of requirements of Article III of the General Agreement. The EC considered that the DMA was contrary to Article III:5, first sentence since the DMA was an *internal regulation* applied exclusively to the manufacturing of cigarettes in the United States. Even though it was called *Domestic Marketing Assessment*, the use of the word "assessment" should not mislead the Panel. The Assessment was not a tax, but a penalty which was imposed if a *proportion* of domestic tobacco was not respected by the U.S. manufacturers of cigarettes to which the measure applied. The DMA was therefore primarily a quantitative regulation, functioning as an incentive to respect the proportions imposed by the law. In addition, the DMA applied to the *use* of tobacco⁵¹ by certain U.S. manufacturers of cigarettes. Finally, it required a *specific proportion* of 75 per cent of U.S. grown tobacco⁵².

51. The EC submitted that the DMA was also contrary to Article III:5, second sentence and to Article III:1. The EC noted that the United States had not contested that the purpose of the DMA was to help U.S. tobacco growers (*i.e.*, domestic tobacco production) within the meaning of Article III:1 by providing them with a protected outlet for their production, in addition to an income support in the form of intervention prices. The EC was of the opinion that a measure intended to ensure the sale of certain quantities of domestic product had long been considered as being contrary to Article III:5, second sentence, and referred in this regard to the report of the Animal Feed panel.⁵³

52. The EC, moreover, considered that the DMA was contrary to Article III:4 since the minimum content requirement contained in the DMA resulted in less favourable treatment to imported tobacco. By limiting the proportion of foreign tobacco which could be used by the U.S. manufacturers, the DMA obviously was a law or regulation, within the meaning of Article III:4, which affected the *use* of foreign tobacco in the production of cigarettes in the United States.

53. With respect to the BDA, the EC, referring to the argumentation by the United States that the amount of the tax was very small or that the tax differential between domestic and like imported products was negligible, recalled the findings of the Superfund panel⁵⁴ which considered that

"[a] demonstration that a measure inconsistent with Article III:2, first sentence has no or insignificant effects would therefore in the view of the Panel not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired..."⁵⁵

⁵⁰Report of the Panel on United States - Taxes on Petroleum and Certain imported Substances, paragraphs 5.1.9-10, adopted on 17 June 1987, BISD 34S/136.

⁵¹See: Section 1106(a) of the Omnibus Budget Reconciliation Act of 1993, which refers to "the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes".

⁵²See: Section 1106(a) of the Omnibus Budget Reconciliation Act of 1993.

⁵³Report of the panel on EEC Measures on Animal Feed Proteins, paragraph 4.8, adopted on 14 March 1978, BISD 25S/49.

⁵⁴Report of the Panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136.

⁵⁵*Idem*, paragraph 5.1.9.

Either the BDA conformed with Article III:2, and its actual impact on imports was of no relevance for a violation case, or it did not, in which case its limited effect on the price of the end-product was also not relevant, as Article III:2, first sentence, obliged contracting parties to establish certain competitive conditions for imported products in relation to domestic products, not to protect expectations on trade volumes. As a result, neither the *de minimis* amount of the tax, nor a negligible tax differential should be admitted as a justification for the United States to maintain the discrimination existing as a result of the implementation of the BDA.

54. The EC did not contest the right of the United States to extend the scope of an internal tax to like imported goods as a border tax adjustment. However, in the present case, this extension was not made in conformity with Article III:2 in two respects. The EC considered that the imposition on all imported tobacco of a tax applied only to two varieties of domestically produced tobacco was contrary to Article III:2. The purpose of Article III:2 was to ensure that imported products would be treated in the same way as the *like* domestic products once they had been cleared *through* customs.⁵⁶ This was not the case here, whether one considered that the "like product" was unmanufactured tobacco in general or that only varieties of unmanufactured tobacco were "like products."

55. This difference of treatment (which existed irrespective of the interpretation made of the concept of "like product") resulted in practice in imported tobacco being subject to internal taxes in excess of those applied to like domestic products, within the meaning of Article III:2. If the like product was unmanufactured tobacco, domestic unmanufactured tobacco benefitted from certain exceptions and was consequently on average taxed less than imported tobacco *which was always liable to the Assessment*. If the like product was each variety of tobacco, the case was even clearer. Among those varieties produced in the United States, only burley and flue-cured were subject to the assessment. The excess represented the full amount of the tax levied on the imported varieties. The violation of Article III:2 in this respect was therefore well established. Second, the calculation of the BDA for imported tobacco resulted in imported flue-cured tobacco being more taxed than domestic flue-cured tobacco. The United States seemed to argue that the *de minimis* difference of the taxation should justify a finding of no nullification or impairment. Such an argumentation had already been rejected by the Superfund panel.⁵⁷ In any event, the *de minimis* argumentation of the United States could not prevail for those varieties which were not taxed when grown in the United States. Moreover, the discrimination should not be justified on the basis that the method used by the United States in calculating the BDA was "reasonable". GATT practice regarding Article III:2 had been to make an objective assessment of the measures under review. If the method used by the United States led to a discrimination (whether *de minimis* or not), it was sufficient to establish a violation. In other words, Article III:2 left no room for "reasonableness" in the application of internal taxes. For the reasons mentioned above, the EC was of the opinion that the BDA violated Article III:2 of the General Agreement.

56. Without prejudice to the merits of the arguments raised by the complainants regarding the conformity of the importers' contribution to the NNCA with provisions of the General Agreement, the EC stressed that the Panel, when reviewing the conformity of this tax, should take due account of the principles enshrined in the text of the General Agreement and in GATT practice, to be found, *inter alia*, in Article III:8(b) of the General Agreement and in the report of the Superfund panel.⁵⁸

57. As concerned the inspection fees, the EC understood that Section 1106(c), as amended, contained two obligations: one that the importers fees and charges for inspection cover, as nearly as practicable,

⁵⁶See: *e.g.*, report of the panel on Italian Discrimination against Imported Agricultural Machinery, paragraph 11, adopted on 23 October 1958, BISD 7S/60.

⁵⁷Report of the Panel on United States - Taxes on Petroleum and Certain imported Substances, paragraphs, adopted on 17 June 1987, BISD 34S/136.

⁵⁸*Idem*, paragraph 5.2.4.

the costs of such services, and one pursuant to which these fees should be comparable to fees and charges fixed and collected for services provided in connection with tobacco produced in the United States. Inspection fees for imported tobacco were currently lower than for domestic tobacco and one could reasonably assume that they were fixed at least at the level of the cost of services. One could consequently deduce that if they were raised to the level of fees on domestic tobacco, they would no longer be commensurate with the actual costs of the services. In other words, one could assume, on the basis of the above, that Section 1106(c) required the U.S. authorities to take actions inconsistent with the General Agreement. Under GATT practice with respect to mandatory legislation, an argument to the effect that the fee had not been increased yet was irrelevant, as was clearly stated by the panel on United States - Measures Affecting Alcoholic and Malt Beverages.⁵⁹

58. **India** submitted that the current complaint with respect to the U.S. measures affecting the importation, internal sale and use of tobacco should be considered in the light of overall trends towards market access restrictions which were not in conformity with the provisions of the General Agreement, like the ones under consideration. India was not a large exporter of tobacco to the United States but had an important systemic interest in this issue because actions such as this had major implications for the world trading system.

59. India believed that the 75 per cent domestic content requirement was inconsistent with the provisions of Article III:5 of the General Agreement. The BDA, requiring that an importer of tobacco remit to the CCC a non-refundable marketing assessment failing which, as in the case of the domestic content requirement, there would be a heavy penalty, was inconsistent with Article III:2. India also considered that the NNCA violated the provisions of Article III:2 of the General Agreement. In India's opinion, the substantive provisions of the 1993 Budget Act not only violated the provisions of the General Agreement, but also went against the obligations of the United States and undermined its credibility as a contracting party to the GATT. If major trading nations like the United States knowingly detracted from their obligations under the multilateral trade rules, this was bound to have very adverse repercussions for the multilateral trading system itself.

60. **Turkey** submitted that the 1993 Budget Act amended the Agricultural Adjustment Act of 1938 by including provisions to protect domestically-produced tobacco, to the detriment of the imported product. The aim of this new measure was to safeguard the interests of small U.S. tobacco farms which were negatively affected by the domestic price support programme and system of production controls. Turkey was of the opinion that it was difficult to accept the introduction of a border measure in order to offset the implications of a malfunctioning domestic support policy, in particular in the aftermath of the conclusion of the Uruguay Round negotiations and signing of the Marrakesh Agreement.

61. As for the product coverage of the measure, tobacco was defined in the proposed regulations to mean that which was commonly considered to be "tobacco" in the trade. As there was no provision in the statute to do otherwise, that would include all foreign tobacco, even those kinds of tobacco which were not produced in the United States and consequently were not subject to marketing quotas and did not receive price support. Turkey was a producer and exporter of Oriental tobacco. Forty-five per cent of its exports went to the United States, amounting to US\$188 million in 1993. In the same year, Turkey's imports of flue-cured and burley tobacco from the United States amounted to 20,000 tons, with a value of US\$121 million. Turkey feared that this two-way trade between the two countries would be adversely affected by the new regulation. In general, the expected reduction in the level of U.S. imports due to this new measure would destabilize world tobacco prices and disrupt the patterns of world trade. Subsequently, fewer sales and lower prices for exporting countries would lead to increased tobacco storage costs.

⁵⁹Paragraph 5.39, adopted on 19 June 1992, BISD 39S/206.

V. FINDINGS

Introduction

62. The Panel recalled that the complainants had identified four separate U.S. measures, corresponding to four subsections of Section 1106 of the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act"), which they claimed were inconsistent with the General Agreement. These four measures were:

- Section 1106(a), a Domestic Marketing Assessment ("DMA"), claimed to be inconsistent with Articles III:2, III:4 and III:5;
- Section 1106(b)(1), a Budget Deficit Assessment ("BDA"), claimed to be inconsistent with Article III:2;
- Section 1106(b)(2), a No Net Cost Assessment ("NNCA"), claimed to be inconsistent with Article III:2; and
- Section 1106(c), Fees for Inspecting Imported Tobacco, claimed to be inconsistent with Article VIII:1(a).

The Panel decided to address the claims relating to each of the four measures in turn.

Domestic Marketing Assessment ("DMA")

63. The Panel noted that the issues in dispute with respect to the DMA arose essentially from the following facts. The DMA legislation, Section 1106(a) of the 1993 Budget Act, required each "domestic manufacturer of cigarettes", as defined in the legislation (see Annex), to certify to the Secretary of the U.S. Department of Agriculture ("USDA"), for each calendar year, the percentage of domestically produced tobacco used by such manufacturer to produce cigarettes during the year. A domestic manufacturer that failed to make such a certification or to use at least 75 per cent domestic tobacco was subject to penalties in the form of a nonrefundable marketing assessment (*i.e.* the DMA) and was required to purchase additional quantities of domestic burley and flue-cured tobacco.

64. The complainants claimed that the DMA, Section 1106(a) of the 1993 Budget Act, was inconsistent with the provisions of three paragraphs of Article III: paragraphs 2, 4 and 5.

65. The Panel considered that because the complainants claimed that the DMA was a domestic content requirement covered by Article III:5, and because that paragraph was the most specific of the provisions alleged to be violated, it should first examine the DMA in light of Article III:5.

Article III:5

66. The Panel noted that Article III:5 provides as follows:

"No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party

shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1".

The Panel then recalled the complainants' claim that the DMA was inconsistent with both the first and second sentences of this provision.

67. As to the applicability of Article III:5, first sentence, to the DMA, the Panel considered that it first had to determine whether the United States had established an "internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions ... ". The Panel noted the following in this respect:

- (a) First, the DMA was established by an Act of the U.S. Congress, Section 1106(a) of the 1993 Budget Act, and was implemented through regulations of USDA. The effective date for the DMA was 1 January 1994. It thus constituted a *regulation* within the meaning of Article III:5.
- (b) Second, the Panel noted that the opening sentence of the DMA legislative provision, Section 1106(a) of the 1993 Budget Act, stated:

"CERTIFICATION. A *domestic manufacturer* of cigarettes shall certify to the Secretary, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that is produced in the United States". (*emphasis added*)

The DMA was thus an *internal* regulation imposed on domestic manufacturers of cigarettes.

- (c) Third, the Panel noted that the second sub-paragraph of the DMA legislative provision stated:

"PENALTIES. In General. Subject to subsection (f) [exception for crop losses due to natural disasters], a *domestic manufacturer of cigarettes that has failed*, as determined by the Secretary after notice and opportunity for a hearing, to *use in the manufacture of cigarettes* during a calendar year a *quantity of tobacco grown in the United States that is at least 75 percent of the total quantity of tobacco used* by the manufacturer or to comply with subsection (a) [certification requirement], shall be subject to the requirements of subsections (c), (d) and (e) [*penalties* in the form of a nonrefundable marketing assessment and a required purchase of additional quantities of domestic burley and flue-cured tobacco]". (*emphasis added*)

The DMA was thus a *quantitative* regulation in that it set a minimum *specified proportion* of 75 per cent for the use of U.S. tobacco in manufacturing cigarettes.

- (d) Fourth, the DMA was an internal quantitative regulation relating to the *use* of a product, in that it *required the use* of U.S. domestically grown tobacco.

The Panel thus found that the DMA was an "internal quantitative regulation relating to the ... use of products in specified amounts or proportions ... ", within the meaning of the first part of the first sentence of Article III:5.

68. The Panel then turned to a consideration of whether the DMA "requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources", as provided in the second part of the first sentence of Article III:5. The Panel noted the following in this respect:

- (a) The DMA required each domestic manufacturer of cigarettes to certify to the Secretary of USDA, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that was produced in the United States.
- (b) Subject to an exception dealing with crop losses due to disasters, a domestic manufacturer that failed to make the required certification or to use at least 75 per cent domestic tobacco was subject to penalties including the required purchase of additional domestic tobacco.

The Panel thus **concluded** that the DMA was an internal quantitative regulation relating to the use of tobacco in specified amounts or proportions which required, directly or indirectly, that a minimum specified proportion of tobacco be supplied from domestic sources, inconsistently with Article III:5, first sentence.

69. The Panel next turned to a consideration of whether the DMA was inconsistent with Article III:5, second sentence, as claimed by the complainants. On this point, the Panel noted that the second sentence of Article III:5 is subsidiary to the first sentence thereof, as the second sentence only becomes relevant where a contracting party is "*otherwise apply[ing] internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1, i.e. "so as to afford protection to domestic production"*". The Panel was therefore of the view that, in light of the finding of inconsistency of the DMA with Article III:5, first sentence, it would not be necessary to examine the consistency of the DMA with Article III:5, second sentence.⁶⁰

Article III:4

70. The Panel then turned to a consideration of the claim that the DMA was inconsistent with Article III:4.

71. The Panel noted that Article III:4 provides in relevant part as follows:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase ... or use".

72. The Panel noted that both Article III:5 and Article III:4 deal with internal regulations, but that Article III:5 is the more specific of the two provisions. In view of the Panel's finding of inconsistency of the DMA with Article III:5, and following the reasoning enunciated in paragraph 69, the Panel considered that it would not be necessary to examine the consistency of the DMA with Article III:4.⁶¹

⁶⁰Cf. Report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 270, where that panel found that it would not be appropriate to consider Canada's Article III:1 allegations to the extent that it found the U.S. measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.

⁶¹Cf. Report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 270, where that panel found that it would not be appropriate to consider Canada's Article III:1 allegations to the extent that it found the U.S. measures to be inconsistent with the more specific provisions of Articles III:2 and III:4.

Article III:2

73. The Panel next turned its consideration to the claim by the complainants that the penalty provisions of the DMA, *i.e.* the nonrefundable marketing assessment and the requirement to purchase additional quantities of domestic burley and flue-cured tobacco, which were applicable where a domestic manufacturer failed to provide the required certification or to use annually a minimum of 75 per cent domestic tobacco in the manufacture of cigarettes, were inconsistent with the first sentence of Article III:2.

74. The Panel noted that Article III:2 provides as follows:

"The products of the territory of any contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1".

75. In the Panel's view, the Article III:2 claim raised the question of whether the DMA's penalty provisions were separate fiscal measures or enforcement measures for the domestic content requirement of the DMA. The Panel noted in this regard that previous panels, consistent with the practice of international tribunals, had refrained from engaging in an independent interpretation of domestic laws, and had treated the interpretation of such laws as questions of fact.⁶² The Panel considered that it should approach its analysis of the complainants' Article III:2 claims in conformity with this practice and, therefore, to treat the interpretation of Section 1106(a) of the 1993 Budget Act as a question of fact. As the basis for such an analysis, the Panel considered that it should seek guidance from the manner in which the United States, as author of the legislation, itself interpreted these provisions.

76. The Panel considered as significant that the subsection of the DMA provision which set forth the additional marketing assessment and purchase requirements was entitled "Penalties". Thus, the ordinary meaning of the title of the provision suggested to the Panel that the additional assessment and purchase requirements were treated under U.S. domestic law as penalties, not as separate fiscal measures.

77. The Panel recalled once again that the DMA provision, in relevant part, read as follows:

"*PENALTIES.* In General. Subject to subsection (f), a domestic manufacturer of cigarettes that has failed, as determined by the Secretary after notice and opportunity for a hearing, to use in the manufacture of cigarettes during a calendar year a quantity of tobacco grown in the United States that is at least 75 percent of the total quantity of tobacco used by the manufacturer or to comply with subsection (a) [certification requirement], shall be subject to the requirements of subsections (c) [*nonrefundable marketing assessment*], (d) [*purchase of additional quantities of domestic burley tobacco*] and (e) [*purchase of additional quantities of domestic flue-cured tobacco*]"'. (*emphasis added*)

78. The Panel further recalled that USDA's Proposed Rules implementing Section 1106(a) of the 1993 Budget Act set out the penalty provisions under Section 723.502(b), entitled "Failure to Comply". The text of these Proposed Rules provided the following:

⁶²See, *e.g.*, report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 284-287, 296-297.

"Each domestic manufacturer of cigarettes who *fails to comply* with the requirements of this section *shall pay* a domestic marketing assessment and *shall purchase* loan stocks of tobacco in accordance with Sections 723.503 and 723.504".⁶³ (*emphasis added*)

79. The Panel noted in addition that the text accompanying the Proposed Rules suggested that the additional marketing assessment and purchase requirements were in the nature of penalties. For example, the Panel noted that the following explanation was provided:

"Section 320C(c) of the Act provides that *if the quantity of imported tobacco* used by a domestic manufacturer for making cigarettes for the year *exceeds 25 percent, such manufacturer must pay a domestic marketing assessment* on each pound of imported tobacco used in excess of 25 percent. In addition, as provided in section 320C(d) and (e), *such manufacturer must purchase tobacco* from the existing burley and flue-cured tobacco inventories of producer owned cooperative marketing associations in an amount equal to the weight of imported tobacco used in excess of 25 percent".⁶⁴ (*emphasis added*)

The accompanying text further provided:

"Where a domestic content *violation* has occurred, the *compensatory* purchases of tobacco ... must be from the inventories of producer owned cooperative marketing associations that handle price support loans for tobacco".⁶⁵ (*emphasis added*)

80. It was thus the Panel's understanding that the U.S. Government treated these DMA provisions as penalty provisions for the enforcement of a domestic content requirement for tobacco, not as separate fiscal measures, and that such interpretation corresponded to the ordinary meaning of the terms used in the relevant statute and proposed rules. Further, it appeared that these penalty provisions had no separate *raison d'être* in the absence of the underlying domestic content requirement. The above factors suggested to the Panel that it would not be appropriate to analyze the penalty provisions separately from the underlying domestic content requirement.

81. The Panel further noted that prior panel decisions also supported the view that the additional marketing assessment and purchase requirements should be treated as enforcement measures, and not be analyzed separately as internal charges. The Panel recalled that one such panel, in examining a regulation according to which buyers of vegetable proteins had the possibility of providing a security as an alternative to the required purchase of a certain quantity of skimmed milk powder, had determined that the security deposit was not a fiscal measure because, *inter alia*,

"the revenue from the security deposit accrued to EEC budgetary authorities only when the buyer of vegetable proteins had not fulfilled the purchase obligation. The Panel therefore considered that the security deposit, including any associated cost, was only an enforcement mechanism for the purchase requirement and, as such, should be examined with the purchase obligation".⁶⁶

⁶³59 Federal Register 1493, 1497 (11 January 1994).

⁶⁴59 Federal Register 1493, 1495 (11 January 1994).

⁶⁵59 Federal Register 1493, 1495 (11 January 1994).

⁶⁶Report of the panel on EEC - Measures on Animal Feed Proteins, adopted on 14 March 1978, BISD 25S/49, 64. See also report of the panel on EEC - Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables, adopted on 18 October 1978, BISD 25S/68, 98.

In a similar vein, another more recent panel had first examined the underlying measure at issue (differing systems for the internal distribution of imported and domestic beer), and considered it unnecessary to examine certain enforcement measures (charges on beer containers).⁶⁷ The Panel did not consider that there were any elements in the case before it which would justify a different approach from that adopted in these earlier cases.

82. In view of the Panel's analysis in paragraphs 75 - 81 above, the Panel considered that the evidence did not support the complainants' claim that the DMA's penalty provisions were separate taxes or charges within the meaning of Article III:2.

Budget Deficit Assessment ("BDA")

83. The Panel noted that the issues in dispute with respect to the BDA arose essentially from the following facts. Pursuant to the Agricultural Act of 1949, and later amendments thereto in the Omnibus Budget Reconciliation Act of 1990, the United States had imposed a series of nonrefundable marketing assessments, known as budget deficit assessments, on various domestically produced agricultural commodities, including tobacco. Pursuant to the 1949 Act and the 1990 amendments, the BDA was imposed on all domestic tobacco for which price support was available. The BDA differed by tobacco type, so that, for example, the BDA for burley was different from that for flue-cured tobacco. However, the formula for determining the BDA was the same for all types of domestic tobacco: one per cent of the average per pound support rate during the preceding crop year, with one half (i.e. 0.5 per cent) paid by the producer and the other half (i.e. 0.5 per cent) paid by the purchaser.

84. For the 1993 crop year, the price support level for burley tobacco was \$1.683 per pound. The total BDA on domestic burley for 1994 was therefore \$0.0168 per pound, divided equally between producers and purchasers, each paying \$0.008415 per pound. Similarly, for the 1993 crop year, the price support level for flue-cured tobacco was \$1.577 per pound, the total BDA on domestic flue-cured for 1994 therefore being \$0.01577 per pound, divided equally between producers and purchasers, each paying \$0.00785 per pound.

85. The legislation was amended in 1993 through the 1993 Budget Act, *inter alia* extending this budget deficit assessment to imported tobacco. Section 1106(b)(1) of the 1993 Budget Act provided in relevant part as follows:

"Effective only for each of the 1994 through 1998 crops of tobacco an importer of tobacco that is produced outside the United States shall remit to the Commodity Credit Corporation a nonrefundable marketing assessment in an amount equal to the product obtained by multiplying the number of pounds of tobacco that is imported by the importer, by the sum of (i) the per pound marketing assessment imposed on purchasers of domestic burley tobacco pursuant to subsection (g); and (ii) the per pound marketing assessment imposed on purchasers of domestic flue-cured tobacco pursuant to subsection (g)".

Section 1106(b)(1) of the 1993 Budget Act thus subjected all imported tobacco for the 1994-1998 crop years to the BDA, but with a calculation formula different from that required for domestically grown tobacco. The BDA on all types of imported tobacco was calculated as half the BDA imposed on purchasers of domestic burley plus half the BDA imposed on purchasers of domestic flue-cured, with the full one per cent payable by the importer. For the 1994 crop year, therefore, the BDA on all types of imported tobacco was \$0.008415 plus \$0.007885, *i.e.* \$0.0163 per pound. The BDAs for both

⁶⁷Report of the panel on Canada - Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies, adopted on 18 February 1992, BISD 39S/27, 85.

domestic and imported tobacco had to be remitted to the CCC and were non-refundable. Penalties for non-payment of BDAs applied equally to imported and domestic tobacco.

86. The Panel recalled the claim of the complainants that the BDA was inconsistent with Article III:2, first sentence, because the legislation mandated calculation of the BDA in such a way that it would always be higher on some types of imported tobacco than on like domestic tobacco. The Panel further recalled the complainants' claim that the BDA was also inconsistent with Article III:2, second sentence, because imported flue-cured tobacco was not similarly taxed to domestic flue-cured tobacco in that purchasers of domestic flue-cured tobacco paid an assessment based on government price support for that type of tobacco whereas importers had to pay an assessment based on the average of the sum of assessments on domestic burley and flue-cured tobacco, thus extending protection to domestic production. The Panel then recalled the defense of the United States that the BDA was simply a border tax adjustment, that the method of calculating the BDA for imports (averaging the BDA charges for domestic burley and flue-cured tobacco to arrive at a single BDA charge for imports) was reasonable, and that in any case the discriminatory impact of the BDA was so small as to be of no commercial consequence.

87. The Panel noted that Article III:2 provides as follows:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1".

The Panel also noted that the second sentence of Article III:2, when read in conjunction with Article III:1, means that "internal taxes or other internal charges" ... "should not be applied to imported or domestic products so as to afford protection to domestic production". In addition, the Panel noted that the Interpretative Note Ad Article III:2 provides further:

"A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed".

88. In examining the claims under Article III:2, first sentence, the Panel first noted that the BDA was an internal fiscal measure: an internal tax or charge imposed directly on both imported and domestic tobacco. Indeed, as the Panel recalled, the United States itself claimed that the BDA was an internal tax subject to border tax adjustment.

89. The Panel then turned to the claim of the United States that the internal tax on imported tobacco was a border tax adjustment applied consistently with Article III:2 due to the existence of a similar internal tax applied to domestic tobacco. Addressing this claim, the Panel noted that the BDA could only be subject to border tax adjustment if it were an internal tax or charge consistent with Article III:2.⁶⁸

90. The Panel thus considered that it needed to examine whether the imported product subject to the U.S. measure - all imported tobacco, as provided for in Section 1106(b)(1) - was treated less favourably in respect of this internal tax than all domestic tobacco. Here, the Panel first noted that, by statute, all imported tobacco was subject to the BDA but that not all domestic tobacco was subject to such a tax. The BDA applied only to domestic tobacco for which price support was available.

⁶⁸Report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 155-159; report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 386-387.

As the evidence indicated, a number of domestic tobacco types, *e.g.* Maryland tobacco, were not subject at the present time to any such assessment. The Panel thus was of the view that the BDA, as currently applied, provided less favourable treatment to imported tobacco than to like domestic tobacco.

91. The Panel next considered the claim of the complainants that the differing formulas mandated by the U.S. legislation for calculating the BDA on imported tobacco on the one hand, and the domestic BDA on domestic tobacco on the other, were such that the BDA would always be higher on some types of imported tobacco than on like domestic tobacco. In examining this claim, the Panel considered that it should focus attention on the differing calculation bases for the BDA and the significance these might have for the treatment of imported and domestic tobacco.

92. The Panel recalled that the BDA, applicable to all domestic tobacco for which price support was available, was calculated at the rate of one per cent of the average price support level for each such tobacco type in the previous crop year. The Panel then recalled that the BDA on all types of imported tobacco was calculated as the average of the BDA on domestic burley and domestic flue-cured tobacco.

93. The Panel further noted that the application of these two different statutorily prescribed formulas to tobacco in the current year, at least in the case of flue-cured tobacco, resulted in an internal tax on imported tobacco that was *higher* than that on like domestic tobacco. This was because, as the record showed, the BDA for domestic flue-cured tobacco in 1994, calculated at the rate of one per cent of the price support level for flue-cured in 1993, was \$0.0157 per pound; whereas the BDA on all types of imported tobacco for 1994, calculated as the *average* of the BDAs imposed on domestic burley (\$0.0157) and flue-cured (\$0.0168) tobacco in 1994, was \$0.0163 per pound.

94. The Panel thus considered that this imposition of an internal tax on imported flue-cured tobacco at a higher rate than on domestic flue-cured tobacco, as well as the fact that some domestic tobacco was entirely exempt from such tax, each presented cases of less favourable tax treatment inconsistent with Article III:2, first sentence.⁶⁹

95. The Panel recognized that a change in the price support levels for domestic burley and flue-cured tobacco could result in a given year in the elimination of the discriminatory tax treatment against imported flue-cured tobacco. However, beyond the immediate circumstance of a higher assessment on imported flue-cured tobacco than on like domestic tobacco, the Panel considered that the U.S. statutorily prescribed averaging method for calculation of the BDA on imported tobacco contained an inherent *risk* of a higher assessment on some types of imported tobacco than on like domestic tobacco. The Panel agreed with the argument of the complainants that, mathematically, given the statutorily mandated averaging formula, the BDA would always be higher on imported tobacco than on one type of domestic tobacco so long as there was any price differential between the average support price of burley and flue-cured tobacco.

96. The Panel noted that an internal regulation which merely exposed imported products to a risk of discrimination had previously been recognized by a GATT panel to constitute, by itself, a form of discrimination, and therefore less favourable treatment within the meaning of Article III.⁷⁰ The Panel agreed with this analysis of risk of discrimination as enunciated by this earlier panel.

⁶⁹See, *e.g.*, report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 155; report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 270.

⁷⁰See, *e.g.*, report of the panel on EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal Feed Protein, adopted on 25 January 1990, BISD 37S/86, 125.

97. The Panel thus considered that the system for calculation of the BDA on imported tobacco itself, not just the manner in which it was currently applied, was inconsistent with Article III:2 because it carried with it the risk of discriminatory treatment of imports in respect of internal taxes.

98. The Panel recalled the U.S. defense that even if the BDA was higher on imported flue-cured tobacco than on like domestic tobacco, the method of calculation of the BDA for imports - averaging the BDA on domestic burley and flue-cured tobacco - was a reasonable method and should not be subject to challenge before this Panel. However, the Panel could not see how such a method of calculation could be termed "reasonable" in the context of the General Agreement if it mandated and inevitably resulted in discriminatory treatment of imported tobacco in respect of internal taxes. The Panel recalled in this regard that a prior GATT panel had ruled that in assessing whether there was tax discrimination, account was to be taken not only of the rate of the applicable internal tax but also of the taxation methods, including the basis of assessment.⁷¹ Another Article III panel had ruled that more favourable treatment as to some products could not be balanced against less favourable treatment as to others.⁷² It had noted that "[s]uch an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III".⁷³ The Panel agreed with these earlier rulings and rejected the U.S. defense of "reasonableness" of the BDA's method of calculation. In accordance with the national treatment provisions of Article III:2, each pound of tobacco imported into the United States had to be accorded treatment no less favourable in respect of internal taxes than that accorded to like domestic tobacco.

99. The Panel further recalled the U.S. argument that the discriminatory impact of the BDA differential was so small as to be of no commercial consequence. Here, the Panel noted that previous panels had rejected arguments of *de minimis* trade consequences and had found that the size of the trade impact of a measure was not relevant to its consistency with Article III.⁷⁴ The CONTRACTING PARTIES had recognized that Article III protected expectations on the competitive relationship between imported and domestic products, not export volumes.⁷⁵ In accordance with these past panel rulings, the Panel considered that it was not permissible to impose higher internal taxes on imported products than on like domestic products, even where the difference was minimal or of no commercial consequence.⁷⁶ The Panel thus rejected this particular U.S. defense of the BDA.

100. Accordingly, in view of the analysis in paragraphs 88 - 99 above, the Panel **concluded** that the BDA subjected imported tobacco to an internal tax or charge in excess of that applied to like domestic tobacco, inconsistently with Article III:2, first sentence.

101. The Panel recalled the complainants' subsidiary argument under Article III:2, second sentence, as to the protective effect of the differing tax liability mandated by the BDA. On this point, the Panel noted that the second sentence of Article III:2 is subsidiary to the first sentence thereof: the second sentence only becomes relevant where a contracting party is "*otherwise* apply[ing] internal taxes or

⁷¹Report of the panel on Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, adopted on 10 November 1987, BISD 34S/83, 118-120.

⁷²Report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 387.

⁷³Report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 387.

⁷⁴See, e.g., report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 155-159; report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 386-387.

⁷⁵Report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 158 ("Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products. Unlike some other provisions of the General Agreement, it does not refer to trade effects"). See also report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 271.

⁷⁶Report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 158-159.

other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1", *i.e.* "so as to afford protection to domestic production". However, in the present case, because the Panel had already determined that the BDA was inconsistent with Article III:2, first sentence, the Panel considered that it would not be necessary to examine the consistency of the BDA with Article III:2, second sentence.

No Net Cost Assessment ("NNCA")

102. The Panel noted that the issues in dispute with respect to the NNCA arose essentially from the following facts. For crop years prior to 1982, losses to the domestic price support programme for tobacco at the time of final accounting for the year's inventory were absorbed by the CCC. In 1982, the U.S. Congress enacted legislation to ensure that the U.S. Government would experience no net cost in operating the domestic price support programme. The NNCAs applied to all U.S. tobacco covered by price support programmes. USDA computed an NNCA for each type of domestic tobacco marketed or placed for price support, based on an estimate of the losses the CCC would incur for each such type in each crop year. The legislation was amended in 1985 to provide that the cost of the NNCAs on domestic burley and flue-cured tobacco be split equally between the producers and purchasers of these tobacco types. The legislation was further amended by Section 1106(b)(2) of the 1993 Budget Act, introducing NNCAs for imported burley and flue-cured tobacco as from 1 January 1994. The 1993 legislation mandated the same assessment for domestic and imported burley tobacco (\$0.02817 per pound in 1994) and for domestic and imported flue-cured tobacco (\$0.02423 per pound in 1994), respectively. NNCA receipts were deposited in an account used to reimburse the U.S. Government for any losses resulting from the operation of the domestic tobacco price support programme.

103. The Panel recalled the claim of the complainants that the NNCA was inconsistent with Article III:2, first sentence, because the net charge of the NNCA on imported tobacco was greater than that on like domestic tobacco. The Panel further recalled the complainants' claim that the NNCA was inconsistent with Article III:2, second sentence, because the NNCA charged on imported tobacco reduced the cost of the price support programme to the domestic tobacco producer, without providing any benefit to imported tobacco. The Panel also recalled the defense of the United States that the NNCA was a border tax adjustment consistent with Article III.

104. The Panel noted that Article III:2 provides as follows:

"The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1".

The Panel also noted that the second sentence of Article III:2, when read in conjunction with Article III:1, means that "internal taxes or other internal charges" ... "should not be applied to imported or domestic products so as to afford protection to domestic production". In addition, the Panel noted that the Interpretative Note Ad Article III:2 provides:

"A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed".

105. In examining the parties' claims as to the NNCA in the light of Article III:2, first sentence, the Panel first noted that the record indicated, and all parties to the dispute agreed, that the tax applied

to imported burley and flue-cured tobacco was not in excess of - indeed was identical to - the tax applied to domestic burley and flue-cured tobacco, respectively.

106. The Panel then examined the complainants' claim that the net rate of the NNCA on imported tobacco was higher than that of the NNCA on domestic tobacco because the latter *in effect* benefitted from a tax remission through the operation of the tobacco price support programme.

107. On this point, the Panel first noted that Article III is concerned with ensuring national treatment of products, not of producers.⁷⁷ The Panel then noted that the same rate of tax was imposed via the NNCA on both imported and domestic tobacco. Both in the case of imported and domestic burley and in the case of imported and domestic flue-cured, respectively, the identical rate of tax was paid to the CCC on each pound of such tobacco sold in the United States. What was different in the case of domestic tobacco subject to NNCA was that its producers benefitted from the U.S. Government's tobacco price support programme. In the view of the Panel, this distinction did not transform the NNCA paid on domestic tobacco into a remission of a tax on a product. The Panel here agreed with the United States that whether or not the use of the revenue derived from the NNCA might ultimately benefit domestic rather than imported tobacco was not relevant to the Panel's analysis under Article III:2.

108. The Panel noted, moreover, that Article III:8(b) explicitly recognizes that

"[t]he provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including *payments to domestic producers derived from the proceeds of internal taxes or charges* applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products." (*emphasis added*)

It appeared to the Panel that the complainants were in essence arguing that Article III:2 was violated because U.S. producers benefitted from a payment of a subsidy derived from the proceeds of the internal tax, but that importers did not benefit in a like manner.

109. The Panel was cognizant of the fact that a remission of a tax on a product and the payment of a producer subsidy out of the proceeds of such a tax could have the same economic effects. However, the Panel noted that the distinction in Article III:8(b) is a formal one, not one related to the economic impact of a measure. Thus, in view of the explicit language of Article III:8(b), which recognizes that the product-related rules of Article III "shall not prevent the payment of subsidies exclusively to domestic producers", the Panel did not consider, as argued by the complainants, that the payment of a subsidy to tobacco producers out of the proceeds of the NNCA resulted in a form of tax remission inconsistent with Article III:2.⁷⁸

110. The Panel next examined the complainants' claim of discriminatory treatment of imported tobacco as the result of the differing liability for payment of the NNCA on imported tobacco. In the case of imported tobacco the importer was liable for 100 per cent of the assessment, whereas in the case of domestic tobacco the producer and the purchaser were each liable for 50 per cent of the assessment. However, on this point the Panel again noted that Article III is concerned with the national treatment

⁷⁷See report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 387, citing report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 158.

⁷⁸See report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 271-273 for a discussion of the reasons for the distinction in GATT between tax exemptions and remissions on the one hand and producer subsidies on the other.

of products, not of producers.⁷⁹ In the Panel's view, so long as the tax burden on the imported product was no greater than that on the like domestic product there could be no violation of Article III:2, first sentence, even where there was a differing liability for the payment of that tax. The Panel noted that this conclusion was supported by prior panel decisions.⁸⁰

111. The Panel then considered the complainants' claim that the NNCA was inconsistent with Article III:2, second sentence, because the NNCA's charges on imported tobacco reduced the cost of the price support programme to the domestic tobacco producer, without providing any benefit to imported tobacco. The Panel did not consider that it needed to examine this claim in view of the fact that Article III:8(b), which explicitly recognizes that subsidies to domestic producers are not subject to the national treatment rules of Article III, applies to all provisions of Article III, including that of Article III:2, second sentence.

112. In view of the analysis in paragraphs 106 - 111 above, the Panel rejected the complainants' claims of inconsistency of the NNCA with Article III:2, first and second sentence. In addition, the Panel concurred with the United States that the NNCA's charges on imported burley and flue-cured tobacco were permissible border tax adjustments consistent with Article III:2.

113. The Panel accordingly **concluded** that the NNCA was not inconsistent with Article III:2, first or second sentence.

Fees for Inspecting Imported Tobacco

114. The Panel noted that the issues in dispute with respect to fees for inspecting imported tobacco arose essentially from the following facts. All tobacco sold in the United States, whether domestic or imported, was subjected by law to inspection. Each individual lot of domestic tobacco was required to be inspected for grade and quality at the warehouse, whereas imported tobacco was required to be inspected for grade and quality, on the basis of samples, at the point of entry into the United States. Pursuant to the Tobacco Inspection Act of 1935, as amended by the Tobacco Adjustment Act of 1983, the Secretary of USDA was required to fix by regulation and collect from the importer of tobacco, fees and charges for inspection "which shall, as nearly as practicable, cover the costs of such services, including the administrative and supervisory costs customarily included by the Secretary in user fee calculations".⁸¹ Section 1106(c) of the 1993 Budget Act amended this earlier statutory provision by adding a requirement that, as of 1 January 1994, fees for inspecting imported tobacco "be comparable to the fees and charges fixed and collected for services provided in connection with tobacco produced in the United States". USDA had so far not promulgated regulations to implement this 1993 amendment.

115. The Panel recalled the claim of the complainants that Section 1106(c) was inconsistent with Article VIII:1(a) because it mandated fees for inspecting imported tobacco in excess of the cost of services rendered. The Panel further recalled the defense of the United States that the two statutory provisions governing inspection of imported tobacco did not mandate a violation of Article VIII, that to date there had been no change in the USDA inspection fee structure, and that it was the full intention of the U.S. Government that any new inspection fees promulgated by USDA would be commensurate with the cost of services rendered.

⁷⁹See report of the panel on United States - Section 337 of the Tariff Act of 1930, adopted on 7 November 1989, BISD 36S/345, 387, citing report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 158.

⁸⁰See, e.g., report of the panel on Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages, adopted on 10 November 1987, BISD 34S/83, 119.

⁸¹7 U.S.C. 511r(d).

116. The Panel noted that the text of Article VIII:1(a) provides as follows:

"All fees and charges of whatever character (other than import and export duties and other 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."

117. The Panel thus 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.

118. The Panel first noted that Article VIII:1(a) prohibits the imposition of fees imposed on or in connection with importation which are in excess of the cost of services rendered. In view of the fact that USDA had as yet not amended its inspection fee structure in line with the statutory amendment of Section 1106(c), the main question that arose for the Panel's analysis was whether this section of the 1993 Budget Act mandated action inconsistent with Article VIII or whether it merely gave the U.S. Government the discretion to act inconsistently with Article VIII. In this regard, the Panel recalled that panels had consistently ruled that legislation which mandated action inconsistent with the General Agreement could be challenged as such, whereas legislation which merely gave the discretion to the executive authority of a contracting party to act inconsistently with the General Agreement could not be challenged as such; only the actual application of such legislation inconsistent with the General Agreement could be subject to challenge.⁸²

119. The Panel noted that the fee structure for inspection of domestic tobacco was currently higher than that for imported tobacco. The fees for mandatory inspection of domestic tobacco for grade and quality were set at \$0.0070 per pound and were required to cover all costs of the inspection services.⁸³ The fees for mandatory inspection of imported tobacco (except Oriental and certified cigar tobacco) for grade and quality, applicable as of 25 July 1991, were set at \$0.0099 per kilogram (\$0.0049 per pound).⁸⁴ Domestic fees were thus \$0.00251 per pound - or 30 per cent - higher than such fees for imports.

120. With a fee structure that currently set the inspection fees for domestic tobacco 30 per cent higher than those for imported tobacco, the Panel had to consider whether under Section 1106(c) USDA had the discretion to ensure that imported tobacco could be subject to fees no greater than the cost of services rendered while at the same time ensuring that the fees were "comparable" to the fees for inspecting domestic tobacco.

⁸²See, e.g., report of the panel on United States - Taxes on Petroleum and Certain Imported Substances, adopted on 17 June 1987, BISD 34S/136, 160; report of the panel on EEC - Regulation on Import of Parts and Components, adopted on 16 May 1990, BISD 37S/132, 198-199; report of the panel on Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes, adopted on 7 November 1990, BISD 37S/200, 227-228; report of the panel on United States - Measures Affecting Alcoholic and Malt Beverages, adopted on 19 June 1992, BISD 39S/206, 281-282, 289-290; report of the panel on United States - Denial of MFN Treatment as to Non-Rubber Footwear from Brazil, adopted on 19 June 1992, BISD 39S/128, 152.

⁸³7 CFR 29.123(a).

⁸⁴7 CFR 29.500.

121. The Panel considered that if USDA had the discretion to lower its fees for inspection of domestic tobacco to a level *comparable* to the cost of services rendered for inspection of imported tobacco or to otherwise determine that the fees for inspecting imported and domestic tobacco were *comparable*, such action would permit the U.S. Government to avoid inconsistency with Article VIII:1(a).

122. On this point, the Panel recalled the complainants' argument that Section 1106(c) required inspection fees to be imposed commensurate with something other than the *cost* of inspecting tobacco, and was therefore inconsistent with Article VIII:1(a). The complainants considered that the term "comparable to" as used in Section 1106(c) meant "*the same as*". Thus, in the view of the complainants, if the cost of inspecting domestic tobacco was higher than the cost of inspecting imported tobacco (as it was presently), Section 1106(c) required the fees for inspecting imported tobacco to be increased to the level of those for inspecting domestic tobacco. According to the complainants, only if the cost of inspecting domestic and imported tobacco happened to be the same would the requirement of Section 1106(c) be consistent with the General Agreement. In contrast, the Panel recalled the defense of the United States that the complainants' assumptions about the meaning of "comparable" in Section 1106(c) amounted to a misreading of the statute, attribution of an overly narrow definition to the term, and mere speculation as to how the U.S. Government would itself interpret the 1993 legislative amendment since to date there had been no change in the USDA inspection fee structure. The United States had indicated that it was the intention of the U.S. Government and the requirement of U.S. law that any new inspection fees promulgated by USDA would be commensurate with the cost of services rendered. The United States had further indicated that the amendment requiring the fees for inspecting imported tobacco to be *comparable* to those imposed on domestic tobacco did not require the fees to be identical and did not preclude a fee structure under which the fees for inspection of imports were less than those imposed on domestic products and at the same time commensurate with the cost of services rendered.

123. Considering these various arguments and the evidence of record, the Panel noted that there was no clear interpretation on the meaning of the term "comparable" as used in the 1993 legislative amendment. It appeared to the Panel that the term "comparable", including the ordinary meaning thereof, was susceptible of a range of meanings. The Panel considered that this range of meanings could encompass the interpretation advanced by the United States in this proceeding, an interpretation which would potentially enable USDA to comply with the obligation of Article VIII:1(a) not to impose fees in excess of the cost of services rendered, while at the same time meeting the comparability requirement of Section 1106(c) of the 1993 Budget Act. This being the case, and given that the United States had as yet neither changed the fee structure nor promulgated rules implementing Section 1106(c), the Panel found that it was not demonstrated that Section 1106(c) could not be applied in a manner ensuring that the fees charged for inspecting imported tobacco were not in excess of the cost of services rendered.

124. Accordingly, the Panel **concluded** that the evidence did not demonstrate that Section 1106(c), Fees for Inspecting Imported Tobacco, mandated action inconsistent with Article VIII:1(a).

VI. CONCLUSIONS AND RECOMMENDATIONS

125. On the basis of the findings set out above, the Panel **concludes** that:

- (a) the Domestic Marketing Assessment (Section 1106(a) of the 1993 Budget Act) was an internal quantitative regulation inconsistent with Article III:5; in light of this conclusion, the Panel did not consider it necessary to examine the consistency of the Domestic Marketing Assessment with Articles III:2 and III:4;
- (b) the Budget Deficit Assessment (Section 1106(b)(1) of the 1993 Budget Act) was an internal tax or charge inconsistent with Article III:2;
- (c) the No Net Cost Assessment (Section 1106(2)(b) of the 1993 Budget Act) was not inconsistent with Article III:2; and
- (d) the evidence did not demonstrate that Section 1106(c) of the 1993 Budget Act, Fees for Inspecting Imported Tobacco, mandated action inconsistent with Article VIII:1(a).

126. The Panel **recommends** that the CONTRACTING PARTIES request the United States to bring its inconsistent measures into conformity with its obligations under the General Agreement.

ANNEX

**SECTION 320C OF THE AGRICULTURAL ADJUSTMENT
ACT OF 1938, AS AMENDED
(DOMESTIC MARKETING ASSESSMENT)**

SEC. 320C. [1314i] DOMESTIC MARKETING ASSESSMENT.⁸⁵

(a) **CERTIFICATION.** - A domestic manufacturer of cigarettes shall certify to the Secretary, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that is produced in the United States.

(b) **PENALTIES.-**

(1) **IN GENERAL.** - Subject to subsection (f), a domestic manufacturer of cigarettes that has failed, as determined by the Secretary after notice and opportunity for a hearing, to use in the manufacture of cigarettes during a calendar year a quantity of tobacco grown in the United States that is at least 75 per cent of the total quantity of tobacco used by the manufacturer, or to comply with subsection (a), shall be subject to the requirements of subsections (c), (d) and (e).

(2) **FAILURE TO CERTIFY.-** For purposes of this section, if a manufacturer fails to comply with subsection (a), the manufacturer shall be presumed to have used only imported tobacco in the manufacture of cigarettes produced by the manufacturer.

(3) **REPORTS AND RECORDS.-**

(A) **IN GENERAL.-** The Secretary shall require manufacturers of domestic cigarettes to make such reports and maintain such records as are necessary to carry out this section. If the reports and records are insufficient, the Secretary may request other persons to provide supplemental information.

(B) **EXAMINATIONS.** - For the purpose of ascertaining the correctness of any report or record required under this section, or of obtaining further information required under this section, the Secretary and the Office of Inspector General may examine such records, books, and other materials as the Secretary has reason to believe may be relevant. In the case of a manufacturer of domestic cigarettes, the Secretary may charge a fee to the manufacturer to cover the reasonable costs of any such examination.

(C) **PENALTIES.-** Any person who fails to provide information required under this paragraph or who provides false information under this paragraph shall be subject to section 1001 of title 18, United States Code.

(D) **CONFIDENTIALITY.-** Section 320A(c) shall apply to information submitted by manufacturers of domestic cigarettes and other persons under this paragraph.

(E) **DISCLOSURE.-** Notwithstanding any other provision of law, information on the percentage or quantity of domestic or imported tobacco in cigarettes or on the volume of cigarette production that is submitted under this section shall be exempt from disclosure under section 552 of title 5, United States Code.

⁸⁵This sec. was added by sec. 1106(a) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 318, Aug. 10, 1993. (320C-1)

(c) DOMESTIC MARKETING ASSESSMENT.-

(1) IN GENERAL.- A domestic manufacturer of cigarettes described in subsection (b) shall remit to the Commodity Credit Corporation a nonrefundable marketing assessment in accordance with this subsection.

(2) AMOUNT.- The amount of an assessment imposed on a manufacturer under this subsection shall be determined by multiplying-

(A) the quantity by which the quantity of imported tobacco used by the manufacturer to produce cigarettes during a preceding calendar year exceeds 25 per cent of the quantity of all tobacco used by the manufacturer to produce cigarettes during the preceding calendar year; by

(B) the difference between -

(i) $\frac{1}{2}$ of the sum of -

(I) the average price per pound received by domestic producers for Burley tobacco during the preceding calendar year; and

(II) the average price per pound received by domestic producers for Flue-cured tobacco during the preceding calendar year; and

(ii) the average price per pound of unmanufactured imported tobacco during the preceding calendar year, as determined by the Secretary.

(3) COLLECTION.- An assessment imposed under this subsection shall be -

(A) collected by the Secretary and transmitted to the Commodity Credit Corporation; and

(B) enforced in the same manner as provided in section 320B.

(d) PURCHASE OF BURLEY TOBACCO

(1) IN GENERAL.- A domestic manufacturer of cigarettes described in subsection (b) shall purchase from the inventories of the producer-owned co-operative marketing associations for Burley tobacco described in section 320B(a)(2), at the applicable list price published by the association, the quantity of tobacco described in paragraph (2).

(2) QUANTITY.- Subject to paragraph (3), the quantity of Burley tobacco required to be purchased by a manufacturer during a calendar year under this subsection shall equal $\frac{1}{2}$ of the quantity of imported tobacco used by the manufacturer to produce cigarettes during the preceding calendar year that exceeds 25 per cent of the quantity of all tobacco used by the manufacturer to produce cigarettes during the preceding calendar year.

(3) LIMITATION.- If the total quantity of Burley tobacco required to be purchased by all manufacturers under paragraph (2) would reduce the inventories of the producer-owned co-operative marketing associations for Burley tobacco, the Secretary shall reduce the quantity of tobacco required to be purchased by manufacturers under paragraph (2), on a pro rata basis, to ensure that the inventories will not be less than the reserve stock level for Burley tobacco.

(4) NONCOMPLIANCE.- If a manufacturer fails to purchase from the inventories of the producer-owned co-operative marketing association the quantity of Burley tobacco required under this subsection, the manufacturer shall be subject to a penalty of 75 per cent of the average market price (calculated to the nearest whole cent) for Burley tobacco for the immediately preceding year on the quantity of tobacco as to which the failure occurs

(5) PURCHASE REQUIREMENTS.- Tobacco purchased by a manufacturer under this subsection shall not be included in determining the quantity of tobacco purchased by the manufacturer under section 320B.

(e) PURCHASE OF FLUE-CURED TOBACCO.-

(1) IN GENERAL.- A domestic manufacturer of cigarettes described in subsection (b) shall purchase from the inventories of the producer-owned co-operative marketing association for Flue-cured tobacco described in section 320B(a)(2), at the applicable list price published by the association, the quantity of tobacco described in paragraph (2).

(2) QUANTITY.- Subject to paragraph (3), the quantity of Flue-cured tobacco required to be purchased by a manufacturer during a calendar year under this subsection shall equal $\frac{1}{2}$ of the quantity of imported tobacco used by the manufacturer to produce cigarettes during the preceding calendar year that exceeds 25 per cent of the quantity of all tobacco used by the manufacturer to produce cigarettes during the preceding calendar year.

(3) LIMITATION.- If the total quantity of Flue-cured tobacco required to be purchased by all manufacturers under paragraph (2) would reduce the inventories of the producer-owned co-operative marketing association for Flue-cured tobacco to less than the reserve stock level for Flue-cured tobacco, the Secretary shall reduce the quantity of tobacco required to be purchased by manufacturers under paragraph (2), on a pro rata basis, to ensure that the inventories will not be less than the reserve stock level for Flue-cured tobacco.

(4) NONCOMPLIANCE.- If a manufacturer fails to purchase from the inventories of the producer-owned co-operative marketing association the quantity of Flue-cured tobacco required under this subsection, the manufacturer shall be subject to a penalty of 75 per cent of the average market price (calculated to the nearest whole cent) for Flue-cured tobacco for the immediately preceding year on the quantity of tobacco as to which the failure occurs.

(5) PURCHASE REQUIREMENTS.- Tobacco purchased by a manufacturer under this subsection shall not be included in determining the quantity of tobacco purchased by the manufacturer under section 320B.

(f) CROP LOSSES DUE TO DISASTERS.-

(1) IN GENERAL.- If the Secretary, in consultation with producer-owned co-operative marketing associations, determines that because of drought, insect or disease infestation, or other natural disaster, or other condition beyond the control of producers, the total quantity of a crop of domestic Burley tobacco or Flue-cured tobacco that is harvested and suitable for marketing is substantially less than the expected yield for the crop, and that pool inventories for the kind of tobacco involved have been depleted, effective for the calendar year following the year in which the crop loss occurs, the Secretary may reduce the minimum percentage of domestic tobacco specified in subsection (a) to a percentage below 75 per cent, as determined by the Secretary, that reflects the reduced availability of domestic supplies of the kind of tobacco involved.

(2) DETERMINATION OF EXPECTED YIELD.- For purposes of paragraph (1), the Secretary shall determine the expected yield for a crop of Burley tobacco of Flue-cured tobacco by taking into consideration.

- (A) the total acreage planted to the crop (including acreage that the producers were prevented from planting because of a condition referred to in paragraph (1)); and
- (B) normal farm yields established for the crop.

(3) DEADLINE FOR DETERMINATIONS.- The Secretary shall make determinations under paragraph (1) about crop losses and announce the reduced percentage of the domestic tobacco pool not later than November 30 of the year in which the applicable crop of Burley tobacco or Flue-cured tobacco is harvested.

SECTION 106(h) OF THE AGRICULTURAL ACT OF 1949, AS AMENDED

(h)⁸⁶ (1) Effective only for each of the 1994 through 1998 crops of tobacco, an importer of tobacco that is produced outside the United States shall remit to the Commodity Credit Corporation a nonrefundable marketing assessment in an amount equal to the product obtained by multiplying-

- (A) the number of pounds of tobacco that is imported by the importer; by
- (B) the sum of -
 - (i) the per pound marketing assessment imposed on purchasers of domestic Burley tobacco pursuant to subsection (g); and
 - (ii) the per pound marketing assessment imposed on purchasers of domestic Flue-cured tobacco pursuant to sub-section(g).

(2) An assessment imposed under this subsection shall be paid by the importer.

(3)(A) The importer shall remit the assessment at such time and in such manner as may be prescribed by the Secretary.

(B) If the importer fails to comply with subparagraph (A), the importer shall be liable, in addition, for a marketing penalty at a rate equal to 37.5 per cent of the sum of the average market price (calculated to the nearest whole cent) of Flue-cured and Burley tobacco for the immediately preceding year on the quantity of tobacco as to which the failure occurs.

(C) This subsection shall be enforced in the same manner as subparagraphs (B) and (C) of paragraph (1), and paragraphs (2) and (3), of section 106A(h).

(4) Any penalty collected by the Secretary under this subsection shall be deposited for use by the Commodity Credit Corporation.

⁸⁶Subsec. (h) was added by sec. 1106(b)(1) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 321, Aug. 10, 1993. (106-15)

EXCERPTS FROM SECTIONS 106A AND 106B OF THE
AGRICULTURAL ACT OF 1949, AS AMENDED
(NO NET COST ASSESSMENTS APPLIED TO IMPORTS)

SECTION 106A

(c) Each association shall establish within the association a Fund. The Fund shall be comprised of amounts contributed by producer-members or paid by or on behalf of purchasers⁸⁷ and importers⁸⁸ as provided in subsection (d).

(d)⁸⁹ The Secretary shall -

(1)⁹⁰ require-

(A) that -

(i) as a condition of eligibility for price support, each producer of each kind of quota tobacco⁹¹ shall agree, with respect to all such kind of quota tobacco marketed by the producer from a farm, to contribute to the appropriate association, for deposit in the association's Fund, an amount determined from time to time by the association with the approval of the Secretary;⁹²

(ii)⁹³ each purchaser of Flue-cured and Burley quota tobacco shall pay to the appropriate association, for deposit in the Fund of the association, an assessment, in an amount determined from time to time by the association with the approval of the Secretary, with respect to purchases of all such kind of tobacco marketed by a producer from a farm (including purchases of such tobacco from the 1986 and subsequent crops from the association); and

⁸⁷Sec. 1108(a)(2) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 92, April 7, 1986, inserted "or paid by or on behalf of purchasers".(106A-5)

⁸⁸Sec. 1106(b)(2)(A) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 321, Aug. 10, 1993, amended subsec. (c) by inserting "and importers" after "purchasers".(106A-6)

⁸⁹Sec. 2243(e)(2) of the Food, Agriculture, Conservation, and Trade Act of 1990, P.L. 101-624, 104 Stat. 3967, Nov. 28, 1990, provides that disaster payments made to producers under such sec. may not be considered by the Secretary in determining the net losses of the Commodity Credit Corporation under subsec. (d). (106A-7)

⁹⁰Sec. 314(a) of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1314(a)) imposes a penalty for the marketing of any kind of tobacco that is not eligible for price support under this Act because a producer on the farm has not agreed to make contributions or pay assessments to the No Net Cost Tobacco Fund as required by sec. 106A(d)(1) (7 U.S.C. 1445-1(d)(1)) of such Act. (106A-8)

⁹¹Sec. 637(1) of the Agriculture, Rural Development, and Related Agencies Appropriations Act, 1987, P.L. 99-500, 100 Stat. 1783-34, Oct. 18, 1986, and P.L. 99-591, 100 Stat. 3341-34, Oct. 30, 1986, struck out the parenthetical phrase "(other than Burley quota tobacco with respect to the 1983 and subsequent crops)" after "each kind of quota tobacco" in clause (i). (106A-9)

⁹²Sec. 637(2) of the Agriculture, Rural Development, and Related Agencies Appropriations Act, 1987, P.L. 99-500, 100 Stat. 1783-34, Oct. 18, 1986, and P.L. 99-591, 100 Stat. 3341-34, Oct. 30, 1986 inserted "and" at the end of clause (i). Sec. 1106(b)(2)(B)(i) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 321, Aug. 10, 1993, amended subpara. (A) by striking "and" at the end of clause (i). (106A-10)

⁹³Sec. 637(2) of the Agriculture, Rural Development, and Related Agencies Appropriations Act, 1987, P.L. 99-500, 100 Stat. 1783-34, Oct. 18, 1986, and P.L. 99-591, 100 Stat. 3341-34, Oct. 30, 1986 amended this subpara. by striking out clause (ii) (as added by sec. 101 of the No Net Cost Tobacco Program Act of 1982, P.L. 97-218, 96 Stat. 197, July 20, 1982) and redesignating clause (iii) (as added by sec. 1108 (a)(3)(B) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat 92, April 7, 1986) as clause (ii). (106A-11)

(iii)⁹⁴ each importer of Flue-cured or Burley tobacco shall pay to the appropriate association, for deposit in the Fund of the association, an assessment, in an amount that is equal to the product obtained by multiplying -

(I) the number of pounds of tobacco that is imported by the importer; by

(II) the sum of the amount of per pound producer contributions and purchaser assessments that are payable by domestic producers and purchasers of Flue-cured and Burley tobacco under clauses (i) and (ii); and

(B) that, upon making a contribution under subparagraph (A)-

(i) in the case of quota tobacco marketed other than by consignment to an association for a price support advance, the producer shall receive from the association capital stock or, if the association does not issue such stock, a capital certificate having a par value or face amount, respectively, equal to the contribution; and

(ii) in the case of quota tobacco consigned by the producer to an association for a price support advance, the producer shall receive from the association a qualified per unit retain certificate, as defined in section 1388(h) of the Internal Revenue Code⁹⁵, having a face amount equal to the amount of the contribution and representing an interest in the association's Fund.

The amount of producer contributions and purchaser assessments shall be determined in such a manner that producers and purchasers share equally, to the maximum extent practicable, in maintaining the Fund of an association. In making such determination with respect to the assessment of a purchaser, only 1985 and subsequent crops of Flue-cured and Burley quota tobacco shall be taken into account.⁹⁶ The Secretary shall approve the amount of the contributions and assessments⁹⁷ determined by an association from time to time under this paragraph only if the Secretary determines that such amount will result in accumulation of a Fund adequate to reimburse the Corporation for any net losses which the Corporation may sustain under its loan agreements with the association, based on reasonable estimates of the amounts which the Corporation will lend to the association under such agreements and the proceeds which will be realized from the sales of tobacco which are pledged to the Corporation by the association as security for loans;

(2)⁹⁸ require that any producer contribution or purchaser or importer⁹⁹ assessment due under paragraph (1) shall be collected -

⁹⁴Clause (iii) was added by sec. 1106(b)(2)(B)(ii) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 101 Stat. 321, Aug. 10, 1993. (106A-12)

⁹⁵So in original. Probably should be "Internal Revenue Code of 1986". (106A-13)

⁹⁶Sec. 1008 (a)(3)(C) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 92, April 7, 1986, struck out "The" in the former last sentence of para. (1) and inserted in lieu thereof this sentence and "The" in the following sentence. (106A-14)

⁹⁷Sec. 1008 (a)(3)(D) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 92, April 7, 1986, inserted "and assessments". (106A-15)

⁹⁸Sec. 1008 (a)(3)(E) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 92, April 7, 1986 struck out para. (2) which was effective only for the 1983 crop of Flue-cured tobacco and inserted this para. for the former text of para. (2), see p. 23-5 of Agriculture Handbook No. 476, as of Jan. 1, 1985. (106A-16)

⁹⁹Sec. 1006 (b)(2)(C)(i) of the Omnibus Budget Reconciliation Act of 1993, P. L. 103-66, 107 Stat. 322, Aug. 10, 1993, amended para. (2) by inserting "or importer" after "or purchaser". (106A-17)

(A) from the person who acquired the tobacco involved from the producer, except that if the tobacco is marketed by sale, an amount equal to the producer contribution may be deducted by the purchaser from the price paid to such producer;

(B) if the tobacco involved is marketed by a producer through a warehouseman or agent, from such warehouseman or agent, who may-

(i) deduct an amount equal to the producer contribution from the price paid to the producer; and

(ii) add an amount equal to the purchaser assessment to the price paid by the purchaser;¹⁰⁰

(C) if the tobacco involved is marketed by a producer directly to any person outside the United States, from the producer, who may add an amount equal to the purchaser assessment to the price paid by the purchaser; and¹⁰¹

(D) if the tobacco involved is imported by an importer from the importer.¹⁰²

(3) require that the Fund established by each association shall be kept and maintained separate from all other accounts of the association and shall be used exclusively, as prescribed by the Secretary, for the purpose of ensuring, insofar as practicable, that the Corporation, under its loan agreements with the association with respect to 1982 and subsequent crops of quota tobacco, will suffer no net losses (including, but not limited to, recovery of the amount of loans extended to cover the overhead costs of the association), after any net gains are applied to net losses of the corporation¹⁰³ under paragraph (5): *Provided*.¹⁰⁴ That, notwithstanding any other provision of law, use by the association of moneys in the Fund, including interest and other earnings, for the purposes of reducing the association's outstanding indebtedness to the Corporation associated with 1982 and subsequent crops of quota tobacco and making loan advances to producers is authorized, and use of such moneys for any other purposes that will be mutually beneficial to producers and purchasers who contribute or pay¹⁰⁵ to the Fund and to the Corporation, shall, if approved by the Secretary, be considered an appropriate use of the Fund;

(4) permit an association to invest the monies in the Fund in such manner as the Secretary may approve, and require that the interest or other earnings on such investment shall become a part of the Fund;

(5) require that loan agreements between the Corporation and the association provide that the Corporation shall retain the net gains from each of the 1982 and subsequent crops of tobacco pledged by the association as security for price support loans, and that such net gains will be used for the purpose of (A) offsetting any losses sustained by the Corporation under its loan agreements with the association for any of the 1982 and subsequent crops of loan tobacco, or (B) reducing the outstanding balance

¹⁰⁰Sec. 1006(b)(2)(C) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 322, Aug. 10, 1993, amended para. (2) by striking "and" at the end of subpara. (B), by inserting "and" at the end of subpara. (C), and by adding at the end subpara. (D). (106A-18)

¹⁰¹See note 106A-18 (106A-19)

¹⁰²See note 106A-18. Period at end of subpara. (D) is so in original. Probably should be a semicolon. (106A-20)

¹⁰³Reads "corporation" in the original. It probably should be "the Corporation". (106A-21)

¹⁰⁴The proviso was added by sec. 203 of the Dairy and Tobacco Adjustment Act of 1983, P.L. 98-180, 97 Stat. 1145, Nov. 29, 1983. (106A-22)

¹⁰⁵Sec. 1108(a)(3)(F) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 93, April 7, 1986, struck out "producers who contribute" and insert in lieu thereof "producers and purchasers who contribute or pay". (106A-23)

of any price support loan made by the Corporation to the association under such agreements for 1982 and subsequent crops of tobacco, or for both purposes;¹⁰⁶

(6)¹⁰⁷; and

(7) ¹⁰⁸ effective for the 1986 and subsequent crops of quota tobacco, provide, in loan agreements between the Corporation and an association, that if the Secretary determines that the amount in the Fund or the net gains referred to in paragraph (5) exceeds the amounts necessary for the purposes specified in this section, the association, with the approval of the Secretary, may suspend the payment and collection of contributions and assessments under this section on terms and conditions established by the association, with the approval of the Secretary.

(e) If any association which has entered into a loan agreement with the Corporation with respect to 1982 or subsequent crops of quota tobacco fails or refuses to comply with the provisions of this section, the regulations issued by the Secretary thereunder, or the terms of such agreement, the Secretary may terminate such agreement or provide that no additional loan funds may be made available thereunder to the association. In such event, the Secretary shall make price support available to producers of the kind or kinds of tobacco, the price of which had been supported through loans to such association, through such other means as are authorized by this Act or the Commodity Credit Corporation Charter Act [(15 U.S.C. 714 et seq.)].

(f) If, under subsection (e), a loan agreement with an association is terminated, or if an association having a loan agreement with the Corporation is dissolved, merges with another association, or otherwise ceases to operate, the Fund or the net gains referred to in subsection (d)(5) shall be applied or disposed of in such manner as the Secretary may approve or prescribe, except that they shall, to the extent necessary, first be applied or used for the purposes therefor prescribed in this section.

(g) The Secretary shall issue regulations necessary to carry out the provisions of this section.

(h)(1)(A)¹⁰⁹ Each person who fails to collect any contribution or assessment as required by subsection (d)(2) and remit such contribution or assessment to the association, at such time and in such manner as may be prescribed by the Secretary, shall be liable, in addition to any amount due, to a marketing penalty at a rate equal to 75 per cent of the average market price (calculated to the nearest whole cent) for the kind of tobacco involved for the immediately preceding year on the quantity of tobacco as to which the failure occurs.

(B)¹¹⁰ Each importer who fails to pay to the association an assessment as required by subsection (d)(2) at such time and in such manner as may be prescribed by the Secretary, shall be liable, in addition to any amount due, for a marketing penalty at a rate equal to 75 per cent of the average market price (calculated to the nearest whole cent) for the respective kind of

¹⁰⁶Sec. 1108(a)(3)(G) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 93, April 7, 1986 struck out "and" at the end of para. (5). (106A-24)

¹⁰⁷Sec. 1108(a)(3)(H) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 93, April 7, 1986, made para. (6) effective for only the 1982-1985 crops of quota tobacco. (106A-25)

¹⁰⁸Para. (7) was added by sec. 1108(a)(3)(J) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 93, April 7, 1986. (106A-26)

¹⁰⁹Subsec. (h) was added by sec. 1108(a)(4) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 93, April 7, 1986. (106A-27)

¹¹⁰Sec. 1106(b)(2)(D) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 322, Aug. 10, 1993, amended para. (1) by redesignating subparas. (B) and (C) as subparas. (C) and (D), respectively, and by inserting a new subpara. (B) after subpara. (A). (106A-28)

tobacco for the immediately preceding year on the quantity of tobacco as to which the failure occurs.

(C)¹¹¹ The Secretary may reduce any such marketing penalty in such amount as the Secretary determines equitable in any case in which the Secretary determines that the failure was unintentional or without knowledge on the part of the person concerned.

(D)¹¹² Any penalty provided for under this paragraph shall be assessed by the Secretary after notice and opportunity for a hearing.

(2)(A) Any person against whom a penalty is assessed under this subsection may obtain review of such penalty in an appropriate district court of the United States by filing a civil action in such court not later than 30 days after such penalty is imposed.

(B) The Secretary shall promptly file in such court a certified copy of the record on which the penalty is based.

(3) The district courts of the United States shall have jurisdiction to review and enforce any penalty imposed under this subsection.

(4) An amount equivalent to any penalty collected by the Secretary under this subsection shall be transmitted by the Secretary to the appropriate association, for deposit in the Fund of such association.

(5) The remedies provided in this subsection shall be in addition to, and not exclusive of, other remedies that may be available.

SECTION 106B

(c)(1) Any Account established for an association under subsection (b)(2) shall be established within the Corporation and shall be comprised of amounts paid by producers, purchasers, and importers¹¹³ under subsection (d).

(2) Upon the establishment of an Account for an association, any amount in the No Net Cost Tobacco Fund established within such association under section 106A shall be applied or disposed of in such manner as the Secretary may approve or prescribe, except that such amount shall, to the extent necessary, first be applied or used for the purposes therefor prescribed in such section.

(d)(1)(A)¹¹⁴ If an Account is established for an association under subsection (b)(2), then the Secretary shall require (in lieu of any requirement under section 106A(d)(1) that each producer

¹¹¹See note 106A-28. (106A-29)

¹¹²See note 106A-28. (106A-30)

¹¹³Sec. 1108(b)(2) 1108(b)(1)(C) of the Consolidated Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 94, April 7, 1986, inserted "and producers" after "producers". Sec. 1106(b)(3)(A) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 322, Aug. 10, 1993, amended para. (1) by striking "producers and purchasers" and inserting "producers, purchasers and importers". (106B-7)

¹¹⁴Sec. 1106(b)(3)(B) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 322, Aug. 10, 1993, amended subsec. (d)(1) by designating the first and second sentences as subparagraphs (A) and (B), respectively, and by adding at the end subpara. (C). Sec. 314(a) of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1314(a) imposes a penalty for the marketing of any kind of tobacco that is not eligible for price support under this Act because a producer on the farm has not agreed to make contributions or pays assessments to the No Net Cost Tobacco Account as required by sec. 106(B)(d)(1) of such Act (So in original. A reference to sec. 106B(d)(1) (7 U.S.C. 1445-2(d)(1)) was probably intended). (106B-8)

of the kind of tobacco involved whose farm is within such association's area shall, as a condition of eligibility for price support, agree, with respect to all of such kind of tobacco marketed by the producer from the farm, to pay to the Corporation, for deposit in such association's Account, marketing assessments as determined under paragraph (2) and collected under paragraph (3).

(B)¹¹⁵ The Secretary shall also require (in lieu of any requirement under section 106A(d)(1) that each purchaser of Flue-cured and Burley quota tobacco shall pay to the Corporation, for deposit in the Account of such association, an assessment, as determined under paragraph (2) and collected under paragraph (3), with respect to purchases of all such kind of tobacco marketed by a producer from a farm (including purchases of such tobacco from the 1986 and subsequent crops from the association).

(C)¹¹⁶ The Secretary shall also require (in lieu of any requirement under section 106A(d)(1) that each importer of Fluecured and Burley tobacco shall pay to the Corporation, for deposit in the Account of the association, an assessment, as determined under paragraph (2) and collected under paragraph (3), with respect to purchases of all such kinds of tobacco imported by the importer.

(2)(A) For purposes of paragraph (1), the Secretary shall determine and adjust from time to time, in consultation with such association, the amount of the marketing assessment which shall be imposed, as a condition of eligibility for price support, on each pound of the kind of tobacco involved marketed by a producer from a farm within such association's¹¹⁷ area and the amount of the assessment to be paid by purchasers of tobacco. The amount of the assessment to be paid by producers and purchasers shall be determined in such a manner that producers and purchasers share equally, to the maximum extent practicable, in maintaining the Account of an association. In making such determination with respect to the assessment of a purchaser, only 1985 and subsequent crops of Fluecured and Burley quota tobacco shall be taken into account. The amount of the assessment¹¹⁸ shall be equal to an amount which, when collected, will result in an accumulation of an Account for such association adequate to reimburse the Corporation for any net losses which the Corporation may sustain under its loan agreements with such association, based on reasonable estimates of the amounts which the Corporation will lend to such association under such agreements and the proceeds which will be realized from the sales of the kind of tobacco involved which are pledged to the Corporation by such association as security for loans. Notwithstanding the foregoing provisions of this paragraph, the amount of any assessment that is determined by the Secretary for the 1986 and subsequent crops of Burley quota tobacco shall be determined without regard to any net losses that the Corporation may sustain under the loan agreements of the Corporation with such association with respect to the 1983 crop of such tobacco.¹¹⁹

¹¹⁵This sentence was originally added by sec. 1108(b)(3)(A) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 94, April 7, 1986. For designation as subpara. (B), see note 106B-8. (106B-9)

¹¹⁶See note 106B-8. (106B-10)

¹¹⁷Sec. 1108(b)(3)(B) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 94, April 7, 1986, struck out "area. Such amount" and inserted the remainder of this sentence, the next two sentences, and "the amount of the assessment" in the following sentence. (106B-11)

¹¹⁸See note 106B-11. (106B-12)

¹¹⁹This sentence was added by sec. 1108(b)(3)(C) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 94, April 7, 1986. (106B-13)

(B)¹²⁰

(C)¹²¹ The amount of the assessment to be paid by importers shall be an amount that is equal to the product obtained by multiplying -

(i) the number of pounds of tobacco that is imported by the importer; by

(ii) the sum of the amount of per pound producer and purchaser assessments that are payable by domestic producers and purchasers of the respective kind of tobacco under this paragraph.

(3)(A)¹²² Except as provided in subparagraphs (B) and (C), any assessment to be paid by a producer or a purchaser under paragraph (1) shall be collected from the person who acquired the tobacco involved from such producer, except that if the tobacco is marketed by sale, an amount equal to the producer assessment may be deducted by the purchaser from the price paid to such producer.

(B) If tobacco of the kind for which an Account is established is marketed by a producer through a warehouseman or agent, both the producer and the purchaser assessment shall be collected from such warehouseman or agent, who may -

(i) deduct an amount equal to the producer assessment from the price paid to the producer; and

(ii) add an amount equal to the purchaser assessment to the price paid by the purchaser.

(C) If tobacco of the kind for which an Account is established is marketed by a producer directly to any person outside the United States, both the producer and the purchaser assessment shall be collected from the producer, who may add an amount equal to the purchaser assessment to the price paid by the purchaser.

(D)¹²³ If Flue-cured or Burley tobacco is imported by an importer, any importer assessment required by subsection (d) shall be collected from the importer.

(e) Amounts deposited in an Account established for an association shall be used by the Secretary for the purpose of ensuring, insofar as practicable, that the Corporation under its loan agreements with such association will suffer, with respect to the crop involved, no net losses (including, but not limited to, recovery of the amount of loans extended to cover the overhead costs of the association), after any net gains are applied to net losses of the Corporation pursuant to subsection (h).

(f) The Secretary shall provide, in any loan agreement between the Corporation and an association for which an Account has been established under subsection (b)(2), that if the Secretary determines that the amount in such Account or the net gains referred to in subsection (h) exceed the amounts

¹²⁰Subpara. (B) was effective only for the 1985 crop of Burley tobacco. (106B-14)

¹²¹Subpara. (C) was added by sec. 1106(b)(3)(C) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 322, Aug. 10, 1993. (106B-15)

¹²²Sec. 1108(b)(3)(D) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 94, April 7, 1986, amended para. (3) in its entirety. (106B-16)

¹²³Subpara. (D) was added by sec. 1106(b)(3)(D) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 323, Aug. 10, 1993. (106B-17)

necessary for the purposes of this section, then the Secretary, in consultation with such association, may suspend the payment and collection of marketing assessments under this section upon terms and conditions established by the Secretary.

(g) With respect to any association for which an Account is established under subsection (b)(2), if a loan agreement between the Corporation and such association is terminated, if such association is dissolved or merges with another association that has entered into a loan agreement with the Corporation to make price support available to producers of the kind of tobacco involved, or if such Account terminates by operation of law, then amounts in such Account and the net gains referred to in subsection (h) shall be applied to or disposed of in such manner as the Secretary may prescribe, except that they shall, to the extent necessary, first be applied to or used for the purposes therefor prescribed in this section.

(h) The provisions of section 106A(d)(5) relating to net gains shall apply to any loan agreement between an association and the Corporation entered into upon or after the establishment of an Account for such association under subsection (b)(2).

(i) The Secretary shall issue regulations necessary to carry out the provisions of this section.

(j)(1)(A)¹²⁴ Each person who fails to collect any assessment as required by subsection (d)(3) and remit such assessment to the Corporation, at such time and in such manner as may be prescribed by the Secretary, shall be liable, in addition to any amount due, to a marketing penalty at a rate equal to 75 per cent of the average market price (calculated to the nearest whole cent) for the kind of tobacco involved for the immediately preceding year on the quantity of tobacco as to which the failure occurs.

(B)¹²⁵ Each importer who fails to pay to the Corporation an assessment as required by subsection (d) at such time and in such manner as may be prescribed by the Secretary, shall be liable, in addition to any amount due, to a marketing penalty at a rate equal to 75 per cent of the average market price (calculated to the nearest whole cent) for the respective kind of tobacco for the immediately preceding year on the quantity of tobacco as to which the failure occurs.

(C)¹²⁶ The Secretary may reduce any such marketing penalty in such amount as the Secretary determines equitable in any case in which the Secretary determines that the failure was unintentional or without knowledge on the part of the person concerned.

(D)¹²⁷ Any penalty provided for under this paragraph shall be assessed by the Secretary after notice and opportunity for a hearing.

(2)(A) Any person against whom a penalty is assessed under this subsection may obtain review of such penalty in an appropriate district court of the United States by filing a civil action in such court not later than 30 days after such penalty is imposed.

¹²⁴Subsec. (j) was added by sec. 1108(b)(4) of the Consolidated Omnibus Budget Reconciliation Act of 1985, P.L. 99-272, 100 Stat. 95, April 7, 1986. (106B-18)

¹²⁵Sec. 1106(b)(3)(E) of the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 323, Aug. 10, 1993, amended subsec. (j)(1) by redesignating subparas. (B) and (C) as subparas. (C) and (D), respectively, and by inserting subpara. (B) after subpara. (A). (106B-19)

¹²⁶See note 106B-19. (106B-20)

¹²⁷See note 106B-19. (106B-21)

(B) The Secretary shall promptly file in such court a certified copy of the record on which the penalty is based.

(3) The district courts of the United States shall have jurisdiction to review and enforce any penalty imposed under this subsection.

(4) An amount equivalent to any penalty collected by the Secretary under this subsection shall be transmitted by the Secretary to the Corporation, for deposit in the Account of the appropriate association.

(5) The remedies provided in this subsection shall be in addition to, and not exclusive of, other remedies that may be available.

THIS SECTION IS CURRENT THROUGH P.L. 103-210,
APPROVED 20 DECEMBER 1993¹²⁸

TITLE 7. AGRICULTURE
CHAPTER 21A. TOBACCO INSPECTION

7 USCS § 511r (1994)

§ 511r. Imported tobacco

(a) Inspection for grade and quality; exception. Notwithstanding any other provision of law -

(1) All tobacco offered for importation into the United States, except tobacco described in paragraph (2), shall be inspected, in so far as practicable, for grade and quality as tobacco marketed through a warehouse in the United States is inspected for grade and quality.

(2) Cigar tobacco and oriental tobacco (both as provided for in Chapter 24 of the Harmonized Tariff Schedule of the United States) offered for importation into the United States shall be accompanied by a certification by the importer, in such form as the Secretary of Agriculture may prescribe, stating the kind and type of such tobacco, and, in the case of cigar tobacco, that such tobacco will be used solely in the manufacture or production of cigars.

(b) Establishment of grade and quality standards. The Secretary of Agriculture shall establish grade and quality standards for the purposes of subsection (a)(1) that are, in so far as practicable, the same as those applicable to tobacco marketed through a warehouse in the United States.

(c) Certification necessary for excepted tobacco; false statements. Any tobacco described in subsection (a)(2) that is not accompanied by the certification required by that subsection shall not be permitted entry into the United States. The provisions of Section 1001 of the Title 18, United States Code, shall be applicable with respect to any certification made by an importer under such subsection.

(d) Place of inspection; fees and charges. The Secretary of Agriculture shall enforce the provisions of subsection (a) at the point of entry of tobacco offered for importation into the United States. The Secretary shall by regulation fix and collect from the importer fees and charges for inspection under subsection (a)(1) and subsection (e) which shall, as nearly as practicable, cover the costs of such services, including the administrative and supervisory costs customarily included by the Secretary in user fee calculations, and which shall be comparable to fees and charges fixed and collected for services provided in connection with tobacco produced in the United States. The fees and charges, when collected, shall be credited to the current appropriation account that incurs the cost and shall be available without fiscal year limitation to pay the expenses of the Secretary incident to providing services under subsection (a)(1), subsection (e), and subsection (f). Any fees collected, late payment penalties, and interest earned shall be credited to the account referred to in this section and may be invested by the Secretary of Agriculture in insured or fully-collateralized interest-bearing accounts or, at the discretion of the Secretary of Agriculture, by the Secretary of the Treasury in United States Government debt instruments. Fees and charges, including late payment penalties, and interest earned from the investment of such funds shall be credited to the account referred to in this section.

¹²⁸United States Code Service. Copyright (c) 1994, Lawyers Cooperative Publishing.

(e) Tobacco pesticide residues; certification; etc., requirement. Notwithstanding any other provision of law:

(1)(A) All flue-cured or burley tobacco offered for importation into the United States shall be accompanied by a certification by the importer, in such form as the Secretary of Agriculture shall prescribe, that the tobacco does not contain any prohibited residue of any pesticide that has been cancelled, suspended, revoked, or otherwise prohibited under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 135 et seq.) [7 USCS §§ 135 et seq.]. Any flue-cured or burley tobacco that is not accompanied by such certification shall be inspected by the Secretary at the point of entry to determine whether that tobacco meets the pesticide residue requirements. Subsection (d) of this section shall apply with respect to fees and charges imposed to cover the costs of such inspection.

(B) Any tobacco that is determined by the Secretary not to meet the pesticide residue requirements shall not be permitted entry into the United States.

(C) The customs fraud provisions under Section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592), and criminal fraud provisions under Section 1001 of Title 18, United States Code, shall apply with respect to the certification requirement in subparagraph (A).

(2) The Secretary shall by regulation provide for pesticide residue standards with respect to pesticides that are cancelled, suspended, revoked, or otherwise prohibited under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 135 et seq.), that shall apply to flue-cured and burley tobacco, whether domestically produced or imported.

(3) The Secretary, to such extent and at such times as the Secretary determines appropriate, shall sample and test flue-cured and burley tobacco offered for importation or for sale in the United States to determine whether it conforms with the pesticide residue requirements. The Secretary shall by regulation impose fees and charges for such inspections.

(4) If the Secretary determines, as a result of tests conducted under paragraph (3), that certain flue-cured or burley tobacco offered for importation does not meet the requirements of this subsection, then such tobacco shall not be permitted entry into the United States.

(5)(A) Subject to subparagraph (B), if the Secretary determines that domestically produced flue-cured or burley tobacco does not meet the requirements of this section, such tobacco may not be moved in commerce among the States and shall be destroyed by the Secretary.

(B) This paragraph shall apply only to tobacco produced after the date of enactment of this provision [enacted 23 December 1985] that receives price support under the Agricultural Adjustment Act of 1938 (7 U.S.C. 1281 et seq.) or the Agricultural Act of 1949 (7 U.S.C. 1421 et seq.).

(f) End users of imported tobacco; certification, identification, etc., requirements.

(1) The certification required under subsection (e)(1) of this section shall also include the identification of any and all end users of such tobacco of which the importer has knowledge. Any flue-cured or burley tobacco permitted entry into the United States must be accompanied by a written identification of any and all end users of such tobacco. In cases in which the importer has no knowledge of the identity of an end user, the importer shall identify any and all purchasers to whom the importer expects to transfer such imported tobacco. The importer shall file with the Department of Agriculture an amended statement if, at any time after the time of entry of such tobacco imports, the importer has knowledge of any additional purchaser or end user. In those cases in which the importer has not identified all end users of such imported tobacco, the Secretary of Agriculture shall take all steps available

to ascertain the identity of any and all such end users, including requesting such information from purchasers of such imported tobacco. Domestic purchasers of imported tobacco shall be required to supply any relevant information to the Department of Agriculture upon demand under this subsection.

(2) The Secretary shall provide to the Senate Committee on Agriculture, Nutrition, and Forestry, and the House Committee on Agriculture, on or before 1 April 1986, a report on the implementation of this authority to identify each end user and purchaser of imported tobacco. Such a report shall identify the end users and purchasers of imported tobacco and the quantity, in pounds, brought by such end user or purchaser, as well as all steps taken by the Department of Agriculture to ascertain such identities. The Secretary shall provide an additional report, beginning 15 November 1986, and annual reports thereafter on the implementation of this authority.

(3) As used in this subsection, the term "end user of imported tobacco" means -

(A) a domestic manufacturer of cigarettes or other tobacco products;

(B) an entity that mixes, blends, processes, alters in any manner, or stores, imported tobacco for export; and

(C) any other individual that the Secretary may identify as making use of imported tobacco for the production of tobacco products.

(4) Subsection (d) shall apply with respect to fees and charges imposed to cover the costs of such end user identification, certification, and reporting activities.

HISTORY: (29 November 1983, P.L. 89-180, Title II, §213, 97 Stat. 1149; 23 December 1985, P.L. 99-198, Title XI, Subtitle E, §§ 1161, 1166, 99 Stat. 1498, 1501; 23 August 1988, P.L. 100-418, Title I, Subtitle B, § 1214(b), 102 Stat. 1156; 5 November 1990, P.L. 101-508, Title I, Subtitle B, §1204(c), 104 Stat. 1388-11; 28 November 1990, P.L. 101-624, Title XXV, § 2511, 104 Stat. 4073.) (As amended 10 August 1993, P.L. 103-66, Title I, Subtitle A, § 1106 (c), 107 Stat. 323.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Tariff Schedules of the United States", referred to in this section, are no longer published in the United States Code. For information as to the Revised Tariff Schedules, see the note preceding 19 USCS § 1001.

Explanatory notes:

This section was enacted as part of Act 29 November 1983, P.L. 98-180, and not as part of Act 23 August 1935, ch 523, 49 Stat. 731, which generally comprises this chapter.

Amendments:

1985. Act 23 December 1985 (effective upon enactment on 23 December 1985, as provided by § 1801 of such Act, which appears as 7 USCS § 1281 note), in subsection (d), inserted "and subsection (e)"; and added subsections (e) and (f).

1988. Act 23 August 1988 (effective 1 January 1989 and applicable with respect to articles entered on or after such date as provided by § 1217(b) of such Act, which appears as 19 USCS § 3001

note), in subsection (a)(2), substituted "Chapter 24 of the Harmonized Tariff Schedule of the United States" for "Schedule 1, Part 13, Tariff Schedules of the United States".

1990. Act 5 November 1990 (effective as provided by § 1301 of such Act, which appears as a note to this section), in subsection (d), inserted," subsection (e), and subsection (f)"; and, in subsection (f), added paragraph (4).

Act 28 November 1990 (for effective date, see other provisions note below), in subsection (d), inserted the sentences beginning "Any fees collected ..." and "Fees and charges ...".

1993. Act 10 August 1993, in subsection (d), inserted," and which shall be comparable to fees and charges fixed and collected for services provided in connection with tobacco produced in the United States".

Other provisions:

Effective date of amendments made by Title I of Act 5 November 1990. Act 5 November 1990, P.L. 101-508, Title I, Subtitle C, § 1301, 104 Stat. 1388-12, provides: "This title and the amendments made by this title [for full classification, consult USCS Tables volumes] shall become effective one day after the date of enactment of the Food, Agriculture, Conservation, and Trade Act of 1990 [enacted 28 November 1990], or 1 December 1990, whichever is earlier".

Severability. Act 28 November 1990, P.L. 101-624, Title XXV, § 2519, which appears as a note to 7 USCS § 1421, provides that invalid provisions of such Act shall not affect valid provisions of such Act.

Notes:

Code of Federal Regulations

Regulations governing tobacco inspection, 7 CFR Part 29.

Add: 7 CFR Part 92.