

***Argentina - Measures Affecting Imports of Footwear,
Textiles, Apparel and Other Items***

Report of the Panel

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I. INTRODUCTION

1.1 On 4 October 1996, the United States requested Argentina to hold consultations pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article 14 of the Agreement on Technical Barriers to Trade ("TBT Agreement"), Article 19 of the Agreement on Implementation of Article VII of the GATT 1994 ("Customs Valuation Agreement"), and Article 7 of the Agreement on Textiles and Clothing ("ATC"), regarding certain measures maintained by Argentina affecting imports of footwear, textiles, apparel and other items, namely, measures imposing specific duties on various footwear, textiles and apparel in excess of the bound rate of 35 per cent *ad valorem* provided in Argentina's Schedule LXIV; a statistical tax of three per cent *ad valorem* on imports of all sources other than MERCOSUR countries; and measures imposing, *inter alia*, labelling requirements related to affidavits of product components (WT/DS56/1).

1.2 Pursuant to Article 4.11 DSU, Hungary requested to be joined in these consultations on 21 October 1996 (WT/DS56/2). The European Communities ("EC") made a similar request on 25 October 1996 (WT/DS56/3). In separate communications dated 6 November 1996, Argentina accepted the request of Hungary and the request of the EC to join the consultations which the United States had requested (WT/DS56/4).

1.3 During the consultations, a mutually agreed solution was reached between the United States and Argentina regarding Argentina's labelling requirements. However, the parties failed to reach a mutually satisfactory solution on the other aspects raised during the consultations.

1.4 On 9 January 1997, the United States requested the Dispute Settlement Body ("DSB") to establish a panel (WT/DS56/5). The United States claimed that Argentina's measures were "inconsistent with the obligations of Argentina under Articles II, VII, VIII and X of the GATT 1994; Articles 1 through 8 of the Agreement on Implementation of Article VII of the GATT 1994; and Article 7 of the Agreement on Textiles and Clothing".

1.5 On 25 February 1997, the DSB established a panel pursuant to the request made by the United States, in accordance with Article 6 DSU. In document WT/DS56/6, the Secretariat reported that the parties had agreed that the Panel would have the standard terms of reference as follows:

"to examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS56/5, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 The same document WT/DS56/6 reported the constitution of the Panel on 4 April 1997 with the following composition:

Chairman: Mr. Peter Pale_ka
Members: Ms. Heather Forton
Mr. Peter May

1.7 The EC, Hungary and India reserved their rights to participate in the Panel proceedings as third parties, and all presented arguments to the Panel.

1.8 The Panel met with the parties on 17-18 June 1997 and 23 July 1997. It met with third parties on 17 June 1997. The Panel issued its interim report to the parties on 30 September 1997. Both parties

requested the panel to review parts of the interim report. None of them requested the panel to hold an additional meeting.

II. FACTUAL ASPECTS

A. ARGENTINA'S IMPORT REGIME FOR TEXTILES, APPAREL AND FOOTWEAR

2.1 The great majority of Argentina's import tariffs are fixed in *ad valorem* terms. Regarding textiles, clothing and footwear, Argentina maintained a regime of minimum specific import duties as from 1993. This regime was applied through *resoluciones* (resolutions) and *decretos* (decrees) having fixed terms.

2.2 Argentina approved the results of the Uruguay Round through Law No. 24.425, promulgated on 23 December 1994. These results included a bound rate of duty of 35 per cent *ad valorem* with respect to textiles, apparel and footwear imported into Argentina. In parallel, Argentina continued to apply a system of minimum specific import duties in the footwear, textile and apparel sectors. Regarding footwear, the minimum specific duty was revoked in 1997. Provisional safeguard measures were applied in that sector on 25 February 1997.

2.3 Concurrently, since 1989, Argentina applied a tax on imported products intended to finance statistical services to importers, exporters and the general public.

2.4 The Panel procedure concerned the Argentine measures adopted in order to apply the above-mentioned regime, as established and maintained *inter alia* through the laws, decrees and resolutions referred to below. The latest measures adopted at the time of the request for the establishment of the Panel (9 January 1997) were, for textiles and apparel, Resolution No. 22/97 of 7 January 1997, extending the validity of the minimum specific import duties for those sectors until 31 August 1997,¹ for footwear Resolution No. 23/97 of 7 January 1997, extending the validity of the minimum specific import duties for that sector until 31 August 1997² and, with respect to the statistical services tax, Presidential Decree No. 389/95 of 22 March 1995. On 25 February 1997, the date of establishment of the Panel by the DSB, the minimum specific import duties for the tariff headings contained in Harmonized System ("HS") Chapter 64 (footwear) and listed in Annex IX to Decree No. 998/95, as amended, had been repealed by Resolution No. 225/97, dated 14 February 1997. Further to the initiation of a safeguard investigation, provisional safeguard measures in the form of minimum specific import duties became applicable on 25 February 1997 to certain imports of footwear in application of Resolution No. 226/97.³

B. MINIMUM SPECIFIC IMPORT DUTIES ("DIEM")

1. STATED PURPOSE AND FUNCTIONING OF THE MINIMUM SPECIFIC IMPORT DUTIES

2.5 The stated purpose of the minimum specific import duties, also referred to as "DIEM",⁴ was to counteract injury allegedly suffered by Argentine manufacturers as a result of imports of textiles, apparel and footwear at prices lower than the production costs in the countries of origin or lower than international prices.⁵

2.6 The system operated as follows: for each relevant HS tariff line of textiles, apparels and footwear, Argentina calculated an *average import price*. Once it had determined the average import price for a particular category, Argentina multiplied that price by the bound rate of 35 per cent, resulting in a specific minimum duty for all products in that category. Upon the importation of covered textiles,

¹Boletín Oficial de la República Argentina, No. 28.561 of 10 January 1997.

²Ibid.

³Boletín Oficial de la República Argentina, No. 28.592 of 24 February 1997.

⁴For *Derechos de Importación Específicos Mínimos* (minimum specific import duties)

⁵See, e.g., preambles of Resolutions No. 811/93 (textiles and apparel) and No. 1696/93 (footwear).

apparel or footwear, depending on the customs value of the goods concerned, Argentina applied either the specific minimum duty applicable to those items or the *ad valorem* rate, whichever was higher.

2. **MINIMUM SPECIFIC IMPORT DUTIES ON TEXTILES AND APPAREL**

2.7 Minimum specific import duties were originally applied by Argentina to approximately 200 categories of textiles and apparel by Resolution No. 811/93 of the Argentine Ministry of Economy, and Public Works and Services of 29 July 1993.⁶ Article 3 of the Resolution provided that the specific import duties established by Article 1 were to operate as a minimum of the corresponding *ad valorem* import duty. The categories of products to which the minimum specific duties applied were listed, together with the duties, in Annex I to the Resolution. The minimum specific import duties established by the Resolution were to remain valid until 31 January 1995, with the possibility of a single, non-renewable extension of six months.

2.8 As a result of the Uruguay Round of multilateral trade negotiations, Argentina included in its Schedule of Concessions (Schedule LXIV) a maximum duty rate of 35 per cent *ad valorem*.⁷ This bound rate became effective on 1 January 1995. It was generally applicable to imports, with certain specified exceptions for products subject to a different level of binding.

2.9 After the entry into force of the Uruguay Round results, Argentina continued to apply the minimum specific import duties. Presidential Decree No. 2275/94 of 23 December 1994 extended the application of these specific duties until 31 December 1995 and expanded the number of affected categories of merchandise.⁸ Pursuant to Article 15 and Annex XII to the Decree, minimum specific import duties applied to categories of textiles and apparel (HS Chapters 51 to 63) and footwear (HS Chapter 64).

2.10 Presidential Decree No. 2275/94 was modified, on 22 September 1995, by two resolutions of the Argentine Ministry of Economy and Public Works and Services. Resolution No. 304/95 applied to textiles and apparel and modified the specific duties applicable. It increased the rate of the formerly established specific duties for a number of textiles and apparel tariff lines. Resolution No. 305/95 applied to footwear.

2.11 The application of the minimum specific import duties on textiles and apparel was extended until 31 December 1996 by Article 9 of Presidential Decree No. 998/95 of 28 December 1995.⁹ This Decree was amended through Resolution No. 299/96 of the Ministry of Economy and Public Works and Services of 20 February 1996, which, *inter alia*, modified the specific duties applicable to imports of nylon carpeting, towels and undergarments.

2.12 As of 1 January 1997, the Ministry of Economy and Public Works and Services extended the application of the minimum specific import duties until 31 August 1997 through Resolution No. 22/97.¹⁰

2.13 The minimum specific import duties on textile and apparel products were finally modified by Resolution No. 597/97 of the Ministry of Economy and Public Works and Services of 14 May 1997.¹¹ This Resolution modified Annex IX to Decree No. 998/95 for a series of tariff positions. For some of these, minimum specific duties were progressively reduced. The Resolution called for reductions to take place on five dates between 1 June 1997 and 1 April 1998.

⁶Boletín Oficial de la República Argentina, No. 27.692 of 2 August 1993.

⁷See Argentina's Schedule LXIV, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations done at Marrakesh on 15 April 1994. Members' schedules of concessions are hereafter referred to as their "Schedules".

⁸Boletín Oficial de la República Argentina, No. 28.050 of 30 December 1994.

⁹Boletín Oficial de la República Argentina, No. 28.301 of 29 December 1995.

¹⁰Boletín Oficial de la República Argentina, No. 28.561 of 10 January 1997.

¹¹Boletín Oficial de la República Argentina, No. 28.650 of 20 May 1997.

3. MINIMUM SPECIFIC DUTIES ON FOOTWEAR

2.14 Measures similar to the specific duties applicable to textiles and apparel were applied to imports of footwear. Through Resolution No. 1696/93 of 28 December 1993,¹² the Argentine Ministry of Economy and Public Works and Services instituted minimum specific import duties on certain categories of athletic shoes. Article 5 of the Resolution provided that the specific import duties established by Article 4 were to operate as a minimum of the corresponding *ad valorem* import duty. Article 6 provided that the Resolution was to apply until 31 December 1994, with the possibility of a single, non-renewable extension of six months. As for the minimum specific import duties on textiles and apparel, the specific import duties on footwear were to be levied only in the event that they resulted in the payment of a higher tariff than the relevant *ad valorem* duty.¹³ Resolution No. 1696/93 applied only to products from countries outside the Southern Common Market (MERCOSUR) or the Latin American Integration Association (LAIA).¹⁴

2.15 The minimum specific import duties on footwear were maintained after the entry into force of the Uruguay Round results. As for textiles and apparel, Presidential Decree No. 2275/94 of 23 December 1994 extended the application of the specific duties on footwear until 31 December 1995. Their application was further extended until 31 December 1996 by Article 9 of Presidential Decree No. 998/95. Resolution No. 305/95 of 22 September 1995 increased the specific duties for certain categories of footwear and amended the list of footwear tariff lines to which the minimum specific import duties were applicable.

2.16 Through Resolution No. 103/96 of 6 September 1996, Argentina's Ministry of Economy and Public Works and Services amended the level of specific duties applied on certain footwear categories. Reductions in the rate of duty were to occur in four phases through January 1998.

2.17 The specific duties on footwear HS categories as set forth in Decree No. 998/95 as amended by Resolution No. 103/96 were renewed by Resolution No. 23/97 until 31 August 1997.¹⁵

2.18 On 14 February 1997, the Argentine Ministry of Economy and Public Works and Services adopted Resolution No. 225/97, revoking all minimum specific import duties on footwear. The same day, the Ministry of Economy and Public Works and Services, through Resolution No. 226/97,¹⁶ initiated a safeguard investigation and imposed provisional safeguard measures. On 21 February 1997, Argentina notified the Committee on Safeguards of the World Trade Organization of the initiation of an investigation and the reasons for it as well as of its intention to adopt provisional safeguard measures.¹⁷ The provisional safeguard duties became effective on 25 February 1997.

C. STATISTICAL TAX

2.19 The statistical tax at issue in this case was regulated by Articles 762 to 766 of the Argentine Customs Code (Law No. 22.415). In 1961, a tax intended to finance a statistical service had been imposed through Decree No. 6123/61. In application of Law No. 23.664, adopted in 1989 and relating to Articles 762 to 766 of the Argentine Customs Code,¹⁸ Argentina imposed, until 1994, a three per cent

¹² *Boletín Oficial de la República Argentina*, No. 27.797 of 30 December 1993.

¹³ See Resolution No. 1696/93, Article 5.

¹⁴ *Ibid.*, Article 7.

¹⁵ *Boletín Oficial de la República Argentina* No. 28.561 of 10 January 1997.

¹⁶ *Boletín Oficial de la República Argentina*, No. 28.592 of 24 February 1997.

¹⁷ Document G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, 25 February 1997.

¹⁸ *Boletín Oficial de la República Argentina*, No. 26.652 of 12 June 1989.

ad valorem tax which related to the collection of statistical information by the Argentine customs service regarding imports and exports. Through Presidential Decree No. 2277/94 adopted on 23 December 1994¹⁹ pursuant to Article 764 of the Customs Code, the tax was reduced to zero per cent in order (a) "to remove all those factors that may complicate the process of economic integration and openness";²⁰ (b) "to eliminate those factors that can make difficult the free circulation of goods";²¹ and (c) "to neutralize the effect on foreign trade that the statistical tax [...] in force in [Argentina] may cause".²² On 22 March 1995, Presidential Decree No. 389/95 set the level of the statistical tax at three per cent. The statistical tax was applied to import transactions with a view to providing a general statistical service. According to Article 762 of the Argentine Customs Code, the tax was to be applied on an *ad valorem* basis. The tax did not apply to goods exported to any destination in suspensive or definitive form for consumption. It applied to all imports except for articles subject to a temporary import regime, articles originating in MERCOSUR Member States, imported goods subject to the MERCOSUR common external tariff rate of zero percent, selected imported capital goods, goods related to data processing and telecommunications and certain other categories under the Common Nomenclature of MERCOSUR. The Ministry of Economy and Public Works and Services was authorized by Decree No. 389/95 to establish the appropriate exceptions in every case.

2.20 The purpose of Argentina's import tax was to recover the cost of the statistical service rendered in respect of Argentine import and export transactions. The first paragraph of the preamble of the Decree stated that "it was necessary to provide for the necessary tax collection to contribute to the financing of customs activities related to the registration, computing and data processing of export and import information, in order to rely upon Foreign Trade statistics in rapid and flexible form".²³ This service was not provided to importers on an individual basis, *i.e.* to the specific importer concerned by the relevant transaction on which the statistical tax was levied, but benefited foreign trade operators in general and foreign trade as an activity in itself. The service consisted in the recording of trade information, subsequent processing and publication, and distribution to the public in general. Argentina's customs administration registered the information relating to prices, quantities, description, quality and classification of the goods in the desegregated form required for purposes of control, valuation and assessment of the taxes. This information was standardized and transmitted to the National Statistical and Census Institute²⁴ of Argentina for purposes of analysis and subsequent processing, and a compilation of the information was published. At the same time, the basic data were also transmitted to the Departments of Agriculture, Mining, Fuel, Tourism, Transport and Industry and Trade, for analysis and processing. This exercise resulted in publications and statistical material which was made available to foreign trade operators.

2.21 The tax was bound in Argentina's Schedule LXIV under the heading "other duties and charges" at three per cent *ad valorem*.

[Parties' arguments in Sections III and IV deleted from this version]

¹⁹*Boletín Oficial de la República Argentina*, No. 28.050 of 30 December 1994.

²⁰Decree No. 2277/94 first preambular paragraph. The original in Spanish reads "*remover todos aquellos factores que puedan dificultar dicho proceso de apertura e integración económica*".

²¹*Ibid.*, third preambular paragraph. The original in Spanish reads: "*eliminarse todos aquellos factores que pueden dificultar la libre circulación de bienes*".

²²*Ibid.*, fourth preambular paragraph. The original in Spanish reads "*neutralizar los efectos que, en el comercio exterior, puede producir la tasa de estadística [...] vigente en [Argentina]*".

²³Decree No. 389/95, first preambular paragraph. The original in Spanish reads "*prever la recaudación necesaria para contribuir al financiamiento de las actividades aduaneras vinculadas con la registración, computo y sistematización de la información de importación y exportación, con el fin de contar con estadísticas de Comercio Exterior en forma ágil y rápida*".

²⁴*Instituto Nacional de Estadísticas y Censos (INDEC)*.

V. INTERIM REVIEW

5.1 On 7 October 1997, Argentina and the United States requested the Panel to review, in accordance with Article 15.2 of the DSU, the interim report that had been issued to the parties on 30 September 1997. We carefully reviewed the arguments presented by Argentina and the United States and revised paragraphs 3.15, 3.140 and 3.234 of the Descriptive Part in the light of the comments made by the parties. In response to their comments, we have clarified the wording of paragraphs 6.41, 6.53, 6.67 and 6.71 of the report. We have also made small modifications on other paragraphs.

5.2 Regarding Argentina's argument that it informed the Committee on Market Access that it was not going to change its minimum specific duties, as applied before the Uruguay Round (see paragraph 6.21), we have referred to the relevant argument submitted by Argentina in paragraph 3.67 of the Descriptive Part.

5.3 Argentina also contested that, in paragraph 6.79 of the panel report, the Panel did not address the wider and more fundamental issue of the existence of cross-conditionalities and conflicting obligations that could exist between a Members's commitments to the IMF and under the WTO Agreement. We see no reason to address this wider issue since, in the situation before the Panel, there is no evidence that Argentina was requested by the International Monetary Fund ("IMF") to impose an import tax that would violate the provisions of the WTO Agreement. Moreover, we see nothing in the Agreement Between the IMF and the WTO¹⁵⁷, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking that suggests that we should change our approach.

5.4 The United States has requested that, since we have decided not to reach any conclusion on its claim that Argentina also violated Article 7 of the Agreement on Textiles and Clothing ("ATC"), we limit our discussion on the matter. We have, consequently, adjusted our findings in paragraph 6.87.

¹⁵⁷Annex I to WT/L/195, adopted by the General Council on 7, 8 and 13 November 1996.

VI. FINDINGS 6.1 The United States claims that Argentina's tariffs on imports of textiles, apparel and footwear items violate, generally and in specific cases, the provisions of Article II of the General Agreement on Tariffs and Trade 1994 ("GATT"). The United States also claims that the statistical tax of three per cent *ad valorem* collected by Argentina on imports¹⁵⁸ is in violation of the provisions of Article VIII of GATT. Finally, the United States claims that these violations give rise to an infringement of the provisions of Article 7 of the Agreement on Textiles and Clothing ("ATC").

6.2 Argentina raises a preliminary objection of a procedural nature on the jurisdiction of the Panel to address part of the US claim, challenges the evidence submitted by the United States and asks the Panel to reject the US claims as unfounded.

6.3 This dispute raises, therefore, various legal issues which we have identified and grouped as follows:

A. Argentina's preliminary objection. Should the Panel consider a measure relating to tariffs applied on footwear which was revoked prior to the establishment of the Panel?

B. Article II of GATT. Does the imposition of minimum specific duties by Argentina, which has bound the tariffs at issue at an *ad valorem* rate, constitute a violation of Article II? Does Argentina's tariff system have the potential to violate Article II and is this potential sufficient to constitute an infringement thereof? Has Argentina imposed duties in excess of its bound rate of 35 per cent *ad valorem*? How should we treat the issues raised by the parties with regard to proof and evidence submitted to the Panel?

C. The domestic challenge procedure. Do the constitutional supremacy of international law under the Argentine Constitution and the existence of a domestic procedure to challenge duties imposed in excess of Argentina's bound rates constitute a defense to the claimed violation of Article II of GATT?

D. Article VIII of GATT. What are the criteria for application of Article VIII's limits on charges and fees imposed in connection with importation? Is the statistical tax of three per cent *ad valorem* collected by Argentina on imports in violation of Article VIII of GATT?

E. Article 7 of the ATC. Does a violation of any provision of the WTO Agreement in the textile and apparel sector constitute a violation of Article 7 of the ATC? Has Argentina violated the provisions of Article 7 of the ATC?

A. PRELIMINARY OBJECTION BY ARGENTINA

6.4 In its request for establishment of a panel, dated 9 January 1997, the United States claims that the tariffs imposed by Argentina on textiles, apparel and footwear violate the provisions of Article II of GATT. The Panel was established on 25 February 1997. On 14 February 1997, i.e., after the circulation of the US request for the establishment of a panel but before the Panel was established by the DSB, Argentina revoked the specific duties that it had been imposing on footwear.

6.5 On the day that it revoked the challenged footwear duties, Argentina imposed a provisional safeguard measure in the form of specific duties (G/SG/N/6/ARG/1, G/SG/N/7/ARG/1, dated 25 February 1997 and G/SG/N/6/ARG/1 Supp.1, G/SG/N/7/ARG/1 Supp.1 dated 18 March 1997) on footwear and initiated a safeguard investigation.

¹⁵⁸See paras. 2.19-2.21 of the Descriptive Part.

6.6 In its first written submission, Argentina claims that the Panel does not have jurisdiction to address the specific duties on footwear which were withdrawn before the Panel was established. At the first meeting of the Panel with the parties, Argentina requested a decision on this issue before proceeding to the substantive questions.

6.7 We decided that we would not render a preliminary decision on this issue and invited both parties to submit evidence and arguments on all aspects of the US claims.

6.8 Argentina essentially argues that the specific duties on footwear were revoked before the Panel was established so that, even if the revoked measure is still contained in the terms of reference of this Panel, that claim has become "abstract", pertaining to the illegality of a measure that no longer exists. For Argentina, WTO proceedings cannot be initiated without a specific subject of dispute to which they can apply. In support of its claim, Argentina refers the Panel to Article 19.1 of the DSU, which provides that "where a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". Argentina stresses that the present tense is used. Moreover, for Argentina, making hypothetical assessments of expired measures would distort the dispute settlement mechanism and amount to making interpretations of the WTO agreements, contrary to the specific provisions of the WTO Agreement.

6.9 The United States argues that the Panel should rule on Argentina's specific duties on footwear since they are contained in the terms of reference of the Panel. In addition, the provisional safeguard duties are essentially the same as those applied as specific duties which were part of the same "regime" of specific duties imposed on textiles, apparel and footwear. In the US view, the safeguard duties have in any case a close factual connection with the duties still in force, in that they apply parallel provisions. Finally, the United States argues that measures similar to those revoked may be reinstated at the expiry of the safeguard measures or should Argentina lose a panel proceeding on such safeguard measures.

6.10 We note first that the terms of reference of this Panel include the specific duties on footwear since the terms of reference simply refer to the US request for establishment of a panel. That request specifically mentioned:

"Resolution 304/95, 305/95, 103/96, 299/96, Decree 998/95 and other measures which impose specific duties on various textile, apparel or footwear items in excess of the bound rate of 35 per cent ad valorem provided in Argentina's schedule LXIV".

6.11 Panels and their terms of reference are established by the DSB and panels are not authorized to amend unilaterally their mandate. On the other hand, panels have often been required to determine their jurisdiction over a matter (See for instance *United States - Standards for Reformulated and Conventional Gasoline*,¹⁵⁹ *Japan - Taxes on Alcoholic Beverages*,¹⁶⁰ *Brazil - Measures Affecting Desiccated Coconut*,¹⁶¹ and *EC - Regime for the Importation, Sale and Distribution of Bananas*¹⁶² ("*Bananas III*"). As stated by the Appellate Body in *Bananas III*, in another context:

"142. We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda.¹⁶³ As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel

¹⁵⁹Panel and Appellate Body Reports adopted on 20 May 1996, WT/DS2/R and WT/DS2/AB/R.

¹⁶⁰Panel and Appellate Body Reports adopted on 1 November 1996, WT/DS/8, 10, 11/R and WT/DS8, 10, 11/AB/R.

¹⁶¹Panel and Appellate Body Reports adopted on 20 March 1997, WT/DS22/R and WT/DS22/AB/R.

¹⁶²Panel and Appellate Body Reports adopted on 25 September 1997, WT/DS27/R and WT/DS27/AB/R.

¹⁶³DSU, Article 6.1.

very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU".

6.12 On several occasions, panels have considered measures that were no longer in force.¹⁶⁴ It appears that in each of those cases, however, there was no objection raised by either party to the panel's consideration of the expired measure. In a recent case, an objection was raised by the respondent to panel consideration of a measure no longer in effect. In that case, the panel stated:

"6.19 The Panel observed that it has not been the usual practice of a panel established under the General Agreement to rule on measures that, at the time the Panel's terms of reference were fixed, were not and would not become effective. In the 1978 Animal Feed Protein case, the Panel ruled on a discontinued measure, but one that had terminated after agreement on the Panel's terms of reference. In the 1980 Chile Apples case, the Panel ruled on a measure terminated before agreement on the Panel's terms of reference; however, the terms of reference in that case specifically included the terminated measure and, it being a seasonal measure, there remained the prospect of its reintroduction. In the present case the Panel's terms of reference were established after the 75 per cent rule had ceased to have any effect, and the rule had not been specifically mentioned in the terms of reference. The Panel further noted that there was no indication by the parties that the 75 per cent rule was a measure that, although currently not in force, was likely to be renewed [...] . The Panel did not therefore proceed to examine this aspect of the Gasoline under Article I:1 of the General Agreement".¹⁶⁵

6.13 As noted earlier, the Argentine measure under consideration was revoked before the Panel was established and its terms of reference set, i.e. before the Panel started its adjudication process. The *Gasoline* panel report would argue in favour of not considering the Argentine specific duties on footwear. Moreover, as noted by the Appellate Body in the *Shirts and Blouses*¹⁶⁶ case, the aim of dispute settlement is not

"to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".

6.14 However, the United States claims that there is a serious threat of recurrence since Argentina could easily reintroduce the previous import measures, and the United States suggests that Argentina is likely to do so because there is only a weak justification for its safeguard measure on footwear. We cannot evaluate the justification or likely duration of that safeguard measure. Moreover, in the absence of clear evidence to the contrary, we cannot assume that Argentina will withdraw the safeguard measure and reintroduce the specific duties measure in an attempt to evade panel consideration of its measures. We must assume that WTO Members will perform their treaty obligations in good faith, as they are required to do by the WTO Agreement and by international law¹⁶⁷. We consider, therefore, that there is no evidence that the minimum specific import duties on footwear will be reintroduced.

6.15 Consequently, we will not review the WTO compatibility of the specific duties which used to be

¹⁶⁴See for instance, the *Gasoline* Panel Report at para.6.19; Panel and Appellate Body Reports on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/R and WT/DS33/AB/R; Panel Report on *EEC - Measures on Animal Feed Proteins*, adopted on 14 March 1978, BISD 25S/49; and Panel Report on *United States - Prohibition on Imports of Tuna and Tuna Products from Canada*, adopted on 22 February 1982, BISD 29S/91.

¹⁶⁵Panel Report on *Gasoline* .

¹⁶⁶See Appellate Body Report on *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p. 19.

¹⁶⁷See Article 3.10 of the DSU and Article 26 of the Vienna Convention on the Law of Treaties (*Pacta Sunt Servanda*).

imposed on footwear and which have, since the establishment of this Panel, been revoked. However, since these specific duties on footwear were in force for a long period until 14 February 1997, and for our understanding of the type of duties used by Argentina, we may, when reviewing the import regime applied to textiles and apparel, refer to some examples of transactions involving footwear because the type of duties used at the time by Argentina for textiles, apparel and footwear was the same.

B. ARTICLE II OF GATT

6.16 The United States claims that Argentina violates the provisions of Article II of GATT in two ways:

- a) Argentina's application of minimum specific duties to products in respect of which it bound *ad valorem* duties violates Argentina's obligation to maintain *ad valorem* tariffs pursuant to Article II; and
- b) The specific duties applied by Argentina will inevitably lead and have in fact led to the imposition of duties in excess of the 35 per cent *ad valorem* tariff rate bound by Argentina pursuant to Article II.

6.17 Argentina argues that an allegation of a "potential" violation of Article II is not sufficient, and that in any case its tariffs do not have the potential and indeed have never exceeded the bound rate of 35 per cent *ad valorem*. It also responds that as long as its applied tariffs do not exceed the equivalent of 35 per cent *ad valorem*, it is free to use any type of duties, including specific duties. Argentina also adds that in its Constitution, international law prevails over domestic law and that it is therefore unconstitutional in Argentina to violate WTO rules. In this context, Argentina further argues that it maintains a domestic mechanism whereby Argentine importers, should they be required to pay duties above Argentina's bindings, can ask any judge to declare such duties to be illegal and unconstitutional, which, it notes, has never happened in the sector of textiles, apparel and footwear.

6.18 Argentina states that the specific duties were determined according to the following methodology¹⁶⁸:

- (a) A representative international price was calculated for each category of product and tariff heading. Since there are no standard international prices for textile and clothing products, the prices prevailing in the major markets were used, mainly the United States market. The use of data concerning these markets was determined in general terms by volume and the representative nature of the markets, and also by the degree of reliability of the statistics.
- (b) A specific duty was applied to the representative international prices thus determined, adjusted to put them on a c.i.f. - Buenos Aires basis.

6.19 The various *resoluciones* (hereafter translated as "resolutions") establishing the minimum specific duty system for textiles, apparel and footwear function the same way: they impose minimum specific duties to be used as equivalents to applied *ad valorem* duties¹⁶⁹. The duty collected is the greater of the applicable specific duty or *ad valorem* duty. For example, this is clear from the first resolution (No. 811/93) assigning specific import duties to textile and apparel imports submitted by the United States¹⁷⁰:

¹⁶⁸See para. 3.120 of the Descriptive Part.

¹⁶⁹They are referred to in paras. 2.4 and 2.7-2.21 of the Descriptive Part.

¹⁷⁰See para. 3.15 of the Descriptive Part.

*"Aclárase que los derechos de importación específicos que se establecen por el artículo 1 de la presente resolución, operarán como mínimo del correspondiente derecho de importación ad valorem".*¹⁷¹

The Annex 1 to this resolution lists the *Derecho Especifico Minimo* (Minimum Specific Import Duty) for a list of *Posición NCE* (Foreign Trade Nomenclature (NCE) Heading). We note that all the following resolutions regarding the minimum specific duty regime imposed on the textile, apparel and footwear sector, were similar. The levels of the minimum specific duties have been adjusted from time to time, but they always have been calculated as described.

6.20 A description of how the DIEM, used by Argentina operates was further explained in a letter sent by Argentina to the United States and submitted by the United States¹⁷²:

*"El funcionamiento del nuevo sistema de derechos aduaneros (v.g. DIEM), se explica de la siguiente manera. Una vez arribado el producto a zona aduanera, y determinado su precio C.I.F. por unidad (en este caso particular, cada unidad está constituida por un par de calzados), se compara el valor del DIEM vigente con el monto resultante de aplicar del Derecho de Importación Extrazona vigente al producto en cuestión, correspondiendo para la nacionalización del mismo (despacho a plaza) la aplicación del mayor de los montos cotejados. A continuación se gráfica el funcionamiento con dos ejemplos hipotéticos".*¹⁷³

6.21 In its first submission, Argentina states that it has not changed its type of duties but rather that it has simply continued to use specific duties as it did before the Uruguay Round. All that it did in the Uruguay Round, was to bind certain tariffs at 35 per cent *ad valorem*. We asked Argentina whether, in its Schedule, it had reserved its right to continue to impose minimum specific duties up to a maximum *ad valorem* duty of 35 per cent. Argentina responded that it declared the situation to the Market Access Committee but did not refer to any minutes of meetings.¹⁷⁴ No further evidence of any such specifications in the bindings was brought to our attention.

6.22 Article II(1)(a) of GATT reads as follows:

"1. (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement".

The issue for the Panel is, therefore, to decide what are the obligations covered by the "treatment no less favourable than that provided for in the appropriate [...] Schedule".

1. THE TYPE OF DUTIES USED

6.23 The United States claims that the type of duties applied by a WTO Member - even below any

¹⁷¹Resolution No. 811/93, 29 July 1993, Article 3. The English translation for this piece of legislation reads as follows: "It is hereby expressly stated that the specific import duties established by Article 1 of this decision shall operate as a minimum of the corresponding *ad valorem* import duty".

¹⁷²See para. 3.15 of the Descriptive Part.

¹⁷³Letter of the National Director of Industry Affairs explaining the Argentine minimum specific import duties. The English translation of this letter reads as follows: "This new customs system, i.e., DIEM, operates as follows. Once the product has arrived in the customs area and its c.i.f. price has been determined per unit (in this particular case, each unit consists of one pair of shoes), the current value of the DIEM is compared against the amount obtained by applying the current extra-zone import duty to the product in question, and the higher of the two amounts compared will be applied for purposes of inward customs clearance. The two hypothetical examples given below will illustrate how this works".

¹⁷⁴See para. 3.67 of the Descriptive Part.

bound rate - must conform to that specified in the Schedule of such Member. Since Argentina has bound its tariffs at 35 per cent *ad valorem* in its Schedule of Concessions (hereafter called "Schedule"), the United States argues that Argentina may only impose *ad valorem* duties. Argentina responds that as long as the duties it imposes are below the equivalent of 35 per cent *ad valorem*, it can use any type of duties. Therefore, we have to decide whether the imposition of minimum specific duties by Argentina, which has bound the tariffs at issue at an *ad valorem* rate, constitutes a violation of Article II.

6.24 The wording of Article II does not seem to address explicitly whether WTO Members have an obligation to use a particular type of duty. However, the wording of Article II must be interpreted in the light of past GATT practice, as mentioned in Article XVI:1 of the WTO Agreement and paragraph 1(b)(iv) of Annex 1A incorporating the GATT 1994 into the WTO Agreement, and indicated by the Appellate Body in *Japan - Taxes on Alcoholic Beverages*.¹⁷⁵ Issues similar to those presented in this case have arisen on a number of occasions.¹⁷⁶

6.25 In this connection, the Working Party Report on *Rectifications and Modifications of Schedules*¹⁷⁷ stated in 1953:

"The Working Party also concerned itself with the proposal of the Greek Government to introduce a minimum *ad valorem* rate for certain specific rates and came to the conclusion that such changes could not be considered rectifications to be dealt with by the Working Party, [...] [I]t decided therefore to refer the question to the CONTRACTING PARTIES so that such changes could form the object of consultations and negotiations with the parties having an interest in these items".

6.26 In 1954, the Working Party Report on *Transposition of Schedule XXXVII - Turkey*¹⁷⁸ stated:

"3. The Working Party has also examined the proposal to change the specific duties in the Turkish Schedule to *ad valorem* duties, in cases where such a change is not expressly provided for in the Schedule, in order that the new tariff as regards bound items will conform with the Government's obligations under the General Agreement. A comparison by the secretariat of the proposed *ad valorem* rates with rates which would have resulted, if the conversion had been carried out on certain other bases which were suggested, has indicated that for a considerable proportion of the items the method employed by the Turkish Government has resulted in lower rates than would have been the case if one of those other bases had been used. The Working Party considered the proposals in relation to the provisions of the Agreement and to the practices of the

¹⁷⁵"Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 -- and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. [Footnote 30: It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible.] In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*". See Appellate Body Report on *Japan - Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8, 10, 11/AB/R, p.14.

¹⁷⁶See also John H. Jackson, *World Trade and the Law of the GATT*, Bobbs-Merrill Co. (1969), p. 215.

¹⁷⁷Adopted on 24 October 1953, BISD 2S/63.

¹⁷⁸Adopted on 20 December 1954, BISD 3S/127.

CONTRACTING PARTIES which deal with the modification of schedules. *It was found that there is no provision in the General Agreement which authorizes a contracting party to alter the structure of bound rates of duty from a specific to an ad valorem basis.* (Emphasis added)

4. The obligations of contracting parties are established by the rates of duty appearing in the schedules and any change in the rate such as a change from a specific to an *ad valorem* duty could in some circumstances adversely affect the value of the concessions to other contracting parties. Consequently, any conversion of specific into *ad valorem* rates of duty can be made only under some procedure for the modification of concessions".

6.27 The Working Party Report on the *Fourth Protocol of Rectifications and Modifications*¹⁷⁹ reached similar conclusions in 1955 :

"1. One question could not be solved by the interested parties and was referred to the Working Party. Among the rectifications requested by the Austrian Government were those relating to Items 140 to 144 of the Austrian Tariff which were being made under the authority of the Note to these items included in the Austrian Schedule XXXII which granted the Austrian Government freedom to change the specific into *ad valorem* rates. The Austrian Government felt that it would not be impairing the value of the concessions if it retained beside the *ad valorem* duty the old specific rate as a minimum rate.

2. *The Working Party took the view that such changes would constitute modifications of Austria's obligations and that it could not recommend their acceptance as rectifications.* Such modifications could only be inserted in a protocol of rectifications and modifications after negotiations authorized by the CONTRACTING PARTIES in accordance with the proper procedures. The Austrian delegation, therefore, did not further insist on the insertion in the Fourth Protocol of Rectifications and Modifications of the specific minimum rates in Items 140 to 144". (Emphasis added)

6.28 In 1984, the report of the *Panel on Newsprint*¹⁸⁰ described GATT practice as follows:

"50. [...] [U]nder longstanding GATT practice, *even purely formal changes in the tariff schedule of a contracting party*, which may not affect the GATT rights of other countries, *such as the conversion of a specific duty to an ad valorem duty without an increase in the protective effect of the tariff rate in question*, have been considered to require negotiations". (Emphasis added)

6.29 The most recent panel report to consider this issue, *Bananas II*,¹⁸¹ concluded as follows:

"134. [...]The Panel then considered whether the introduction of a specific tariff for bananas in place of the *ad valorem* tariff provided for in its Schedule constituted

¹⁷⁹ Adopted on 3 March 1955, BISD 3S/130.

¹⁸⁰ Adopted on 20 November 1984, BISD 31S/114.

¹⁸¹ Panel Report on *EEC - Import Regime for Bananas*, DS/38/R, 11 February 1994, not adopted (*Bananas II*). Although the Panel Report on *Bananas II* was never adopted, the Appellate Body stated clearly, in its Report on *Japan - Taxes on Alcoholic Beverages* at p.15, that although they have no legal status, the reasoning of an unadopted panel report can provide useful guidance to a panel and be, therefore, relevant. In this context we consider the reasoning of the panel in *Bananas II* to be relevant and useful to the present dispute.

'treatment no less favourable' in terms of Article II. The Panel observed that while the bound *ad valorem* tariff was related to the value of bananas, the new specific tariff was based on the weight of bananas. Any change in the value of bananas per ton therefore led to a change in the *ad valorem* equivalent of the specific tariff. Since the value of bananas was unpredictable, the *ad valorem* equivalent of the specific tariff could also not be foreseen. The Panel noted in this context that the *ad valorem* equivalent of the 850 ECUs per ton specific tariff on bananas presently exceeded by far 20 per cent *ad valorem*. As to the 100 ECUs per ton specific tariff, the Panel also noted that the EEC had neither argued nor submitted any evidence that this tariff could never exceed 20 per cent *ad valorem*; according to the complainants, the 100 ECUs per ton specific tariff had already exceeded the equivalent of the bound 20 per cent *ad valorem* tariff after 1 July 1993. The Panel consequently found that the new specific tariffs led to the levying of a duty on imports of bananas whose *ad valorem* equivalent was, either actually or potentially, higher than 20 per cent *ad valorem*.

135. The Panel considered that the actual levying of a duty in excess of the bound rate clearly constituted a treatment of bananas less favourable than that provided for in the EEC's Schedule of Concessions. The Panel then proceeded to examine whether also the mere possibility that the specific tariff rate applied by the EEC might be higher than the corresponding bound *ad valorem* rate, rendered it inconsistent with Article II. *The Panel recalled the importance of security and predictability in the application of tariffs bindings. It noted that previous panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition. The CONTRACTING PARTIES had consistently found that a change from a bound specific to an ad valorem rate was a modification of the concession [...] . The Panel [...] concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade". (Emphasis added)*

6.30 The *Bananas II* panel report clearly recognizes the past GATT practice and can be read as concluding that the imposition of specific duties when only *ad valorem* duties are bound is sufficient to establish a violation of Article II.

6.31 We note that the past GATT practice is clear: a situation whereby a contracting party applies one type of duties while its Schedule refers to bindings of another type of duties constitutes a violation of Article II of GATT, without any obligation for the complaining party to submit further evidence that such variance leads to an effective breach of bindings. The fact that Argentina claims that it is simply following its past practice of using specific duties would not seem to be relevant, since it made *ad valorem* tariff concessions on the products in question and thus created an obligation for itself to impose such type of duties. As a guarantee for predictability and to ensure the full respect of the negotiations under Article II, GATT practice has generally required that once a Member has indicated the type(s) of duties in specifying its bound rate, it must apply such type(s) of duties. Accordingly, faced with such a variance in the type duties applied by Argentina from that reflected in its Schedule, we consider that we do not have to examine the effects of that variance on possible future imports. Indeed, such a variance undermines the stability and predictability of Members' Schedules.

6.32 We, therefore, find that Argentina, in using a system of specific minimum tariffs although it has bound its tariffs at *ad valorem* rates only, is violating the provisions of Article II of GATT and that the United States does not have to provide further evidence that the resultant duties exceed the bound tariff

rate. Such a variance between Argentina's Schedule and its applied tariffs constitutes a less favourable treatment to the commerce of the other Members than that provided for in Argentina's Schedule, contrary to the provisions of Article II of GATT.

2. **THE APPLICATION BY ARGENTINA OF SPECIFIC MINIMUM DUTIES**

6.33 The United States also claims that the system of minimum specific duties applied by Argentina will necessarily lead to, and in fact has led to, the imposition of duties in excess of the tariff rate of 35 per cent *ad valorem* bound by Argentina pursuant to Article II of GATT. The US submission on those claims can be divided into three parts:

- First, the United States argues that the way the minimum specific duty system is implemented necessarily leads to breaches of Argentina's bindings.
- Second, the United States submits a series of tables and charts to demonstrate that, based on the average transaction value of imports and the average level of duties collected, duties well above the 35 per cent *ad valorem* of the import price have been collected by Argentina on many items.
- Third, the United States submits a series of customs documents identifying examples where, it submits, specific duties in excess of 35 per cent *ad valorem* were imposed and paid by importers. Argentina contests the authenticity and the relevance of the evidence, and the arguments submitted by the United States.

(a) **Burden of proof and nature of the evidence required**

6.34 Before we look at the parties' arguments and evidence, we address the issue of the burden of proof and the nature of the evidence required in GATT/WTO panel proceedings. As noted above, Argentina has objected to much of the evidence submitted by the United States.

6.35 Concerning the issue of what one may call the "burden of proof", the Appellate Body has confirmed the GATT practice whereby

- a) it is for the complaining party to establish the violation it alleges;
- b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met; and
- c) it is for the party asserting a fact to prove it.

6.36 In the *Shirts and Blouses*¹⁸² case, the Appellate Body stated:

"We agree with the Panel that it was up to India to present evidence and argument sufficient to establish a presumption that the transitional safeguard determination made by the United States was inconsistent with its obligations under Article 6 of the ATC. With this presumption thus established, it was then up to the United States to bring evidence and argument to rebut the presumption".

6.37 We consider that when the Appellate Body refers to the obligation of the complainant party to provide sufficient evidence to establish a "presumption", it refers to two aspects: the procedural aspect, i.e., the obligation for the complainant to present the evidence first, but also to the nature of evidence needed. In the present case, we consider that it was for the United States to raise a presumption that Argentina did violate the provisions of Article II of GATT. Then, it is for Argentina to provide

¹⁸²Appellate Body Report, p. 13.

sufficient evidence to rebut the said presumption. When, however, Argentina is claiming a specific affirmative defense, such that its national challenge procedure can be used to correct any alleged violation of GATT rules, it is for Argentina to raise first a presumption that such system operates in a way that there is, in effect, no infringement of GATT/WTO rules.

6.38 The concept of "presumption" may need some elaboration. A presumption is an inference in favour of a particular fact and would also refer to a conclusion reached in the absence of direct evidence.¹⁸³

6.39 For international disputes it seems normal that tribunals, in evaluating claims, are given considerable flexibility. Inference (or judicial presumption) is a useful means at the disposal of international tribunals for evaluating claims. In situations where direct evidence is not available, relying on inferences drawn from relevant facts of each case facilitates the duty of international tribunals in determining whether or not the burden of proof has been met. It would therefore appear to be the prerogative of an international tribunal, in each given case, to determine whether applicable and un rebutted inferences are sufficient for satisfying the burden of proof. In this respect, the International Court of Justice, in some cases, found it difficult to assert stringent rules of evidence.¹⁸⁴

6.40 Another incidental rule to the burden of proof is the requirement for collaboration of the parties in the presentation of the facts and evidence to the panel and especially the role of the respondent in that process. It is often said that the idea of peaceful settlement of disputes before international tribunals is largely based on the premise of co-operation of the litigating parties. In this context the most important result of the rule of collaboration appears to be that the adversary is obligated to provide the tribunal with relevant documents which are in its sole possession. This obligation does not arise until the claimant has done its best to secure evidence and has actually produced some *prima facie* evidence in support of its case. It should be stressed, however, that "'discovery' of documents, in its common-law system sense, is not available in international procedures".¹⁸⁵ We shall, therefore, follow these general rules when addressing, for instance, the request of the United States to Argentina for production of documents and the fact that Argentina did not do so.

¹⁸³This would appear to be in conformity with the ordinary meaning of the words. See Black's Law Dictionary, 6th Edition, West Publishing (1991); Raymond Guillien and Jean Vincent, Lexique de termes juridiques, Dalloz (1981); and other similar dictionaries.

¹⁸⁴See Keith Hight, "Evidence and Proof of Facts" in The International Court of Justice at a Crossroads, Transnational Publishers, Inc. (1987), p. 355 and Mojtaba Kazazi, Burden of Proof and Related Issues, Kluwer (1996).

¹⁸⁵See Mojtaba Kazazi, Op. Cit. and, for further discussions on the rule of collaboration, George Scelle, Yearbook of International Law Commission (1950), vol.II, p.134 and other references in footnote 184 above.

(b) Minimum specific duties necessarily lead to breaches of Argentina's bindings

6.41 The United States submits that the way the minimum specific duties were initially determined by Argentina, i.e. on a "representative international price" based essentially on the US market price, will always lead to breaches of the bound tariff rate of 35 per cent for those exports which are priced sufficiently below such average price. The United States submits the example of soccer shoes which are subject to a specific minimum duty of US\$3.50 and an applied *ad valorem* duty of 20 per cent. For shoes imported at a value of US\$5.00, the minimum specific duty assessed of US\$3.50 represents a duty of 70 per cent *ad valorem*. Indeed, all shoes imported at a value below US\$10.00 would be subject to an *ad valorem* duty above 35 per cent¹⁸⁶. In other words, every time a good is imported at a price below the "representative international price", the specific duty - which is set on the basis of what Argentina thought the "price should be" and, as argued by Argentina, to counteract the problem of underpriced imports - would be superior to the normally applicable *ad valorem* duty, and possibly above the bound rate of 35 per cent *ad valorem*. For the United States, the purpose of such minimum specific duty scheme is to impose duties in excess of the 35 per cent *ad valorem* collected on the effective import price because, allegedly, goods are often imported into Argentina at prices below the representative international price so that the bound rate of 35 per cent was not sufficient. The United States further argues that for at least 32 HS headings, the specific duty was set at a rate even greater than 35 per cent of the so-called "representative international price" and referred the Panel to its chart showing on the basis of calculations made by Argentina, the above mentioned instances of violations¹⁸⁷. Later the United States submitted an additional list of 104 categories of HS lines which demonstrated that the *ad valorem* equivalents of the specific duties, even when applied on US export prices, were above 35 per cent.¹⁸⁸

6.42 Argentina's response is three-fold. First, it argues that the minimum specific duty was always set so as to be below 35 per cent *ad valorem* of the representative international price of any such item. Thus, if imports were priced at the representative international price, there would be no problems. Second, for Argentina, the US allegations are too general, hypothetical and theoretical and, therefore, not relevant and that the Panel should not consider such "hypothetical" situations without evidence of specific transactions where breaches occurred, since otherwise the dispute settlement system would be abused with frivolous claims. For Argentina, a potential violation would constitute an infringement only if trade was affected and refers the Panel to the *Tobacco*¹⁸⁹ case where, according to Argentina, the panel refused to sanction mere possibility of violations. Third, Argentina argues that, because of its Constitution under which international law is supreme and overrides any domestic law, in the hypothetical case in which a customs official would make a mistake and require the payment of a duty above 35 per cent, the importer has access to a domestic mechanism to challenge such customs determination. We shall return to this last defense raised by Argentina in Section 3 below.

6.43 We understand that the specific duties were set based on representative international prices. In these circumstances, when the specific duties are set so as to be equivalent to a 35 per cent *ad valorem* rate, it is certain that every time a good is imported at a transaction value below the representative international price, the specific duty level will be more than 35 per cent *ad valorem* of the transaction value. In the case of specific duties set so as to be equivalent to a tariff rate of less than 35 per cent, if a good is imported at a transaction value sufficiently below the representative international price used to set the duty, the bound rate of 35 per cent *ad valorem* will also be exceeded. For example, if the representative international price of a product is US\$100.00 and the specific duty is set at US\$20.00 to reflect an *ad valorem* equivalent of 20 per cent, if the product is imported at a price below US\$57.00, the effective *ad valorem* rate will always exceed 35 per cent. Thus, in many cases, it seems clear that the

¹⁸⁶See paras. 3.113 and 3.117 of the Descriptive Part.

¹⁸⁷See para. 3.110 of the Descriptive Part.

¹⁸⁸See para. 3.168 of the Descriptive Part.

¹⁸⁹Panel Report on *United States - Measures Affecting the Importation and Internal Sale of Tobacco*, adopted on 4 October 1994, DS44/R.

specific duties at issue will necessarily result in a duty in excess of the 35 per cent bound rate when the customs value of a product is below the representative international price for such product.

6.44 We note that customs duties are normally to be imposed on the transaction value of imported goods as defined in the Agreement on the Implementation of Article VII of GATT 1994 ("Customs Valuation Agreement"). The transaction value is defined as "the price actually paid or payable for the goods when sold for export to the country of importation". Obviously, if the customs value declared by the importer does not represent the price actually paid, the Argentine authorities may take action to counteract a false declaration through, for example, revisions of the customs value declared in specific cases and even criminal prosecutions. However, neither the Customs Valuation Agreement nor any other provision of the WTO Agreement allows the breach of tariff bindings made under Article II of GATT on the grounds of a general suspicion that declared customs values are sometimes understated. We note, therefore, that mechanisms to counteract alleged underpricing¹⁹⁰ practices are not justifications for Article II violation.

6.45 In respect of the Argentine argument that the US claim should not be considered because it addresses only a potential violation - in support of which it refers to the *Tobacco* panel report - we note that the Argentine measures, the specific duties, are mandatory measures. Argentina admits that its customs officials are obligated to collect the specific duties on all imports. GATT/WTO case law is clear in that a mandatory measure can be brought before a panel, even if such an adopted measure is not yet in effect, and independently of the absence of trade effect of such measure for the complaining party:

"[T]he very existence of mandatory legislation providing for an internal tax, without it being applied to a particular imported product, should be regarded as falling within the scope of Article III:2, first sentence".¹⁹¹

We are also of the view that the *Tobacco* panel report merely confirms this principle.

6.46 Moreover, in *Bananas III*¹⁹², the Appellate Body confirmed that the principles developed in *Superfund*¹⁹³ were still much applicable to WTO disputes and that any measure which changes the competitive relationship of Members nullifies any such Members' benefits under the WTO Agreement.

"Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement".¹⁹⁴

We consider that this principle is also appropriate when dealing with the application of the obligations contained in Article II of GATT which requires a "treatment no less favourable than that" provided in a Member's Schedule. In the present dispute we consider that the competitive relationship of the parties was changed unilaterally by Argentina because its mandatory measure clearly has the potential to violate its bindings, thus undermining the security and the predictability of the WTO system.

6.47 We find, therefore, that the United States has established a presumption that the very nature of

¹⁹⁰Throughout the panel process, the terms "underpricing" and "underinvoicing" have been used interchangeably. In the present Panel Report we shall refer to "underpricing" without prejudice to the parties' rights and obligations and without addressing any legal distinctions between the two terms.

¹⁹¹Panel Report on *United States - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2.

¹⁹²*Bananas III*, Appellate Body Report, Op. Cit., p. 106, para. 252.

¹⁹³*Superfund*, Op.Cit., para 5.1.9

¹⁹⁴*Ibid.*

the minimum specific duty system maintained by Argentina violates the provisions of Article II of GATT and that, as shown above, this presumption has not been rebutted by Argentina.

(c) Evidence based on average calculations

6.48 The United States filed various charts and tables in an effort to prove that based on the average import price of certain products in relation with the total amount of duties collected, one can only conclude that, on many occasions, duties above 35 per cent *ad valorem* must have had been collected. More specifically, the United States submitted:

a) A first set of two charts which identify 118 HS categories of textiles and apparel in which Argentina's specific duties, on average, are greater than 35 per cent *ad valorem*. The United States mentions that it requested from Argentina the data on which the charts are based for the purpose of performing those calculations. The listed specific duties constitute more than 35 per cent of the average of transaction prices of merchandise imported in each category. The United States submits that the exhibit makes plain that, at the least, all merchandise having a lower actual value than the average are subject to duties above 35 per cent *ad valorem*. The data was then broken down into product sectors and demonstrated graphically in another exhibit. For the United States, that exhibit reflects how high, in *ad valorem* terms, Argentina's specific duties are with respect to a variety of textile and apparel groupings, ranging on average from 40.9 per cent to 56.2 per cent. The United States also adjusted its calculations contained in these two first exhibits to take into account a new Argentine Resolution, No. 597/97, which provides five stages of modifications of specific duties in certain categories. Applying the Argentine data to the new duties, the United States submits that the duties collected are still in excess of 35 per cent, on average, with respect to 72 line items.

b) A second set of tables contains calculations performed by the United States from data that had been provided by Argentina to the European Communities during their consultations. For the United States, the information contained in that document is particularly reliable, since it was created by Argentine officials who used Argentine customs data to calculate the *ad valorem* equivalents for 35 textile line items. The document consists of four pages and covers four different types of information: EC imports to Argentina in 1995; EC imports in the first seven months of 1996; all other imports during 1995; and all other imports during the first seven months of 1996. The document identifies, for each line item the total kilograms of textiles imported, their total value, the average c.i.f. value, the specific duties charged, and the *ad valorem* equivalent. Argentina's calculations show that for 4 out of the 35 line items, the EC imports during 1995 and 1996 exceeded 35 per cent *ad valorem*. For the rest of the world, the bound rate exceeds on average in 1996 for 22 out of the 35 textile and clothing categories and, for 26 out of 35 for 1995. Many of the average percentages for the rest of the world for 1995 and 1996 are well over 50 per cent *ad valorem*. Since the prices of products within each of the 35 HS tariff headings vary, some imports are above and some were below the average prices. However, given the large number of HS categories with an average greater than 50 per cent, the United States submits that there necessarily are many individual transactions well above 35 per cent *ad valorem*.

6.49 Argentina argues that as these tables are based on averages they do not constitute evidence of effective transactions. More specifically, the main counter-argument that Argentina raises against the probative value of the first set of charts and tables is that they are based on data provided to the United States for another purpose: they were given so that the United States would realise the discrepancy between Argentine import prices and US export prices for the same items, which suggests serious underpricing. Another list was submitted to the United States so that it could note the minor trade importance of this issue for US textiles exports. These data were not supplied in order for the United States to determine the average duties collected on imports and such data could not be used for the latter purpose. Argentina also contests the probative value of such calculations because of unacceptable margins of error based on the fact that the data were rounded up to the nearest thousand, a claim contested by the United States, which points out that the numbers were rounded to tens or hundreds of

dollars and that such rounding up does not make any difference for transactions worth more than US\$10,000. Regarding the second set of charts and tables, Argentina submits that they do not originate from Argentina and that such data was not provided to the EC during the consultations, and that it had specified during the consultations that these data were irrelevant for the purpose of assessing the level of duties imposed on imports.

6.50 Argentina also argues that since the United States based its calculations on net weight whereby Argentina's statistics had been established using gross weight, all the US calculations were erroneous. In response, the United States provided further tables where the levels of duties were readjusted to take into account distortions of two to fifteen per cent due to the difference between net and gross weight. These new tables showed that in many instances duties well above 35 per cent *ad valorem* were collected. The United States referred the Panel to the second set of charts and tables received from the EC and prepared by Argentina, which is based on net weight and therefore could be used to assess whether the specific duties collected on imports were effectively above the 35 per cent *ad valorem*. Finally, to the Argentine claim that Argentina did not keep "net" weight data, the United States filed a copy of the 1983 issue of the INDEC statistical yearbook which made clear that the Argentine authorities did collect net weight data. Argentina did not inform the Panel of any change in this regard.

6.51 As Argentina did not provide any affirmative evidence to the contrary, we consider that this US evidence provides reliable information that, on a tariff line basis, duties above the bound rate of 35 per cent *ad valorem* have been imposed. We agree that, if an average calculation shows duties above 35 per cent, this is evidence of a sufficient number of transactions which were subject to duties imposed above the 35 per cent *ad valorem*. The United States was able to demonstrate that Argentina had imposed and collected duties on the effective price of the import transactions at levels well above the bound rate of 35 per cent *ad valorem*. In our view, the fact that the data was prepared by Argentina for other purposes is not relevant and the United States responded adequately to Argentina's arguments questioning the data. Thus, the US evidence based on averages confirms our finding in paragraph 6.65.

(d) Evidence based on specific transactions

6.52 At the first meeting of the Panel and following our request, the United States provided the Panel with nine (9) examples of transactions where it claimed that duties above 35 per cent *ad valorem* were collected on imports on textiles, apparel and footwear items. The arguments of the parties on these particular shipments are further detailed in paragraphs 3.169 and following of the Descriptive Part of the present Panel Report.

- (1) A shipment on 9 May 1996 of U.S. carpets in HS category 5703.20 with a c.i.f. value of US\$56,271.90, i.e., the imposition of specific duties of US\$20,531, or a 36 per cent *ad valorem* equivalent.
- (2) Imports on 4 April 1996 of three types of U.S. carpets in HS Category 5703.30, for which the imposition of specific duties resulted in the payment of duties of 40, 60 and 67 per cent *ad valorem*.
- (3) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$15,722.53 and a total specific duty of US\$10,560.00, i.e. the specific duties constituted an *ad valorem* equivalent of 67 per cent.
- (4) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$23,046.20 and a total specific duty of US\$14,476.00, i.e. the specific duties constituted an *ad valorem* equivalent of 63 per cent.
- (5) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$7,444.33 and a total specific duty of US\$4,809.60, i.e. the specific duties constituted an *ad valorem* equivalent of 65 per cent.

(6) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$94,846.13 and a total specific duty of US\$56,909.70, i.e. the specific duties constituted an *ad valorem* equivalent of 60 per cent.

(7) Footwear imports produced in Indonesia indicating a total c.i.f. value of US\$30,690.17 and a total specific duty of US\$19,576.20, i.e. the specific duties constituted an *ad valorem* equivalent of 64 per cent.

(8) Woven cotton fabric imports indicating a total c.i.f. value of US\$19,384.01 and a total specific duty of US\$7,087.61, i.e. the specific duties constituted an *ad valorem* equivalent of 37 per cent.

(9) A shipment of U.S. carpet resulted in payment of specific duties of US\$1775.00 on a c.i.f. value of US\$2811.58, i.e. the imposition of the specific duties resulted in a duty equivalent to 63 per cent *ad valorem*.

6.53 Argentina challenges the validity of these invoices because the name of the importer and all relevant data that could help identifying the importer or the exporter were deleted. The US response is that it has to protect the confidentiality of the persons involved in these transactions. Argentina claims that this information would be very useful in its attempt to deal with the immense import underpricing problem it faces. In this context, Argentina suggests that the difference between the US average export prices and the specific invoice prices for some of these items was such that it affected the probative value of the US evidence. For these imports, Argentina also argues that all invoices related to footwear items should be excluded if the Panel does not review the specific duties imposed on footwear items. Argentina also opposes consideration of the imports from Indonesia, stating that only imports from the United States are relevant to the present case. On the ninth example, Argentina submits that the amount is very small, and emphasizes that the transaction value is said to be US\$1.90 although in 1995, the year of the transaction, the average price for exports from the United States to Argentina in the same tariff heading had a unit value of US\$2.79. Finally, Argentina generally argues that the evidence submitted by the United States is not the best evidence, and, therefore, is not reliable. However, we note that Argentina does not challenge the accuracy of the amount of duties imposed.

6.54 At the end of the first meeting of the Panel, the United States argued that the best evidence was in possession of Argentina and therefore requested Argentina to produce all relevant customs forms involving imports in HS line-items 5407.81 (woven synthetic fibre fabric), 5703.20 (carpets), and 6110.30 (manmade fibre sweaters) for the period January-September 1996. The United States said that it chose these three categories in part because Argentine customs data showed that the average duty paid for these three groups of imports from the United States was 99, 43 and 56 per cent, respectively, during the period January-July 1996. Argentina did not produce these documents.

6.55 Just a few days before the second hearing of the Panel, the United States sent to Argentina some 90 additional invoices and customs documents as further detailed in paragraph 3.179 of the Descriptive Part of this panel report. The documents purport to show examples in which Argentina applied duties in excess of its 35 per cent *ad valorem* tariff binding. At the beginning of the second hearing Argentina requested the Panel to disregard this evidence as untimely. We note that the rules of procedures of panels do not prohibit the practice of submitting additional evidence after the first hearing of the Panel. Until the WTO Members agree on different and more specific rules on this regard, our main concern is to ensure that "due process" is respected and that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible. In light of the difficulties faced by Argentina in responding to this evidence on such a short notice, we decided to accept this additional evidence on the understanding that Argentina would have a period of two weeks to provide further comments on these additional invoices and customs documents. Argentina informed the Panel that it would not be submitting any further comment.

6.56 The United States submitted additional evidence of invoices of shipments during 1996 and 1997 which involved seventy-eight instances where Argentina applied duties in excess of 35 per cent *ad valorem*. The United States used one of these invoices¹⁹⁵ to demonstrate its points but argued that all other invoices were similar and added that if requested it would provide additional comment on the other invoices.

6.57 Argentina raises a series of objections to this evidence:

- most of these invoices concern import transactions for which customs clearance was carried out manually; consequently these invoices suffer from a number of formal defects which ultimately invalidate the substantive arguments they are intended to support;
- most of these invoices represent only part of a larger shipment for which the customs documentation has not been supplied.
- concerning the specific invoice used by the United States during its demonstration, Argentina argued that the legal basis indicated for determining the *ad valorem* duty applied to the goods and the legal basis on which the three per cent statistical tax was levied were erroneous;
- the values declared are considerably lower than the average export prices of like goods originating in the United States in 1996;
- the alleged importer's registration number and tax identification number (CUIT) as well as the import registration number, and the name and registration number of the customs agent, had been shaded out;
- the goods concerned are of Italian origin in all cases but one;
- there is no receipt from the *Banco de la Nación* of payment of duties which represents the last step in the customs clearance procedure for imported goods;
- there is no evidence of import duties actually paid to Argentine Customs by importers;
- all of the transactions occurred in 1997 except one.

We note that Argentina does not deny that the amounts of duties so indicated were those effectively imposed, it simply claims that it was for the United States to prove that full payment was made to the Customs Authorities.

6.58 We do not consider that the fact that the United States submitted copies of customs documents affects their probative value. The United States did try to obtain the original copies in Argentina's possession. Before an international tribunal, parties do have a duty to collaborate in doing their best to submit to the adjudicatory body all the evidence in their possession. In the absence of the originals, and after careful examination and consideration of the evidence, we consider that the copies submitted by the United States constitute sufficient evidence to allow us to make the conclusions we have reached.

6.59 Argentina claims that it is facing a serious problem of frequent underpriced imports and that it needs the names of the parties involved in the said transactions in order to try to defeat such illegal practices. We note the difficulties faced by Argentina but we must also limit ourselves to the claims presented to us. We also note that a claim of underpricing practices is not a legal defence to alleged

¹⁹⁵See para. 3.179 and following of the Descriptive Part.

violations of Article II of GATT. The WTO Agreement offers specific means for the importing country to redress such practices. We note also that it is often the practice in disputes such as this one, for a party to protect commercial in-confidence information such as the names and other information of the private entities involved. Finally, after reviewing all the evidence and arguments of the parties, we consider that the underpricing arguments raised by Argentina (referred to in paragraph 6.53 above) do not affect the probative value of the US evidence.

6.60 Argentina claims that invoices representing imports from Indonesia and Italy are not admissible since the complainant in the present dispute is the United States. The issue before the Panel is whether Argentina's measures lead to the imposition of duties above its bound rate of 35 per cent *ad valorem*, irrespective of the source.

6.61 The fact that Argentina challenged the admissibility of the customs documentation submitted by the United States on the basis that some of the customs clearance were carried out manually, or that there were cases where the wrong resolution¹⁹⁶ was used and that many of the sets of documents were incomplete does not, in our view, affect the probative value of the evidence provided by the United States. Argentina did not question the rate of duty applicable and the way the amount of duties payable was calculated. Argentina also alluded to the possibility of fraud. Although the Panel understands the difficulties faced by Argentina, in a dispute over the application of Article II of GATT, these points made by Argentina are not relevant. Therefore, we consider, after review of all the evidence and arguments and the fact that Argentina did not present any convincing evidence to the contrary, that there is a presumption, within the meaning given to it by the Appellate Body, that these documents are official and reflect the amount of duties actually imposed. Moreover, we note that customs stamps and signatures can be found on many of these documents. Many of these stamps and signatures were from Argentine customs authorities and a number of these forms had a stamp "*Oficializado - Firma y Sello Despachante de Aduana*" on them.

6.62 Concerning Argentina's claim that there is no evidence of actual payment of the said duties, we recall that we are not faced with a domestic recourse for reimbursement of overpayment. The alleged violation, and the obligation under Article II, is to not impose duties above the bound rate and Argentina does not deny that for each of the 78 examples there is a reflection of the calculation of specific duties in excess of 35 per cent equivalent *ad valorem*.

6.63 Finally, Argentina raises the fact that most of the transactions referred to in the set of invoices submitted a few days before the second meeting of the Panel¹⁹⁷ relate to transactions that took place in 1997 implying that these should not be admissible since they took place after the consultations were initiated. In the present dispute, the purpose of the panel process is to try to understand the way the Argentine tariff system functions. The examination of, amongst other elements, some applications of this tariff system is done in this perspective. In our view, these 1997 transactions based on the resolutions and other legislation at issue, further confirm the evidence submitted by the United States for transactions that took place in the preceding years. This is also why we have looked at the invoices related to footwear imports before 14 February 1997. We recall that we are looking at specific transactions in order to assess whether the Argentine resolutions and regulations, as revealed in their application, are inconsistent with Article II of GATT. For this reason, we consider that these examples of 1997 transactions are relevant for our understanding of the effective functioning and application of the minimum specific duty system on textiles and apparel and constitute admissible and relevant evidence for the present dispute.

¹⁹⁶We note also that the level of the specific duties imposed pursuant to the resolution in force at the time of the importation and that of the expired resolution referred to on the customs clearance were identical and that the amount of duties payable for this imported item under both resolutions were also identical.

¹⁹⁷See para. 3.179 of the Descriptive Part.

6.64 We consider, therefore, that Argentina has not rebutted the presumption raised by the United States to the effect that Argentine customs officials have imposed duties, which in many cases are well above 35 per cent *ad valorem*, contrary to Argentine tariff bindings and contrary to GATT Article II. Argentina's arguments do not affect the admissibility and reliability of the evidence submitted.

6.65 In the light of the foregoing, we find that the United States has provided sufficient evidence that Argentina has effectively imposed duties on imports of textiles and apparel above 35 per cent *ad valorem*, that indeed the total amount of duties collected annually on these items leads to the conclusion that duties above 35 per cent *ad valorem* on the average transaction value have been imposed on the same items, and that in any case, as we found in paragraph 6.47 above, the very nature of the minimum specific duty system imposed in Argentina on the items at issue will inevitably lead, in certain instances, to the imposition of duties above 35 per cent *ad valorem*. In addition, the fact that Argentina is using minimum specific duties while they bound their tariffs according to an *ad valorem* type of duties, is inconsistent with its Schedule and with the requirements of Article II of GATT. Therefore, we consider that minimum specific duties imposed by Argentina on textile and apparel imports constitute a treatment of those imports that is less favourable than that provided for in Argentina's Schedule and contrary to Article II of GATT.

3. THE DOMESTIC CHALLENGE PROCEDURE

6.66 Argentina denies the legitimacy of the US claims, but in the event that the Panel should agree with the United States in respect of those claims, Argentina argues that its domestic challenge procedure is a defense against any claim that it has violated Article II of GATT. Argentina notes that under Article 75.22 of the Argentine Constitution, international law takes precedence over domestic legislation. Therefore, any judge in Argentina has the power to declare, at the request of an interested party, the unconstitutionality of any measure adopted in breach of rules contained in an international treaty, such as the WTO Agreement. Subsequent domestic law cannot annul an international treaty, as such law is lower in rank. Should an importer be victim of domestic legislation or regulations that would violate the provisions of the WTO Agreement, including Article II of GATT and the Argentina's Schedule, Argentina argues that the importer should simply trigger the domestic challenge procedure which is quick and free. Furthermore, all Argentine judges are obligated to recognise the supremacy of WTO rules over an inconsistent Argentine measure such as one imposing duties above the bound rate.

6.67 In our view, this argument has two main flaws. First, although under the Argentine Constitution the WTO Agreement takes precedence over any domestic regulations in Argentina, Argentina states that its customs officials have no discretion and must impose the minimum specific duties even if found to be above the bound rate of 35 per cent *ad valorem* and notwithstanding the fact that such imposition violates the WTO Agreement and the Argentine Constitution.

6.68 Second, Article II of GATT imposes an unconditional obligation on a WTO Member to offer to other Members treatment not less favourable than that provided for in its Schedule. A Member violates this obligation, regardless of whether that Member provides a remedy for such violation in its domestic legal system. Notwithstanding how efficient such domestic court system may be, until the court system acts the Member is in violation of its WTO obligations. Moreover, it is not certain that the violation will ever be corrected since such correction is conditional on a decision by the Argentine importer or the holder of the clearance documents to initiate a domestic action. The inevitable delay and uncertainty in such procedure are fundamentally at variance with the WTO principles and the aim of GATT/WTO tariff bindings which are to provide predictability and security for international trade.¹⁹⁸ We agree with the

¹⁹⁸There is a general rule of international law that a state cannot plead provisions of its own law (or deficiencies in that law) as a defence to a claim against it for an alleged breach of its obligations under international law. Thus, in the *Free Zones of Upper Savoy and the District of Gex*, the Permanent Court of International Justice said: "It is certain that France cannot rely on her own legislation to limit the scope of her international obligations". (1932, PCIJ, Series A/B, case No.46, p.167). A WTO Member cannot offer as a defence to a claim of violation of a WTO agreement, that its internal system provides for a remedy to

statement concerning the purpose of the commitments made in tariff bindings as stated in *Bananas II*.¹⁹⁹

"135. The Panel recalled the importance of security and predictability in the application of tariffs bindings. It noted that previous panels and working parties had emphasized that tariff bindings justify reasonable expectations about market access and conditions of competition. [...] The Panel [...] concluded that, in determining whether treatment accorded by a tariff measure was no less favourable than that provided for in the Schedule, it had to take into account not only the actual consequences of that measure for present imports but also its effects on possible future imports. This followed from the principle recognized by many previous panels that the provisions of the General Agreement serve not only to protect actual trade flows but also to create predictability for future trade".

6.69 Consequently, we do not accept Argentina's defense that its national challenge process is such as to ensure that Argentina does not and will not violate its obligations pursuant to Article II of GATT.

C. THE STATISTICAL TAX

6.70 Argentina maintains an *ad valorem* tax of three per cent on imports, without a minimum or maximum charge, to cover the cost of providing the statistical service intended to provide a reliable basis for foreign trade operators.²⁰⁰ According to Argentina, this service is not rendered to any individual importer, or to the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity per se.²⁰¹

6.71 The United States claims that this statistical tax is in violation of Article VIII of GATT. Argentina responds that its statistical tax is permitted under Article VIII. For Argentina, Article VIII should permit the collection of costs not only for the services rendered to the individual importer for a given transaction but also for all costs (direct and indirect) incurred in providing the services. Argentina adds that this three per cent tax is bound in its GATT 1994 Tariff Schedule under the heading "Other Duties and Charges". Although it states that a similar tax has been in place since 1989²⁰², Argentina argues that this statistical tax is now part of an overall "package" of fiscal commitments it has undertaken with the International Monetary Fund ("IMF"). Consequently, Argentina argues that its obligations under Article VIII should be interpreted to take into account the existence of a potential conflict of rules which goes beyond the framework of a possible bilateral trade dispute.

6.72 This issue subsumes three questions:

- a) Is an *ad valorem* statistical tax of three per cent imposed on imports compatible with Article VIII?
- b) What effect, if any, does Argentina's relationship with the IMF have on the answers to the above question?
- c) Does the fact that this tax was bound as such in Argentina's Schedule exempt Argentina from the requirements of Article VIII?

I. ARTICLE VIII OF GATT

such violation to certain individuals, either national or foreign, and that no violation of WTO has therefore taken place.

¹⁹⁹ *Bananas II*, Op. Cit., para. 6.29 of the present report.

²⁰⁰ As further described in paras. 2.19-2.21 of the Descriptive Part.

²⁰¹ See para. 3.266 of the Descriptive Part.

²⁰² See para. 2.19 of the Descriptive Part.

6.73 Paragraph 1(a) of Article VIII of GATT provides that

"[a]ll fees and charges of whatever character [...] imposed by Members 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".

Article VIII:4(e) makes it clear that fees and charges relating to "statistical services" fall within the scope of Article VIII.

6.74 The meaning of Article VIII was examined in detail in the Panel Report on *United States - Customs Users Fee*.²⁰³ The panel found that Article VIII's requirement that the charge be "limited in amount to the approximate cost of services rendered" is "actually a dual requirement, because the charge in question must first involve a 'service' rendered, and then the level of the charge must not exceed the approximate cost of that 'service'".²⁰⁴ According to the panel report, the term "services rendered" means "services rendered to the individual importer in question".²⁰⁵ In the present case Argentina states that the service is not rendered to the individual importer, or to the specific importer associated with a particular operation, but to foreign trade operators in general and foreign trade as an activity per se.

6.75 An *ad valorem* duty with no fixed maximum fee, by its very nature, is not "limited in amount to the approximate cost of services rendered". For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited *ad valorem* charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered. For example, in the *Customs User Fee* report, the panel examined the consistency with Article VIII of 0.22 and 0.17 per cent *ad valorem* customs merchandise processing fees with no upper limits. The panel concluded that "the term 'cost of services rendered'. . . in Article VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question and accordingly that the *ad valorem* structure of the United States merchandise processing fee was inconsistent with Article VIII:1(a) to the extent that it caused fees to be levied in excess of such costs".²⁰⁶

6.76 The Report of the Working Party on *Accession of the Democratic Republic of the Congo*²⁰⁷ is also relevant to the present dispute:

"Members of the Working Party pointed out that the statistical tax of three per cent *ad valorem* applied by the Congolese authorities on imports was not commensurate with the service rendered and was contrary to the provisions of Article VIII:1(a). The representative of the Congo recognized that this tax exceeded the cost of the service, and explained that the surplus revenue from the tax would be employed toward improving the service. His authorities were prepared to consider the adjustment of the statistical tax, in the light of the provisions of Article VIII as soon as they were in a position to afford it. The Working Party took note of this statement and invited the Government of the Democratic Republic of the Congo to re-examine its present method of application of the statistical tax and to report to the CONTRACTING PARTIES on the possibilities of bringing the tax into line with the provisions of Article VIII:1(a)".

²⁰³ Adopted on 2 February 1988, 35S/245.

²⁰⁴ *Customs Users Fee*, Op. Cit., para. 69.

²⁰⁵ *Ibid.*, para. 80.

²⁰⁶ *Ibid.*, para. 86.

²⁰⁷ Adopted on 29 June 1971, BISD 18S/89, para. 5.

6.77 Argentina's statistical tax is levied on an *ad valorem* basis with no ceiling. As described in paragraph 6.70 above, Argentina's tax is clearly not related to the cost of a service rendered to the specific importers concerned. The tax as assessed on many goods is not in proportion to the cost of any service rendered. The tax purportedly raises revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports. While the gathering of statistical information concerning imports may benefit traders in general, Article VIII bars the levying of any tax or charge on importers to support the related costs "for the individual entry in question" since it will also benefit exports and exporters.²⁰⁸

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

6.79 In addition, although it does not argue that it is required to impose this specific tax in order to meet its commitments to the IMF, Argentina argues that the tax should be found to comply with Article VIII, if necessary through a less strict application of the requirements of Article VIII of GATT than was adopted in the *Customs Users Fee*. We find no exception in the WTO Agreement that would excuse Argentina's compliance with the requirements of Article VIII of GATT. Moreover, we see nothing in the Agreement Between the IMF and the WTO²⁰⁹, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking that suggests that we should interpret Article VIII as argued by Argentina.

6.80 Consequently, following the GATT practice on the subject matter, we conclude that Argentina's statistical tax of three per cent *ad valorem*, in its present form, is in violation of Article VIII:1(a) of GATT to the extent it results in charges being levied in excess of the approximate costs of the services rendered as well as being a measure designated for fiscal purposes.

2. EFFECT OF INCLUDING STATISTICAL TAX IN TARIFF SCHEDULE

6.81 Argentina argues that its three per cent statistical tax was included in its Schedule LXIV and is therefore not in violation of GATT rules. The provisions of the WTO Understanding on the Interpretation of Article II:1(b) of GATT 1994, dealing with 'other duties and charges', make clear that including a charge in a schedule of concessions in no way immunizes that charge from challenge as a violation of an applicable GATT rule. The Understanding provides:

"1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any 'other duties or charges' levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of 'other duties or charges'.

[...]

5. The recording of 'other duties or charges' in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the

²⁰⁸See *Customs User Fee*, Op. Cit., paras. 84-86.

²⁰⁹Annex I to WT/L/195, adopted by the General Council on 7, 8 and 13 November 1996.

consistency of any 'other duty or charge' with such obligations.

6. For the purposes of this Understanding, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply".

This provision is consistent with GATT and WTO jurisprudence dealing with conflicts between non-tariff provisions included in the Member's Schedules and general GATT and WTO rules.²¹⁰

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

6.83 Consequently, for all the reasons mentioned above, we find that the Argentine statistical tax of three per cent *ad valorem* is inconsistent with the provisions of Article VIII of GATT in that it is not "limited in amount to the approximate cost of services rendered".

D. ARTICLE 7 OF THE ATC

6.84 The United States claims that because Argentina has violated Articles II and VIII of GATT with respect to textiles and apparel, it has also violated Article 7 of the ATC. The United States claims that a violation of any provisions of any of the WTO agreements in the sector of textiles and apparel would necessarily constitute a violation of Article 7 of the ATC.

6.85 Argentina's response is two fold: First, Argentina argues that since it has not violated any provision of any of the WTO covered agreements, it cannot be said to violate Article 7 of the ATC; second, Argentina claims that the provisions of Article 7 are only applicable to the measures notified pursuant to Article 7. Since it has not notified and does not maintain any quantitative restrictions or non-tariff measures and it has respected its tariffs reduction commitments, Article 7 is not applicable.

6.86 The parties and third parties have entered into long and well-argued debates as to whether Article 7 covers only actions and obligations covered by the ATC, i.e., quantitative restrictions, or whether the purpose of Article 7 is to ensure that measures other than quantitative restrictions such as tariffs, non-tariff barriers, licensing provisions and intellectual property provisions are not used in a manner which undermines market access in the textile and apparel sector for all WTO Members.

6.87 We have decided to exercise judicial economy and not address the US claim related to the ATC. Such decision is consistent with the findings of the Appellate Body report in the *Shirts and Blouses* case.²¹¹ We do not see how a finding on Article 7 of the ATC would help the parties to resolve their dispute. It would not provide Argentina with any further guidance as to how it should reform its measures found to be inconsistent with the provisions of Articles II and VIII of GATT. Indeed, even if we found that the Argentine measures also violated the provisions of Article 7 of the ATC, such finding would add nothing to the conclusions we reached concerning the violations of Articles II and VIII of GATT. Accordingly, we consider that a finding on Article 7 of the ATC is not necessary, nor useful for the present dispute.

²¹⁰See Panel Report on *United States - Restrictions on Imports of Sugar*, adopted on 22 June 1989, BISD 36S/331 and *Bananas III*, Op. Cit.

²¹¹*Shirts and Blouses*, Appellate Body Report, Op. Cit., pp. 17-20.

VII. CONCLUSIONS

7.1 In the light of the findings above, we conclude that

- (a) the minimum specific duties imposed by Argentina on textiles and apparel are inconsistent with the requirements of Article II of GATT;
- (b) the statistical tax of three per cent *ad valorem* imposed by Argentina on imports is inconsistent with the requirements of Article VIII of GATT.

7.2 The Panel *recommends* that the Dispute Settlement Body request Argentina to bring its measures into conformity with its obligations under the WTO Agreement.