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TURKEY – RESTRICTIONS ON IMPORTS OF TEXTILE AND CLOTHING PRODUCTS

Report of the Panel

The report of the Panel on Turkey – Restrictions on Imports of Textile and Clothing Products is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 31 May 1999, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

I. INTRODUCTION

1.1 On 21 March 1996, India requested consultations with Turkey pursuant to Article 4.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT") regarding the unilateral imposition of quantitative restrictions ("QRs") by Turkey on imports of a broad range of textile and clothing products from India as from 1 January 1996 (WT/DS34/1).

1.2 India and Turkey did not enter into consultations, due to disagreement on the appropriateness of participation of the European Communities in such consultations, and consequently the dispute could not be resolved at that stage. The Dispute Settlement Body ("DSB") was informed accordingly on 24 April 1996.[1]

1.3 In a communication dated 2 February 1998, India requested the DSB to establish a panel to examine the matter in the light of GATT and the Agreement on Textiles and Clothing ("ATC"), in accordance with Article 6.2 of the DSU (WT/DS34/2). In its communication, India claimed that the restrictions imposed by Turkey were inconsistent with Turkey's obligations under Articles XI and XIII of GATT and were not justified by Article XXIV of GATT, which did not authorize the imposition of discriminatory QRs, and that the restrictions were inconsistent with Turkey's obligations under Article 2 of the ATC. India also claimed that the restrictions appeared to nullify or impair benefits accruing to it directly or indirectly under GATT and the ATC.

1.4 On 13 March 1998, the DSB established a panel pursuant to the request of India, with the following standard terms of reference (Article 7.1 of the DSU):[2]

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS34/2, the matter referred to the DSB by India in that document and to make such findings as will assist the DSB in making recommendations or in giving the rulings provided for in those agreements."

1.5 On 11 June 1998, the parties to the dispute agreed on the following composition of the Panel (WT/DS34/3):

Chairman:	Ambassador Wade Armstrong
Members:	Dr. Luzius Wasescha
	Prof. Robert Hudec

1.6 Following the resignation of Prof. Robert Hudec, the parties to the dispute agreed to appoint a new member to the Panel, on 21 July 1998. Accordingly, the composition of the Panel was as follows (WT/DS34/4):

Chairman:	Ambassador Wade Armstrong
Members:	Dr. Luzius Wasescha
	Mr. Johannes Human

1.7 Hong Kong, China; Japan; the Philippines; Thailand; and the United States reserved their third-party rights in accordance with Article 10 of the DSU.

1.8 On 14 August 1998, Turkey requested preliminary rulings by the Panel on a number of issues. On 28 August 1998, the Panel invited India, as well as the third parties, to present their views on the points raised by Turkey. India submitted written comments on the issues; Japan, the Philippines and

[1] WT/DSB/M/15, pp. 3-5.
[2] WT/DSB/M/43, p. 6.

the United States, as third parties, also submitted written communications. The Panel met on 19 September 1998 with Turkey and India on this matter, and issued its ruling on 25 September 1998.

1.9 The Panel received the first written submissions from the parties on 21 August 1998 (India) and on 18 September 1998 (Turkey). Written submissions were also received from Hong Kong, China; Japan; the Philippines; and Thailand, as third parties.

1.10 The first substantive meeting of the Panel with the parties took place on 5-6 October 1998 and the Panel met with third parties on 6 October 1998.

1.11 On 28 October 1998, the Panel addressed a letter to the European Communities, seeking certain relevant factual and legal information under Article 13.2 of the DSU. The European Communities answered in writing the specific questions raised by the Panel on 13 November 1998.

1.12 On 19 November 1998, the Panel received the second written submissions from the parties, with whom it met again on 25 November 1998.

1.12 In a communication dated 20 January 1999, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months. The reasons for that delay are stated in document WT/DS34/5.

1.13 The Panel issued its interim report to the parties on 3 March 1999. On 12 March 1999, both parties submitted written requests for the Panel to review precise aspects of the interim report; no further meeting with the Panel was requested.

1.14 The Panel submitted its final report to the parties on 26 March 1999.

II. FACTUAL ASPECTS

2.1 This section addresses the factual aspects of the dispute in a sequential order, in which the QRs at issue are described in paragraphs 2.39 to 2.41 below. In view of the nature of the dispute, this section outlines first the factual context in which the dispute is addressed.

A. REGIONAL TRADE AGREEMENTS IN THE GATT/WTO FRAMEWORK

2.2 The relationship between the most-favoured-nation ("MFN") principle and Article XXIV of the GATT, which deals with free-trade areas and customs unions, has not always been harmonious. In 1947, their coexistence in the framework of international trade relations had been viewed as ultimately positive, reflecting the perception that genuine customs unions and free-trade areas were congruent with the MFN principle and directed towards the same objective, i.e. multilaterally-agreed trade liberalization.[3]

2.3 As a matter of fact, trade liberalization under the GATT paralleled a process of increasing economic integration among contracting parties: from 1948 to end-1994, 107 regional trade agreements ("RTAs") were notified to the GATT under Article XXIV.[4]

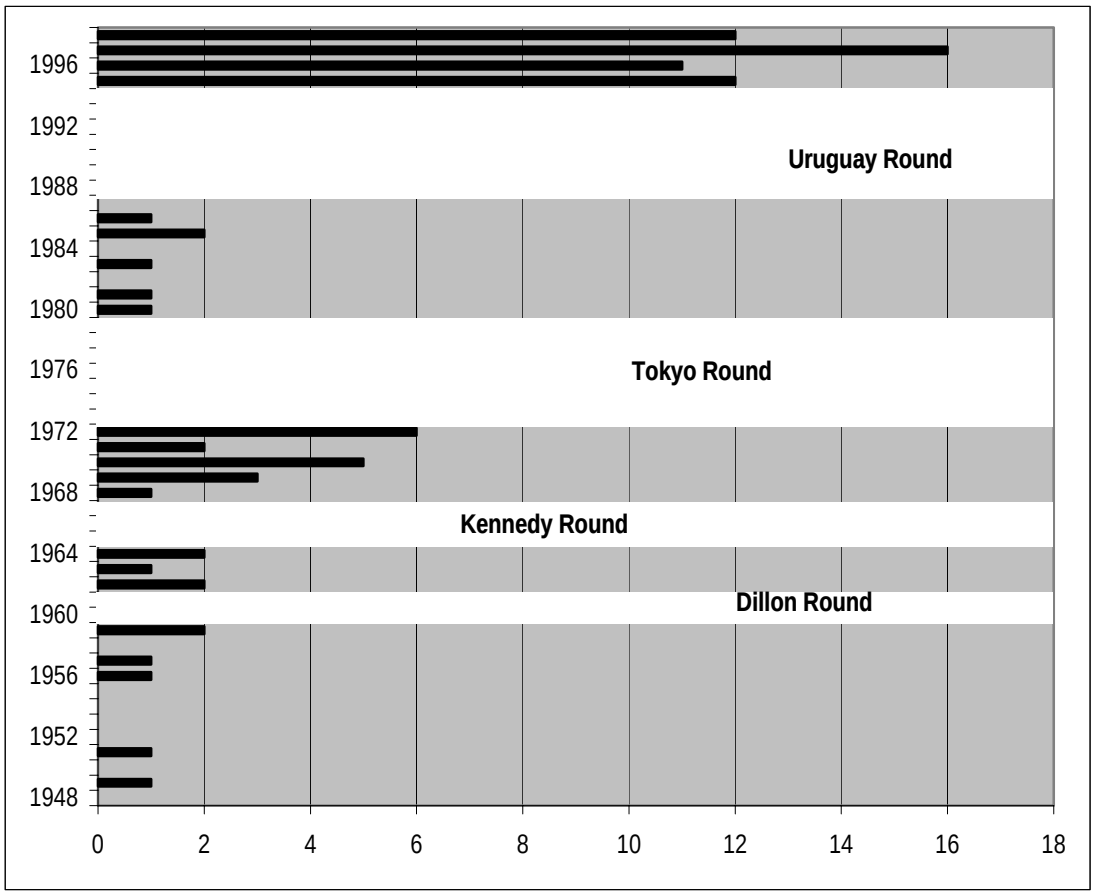
[3] Customs unions and free-trade areas were viewed as trade-creating instruments (susceptible to expand trade both among the parties and between these and third parties), but there were also concerns about their possible trade-distorting effects.

[4] Of these, only 36 remain today in force, reflecting in most cases the evolution over time of the RTAs themselves, as they were superseded by more modern agreements between the same signatories (usually going deeper in integration), or by their consolidation into wider groupings.

2.4 Before 1957, the GATT contracting parties dealt with only three such agreements, covering a small fraction of their aggregate trade (see Figure II.1), on which compatibility with Article XXIV was temporarily waived and which were maintained under surveillance.[5] Article XXIV provisions confronted their first real applicability test with the notification of the Treaty of Rome in 1957, which concerned the integration of major players in the international scene. From then on, the examination of RTAs notified to the GATT did not lead to clear-cut assessments of full consistency with the rules, except in one instance.[6] Frictions between GATT contracting parties arising in the context of the formation of customs unions or free-trade areas were dealt with pragmatically.[7]

2.5 The perception that RTAs could contribute to the expansion of world trade was reiterated during the Uruguay Round, when negotiators re-visited certain aspects of Article XXIV, in an endeavour to clarify some of its provisions.[8]

Figure II.1 – Number of RTAs notified to the GATT/WTO under Article XXIV



2.6 During the course of the Uruguay Round, there was an increase in the number of new RTAs notified to the GATT. The conclusion of the Round and the establishment of the WTO did not put to

[5] See in this respect: *Report on the Customs Union between South Africa and Southern Rhodesia* (BISD II/176) and corresponding *Decisions* (BISD II/29, and 3S/47); *Decision on the Free-Trade Area Treaty between Nicaragua and El Salvador* (BISD II/30); and *Decision on Participation of Nicaragua in Central American Free-Trade Area* (BISD 5S/29).

[6] This was the case of the Customs Union between the Czech Republic and the Slovak Republic (see *Working Party Report*, GATT document L/7501, dated 4 October 1994).

[7] See, for example, BISD 7S, p. 69 *et seq.*.

[8] The result of such negotiations is embodied in the Understanding on the Interpretation of Article XXIV of GATT 1994.

rest the appeal of regional integration. Since 1 January 1995, a further 60 new RTAs have been notified under Article XXIV of GATT, most of which are presently in force.[9]

2.7 The WTO General Council established, on 6 February 1996, the Committee on Regional Trade Agreements ("CRTA"),[10] with the mandate of, inter alia, examining all RTAs notified to the Council for Trade in Goods ("CTG") under Article XXIV.[11] The CRTA is likewise entrusted with the examination of those RTAs notified under the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries and under Article V of the General Agreement on Trade in Services ("GATS"),[12] and referred to it by the Committee on Trade and Development ("CTD") and the Council for Trade in Services ("CTS"), respectively. The mandate of the CRTA also includes the consideration of "the systemic implications of [RTAs] and regional initiatives for the multilateral trading system and the relationship between them".[13]

2.8 Later in 1996, the WTO Membership expressed its views on RTAs and the role of the CRTA in paragraph 7 of the Singapore Ministerial Declaration, as follows:

> "We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system. In this context, we note the importance of existing regional arrangements involving developing and least-developed countries. The expansion and extent of regional trade agreements make it important to analyse whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified. We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. In this regard, we welcome the establishment and endorse the work of the new Committee on Regional Trade Agreements. We shall continue to work through progressive liberalization in the WTO as we are committed in the WTO Agreement and Decisions adopted at Marrakesh, and in so doing facilitate mutually supportive processes of global and regional trade liberalization."[14]

2.9 The CRTA 1998 Report to the General Council is self-explanatory on the results so far achieved in its work.[15] Paragraph 6 of the Report, with respect to the examination of the agreements, reads:

> "In 1998, the Committee endeavoured to accelerate the examination of agreements which had already commenced, as well as to handle new agreements referred to it. The Committee has currently under its purview a total of 62 RTAs. To date, the examination of 54 RTAs have been referred to the Committee by the CTG, seven by the CTS and one by the CTD. Draft reports on the examination of 28 agreements are currently under consideration; for 13 other agreements, reports are being drafted or factual examinations are well engaged, while the first round of examination for the remaining 21 RTAs is scheduled for either the Committee's twentieth session or early in 1999 … Thus far, no report has been adopted."

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[9] The negotiation of RTAs among countries geographically distant has also become an increasingly frequent feature in the 1990s.

[10] WT/L/127.

[11] The CRTA is in charge of the examinations which were previously performed by separate working groups, one per agreement.

[12] These provisions also govern regional integration within the WTO.

[13] WT/L/127, para.1(d).

[14] WT/MIN(96)/DEC, para. 7.

[15] WT/REG/7.

As concluding remarks, paragraph 15 of the CRTA 1998 Report states as follows:

> "… Despite its heavy workload and delays in the submission of certain relevant material, the Committee also made progress in examining RTAs. The need to move forward in the process of examination pursuant to WTO rules was recognized; however, progress in this regard was slowed, *inter alia*, by a lack of consensus on the interpretation of certain elements of those rules relating to RTAs. On systemic issues, the Committee held discussions on some important topics and identified different approaches to these subjects; the need to move forward in the discussion of systemic issues was also recognized."

B. TURKEY'S TRADE RELATIONS WITH THE EUROPEAN COMMUNITIES

1. Association between Turkey and the European Communities, and the GATT/WTO process[16]

2.10 On 12 September 1963, Turkey and the Council and member States of the then European Economic Community ("EEC") signed the *Ankara Agreement*,[17] which entered into force on 1 December 1964. The Ankara Agreement formed the basis of the Association (in the sense of Article 228 of the Treaty of Rome) between Turkey and the European Communities envisaging that its objectives would be reached through a customs union which would be established in three progressive stages: preparatory, transitional and final. Article 28 of the Ankara Agreement also left open "the possibility of the accession" of Turkey to the EEC. The Ankara Agreement itself contained the modalities of the preparatory stage of the Association.

2.11 The terms and conditions for the implementation of the transitional stage were defined in the 1970 *Additional Protocol* to the Ankara Agreement and in the 1971 *Interim Agreement*.[18] The provisions of the Interim Agreement entered into force on 1 September 1971 and the Additional Protocol entered into force on 1 January 1973. These texts provided for an extended transitional period running over 22 years and foresaw the establishment of a customs union by the end of 1995. The Additional Protocol provided for an asymmetrical liberalization of intra-trade, because of the disparity in levels of development between the parties: the European Communities were to abolish all duties and QRs on imports of industrial products from Turkey as from September 1971, while Turkey was to do so over the transitional period, according to a timetable.[19] The Protocol also contained provisions designed to ensure the alignment of Turkey on EC policies in many areas (commercial policy, standards, competition, state aids, trade in services, etc.).

2.12 *Supplementary Protocols* to the Ankara Agreement (and Interim Agreement) were also concluded in 1973 between Turkey and the European Communities, containing adaptation and transition measures following the accession to the European Communities of Denmark, Ireland and the United Kingdom.[20]

2.13 Starting in 1973, Turkey embarked in the gradual alignment of its customs duties to the EC Common Customs Tariff ("CCT"), as scheduled. The implementation of Turkey's obligations arising out of its Association with the European Communities was interrupted during a number of years, due *inter alia* to the crisis in which the Turkish economy was engulfed following the oil shocks of 1973 and 1979. In 1987, when Turkey requested accession to the European Communities, completion of

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[16] The official titles of the agreements have changed over time The European Communities is a WTO Member.

[17] GATT document L/2155/Add.1.

[18] GATT document L/3554.

[19] Other agreements concluded at the time by the EC with Mediterranean countries contained similar provisions.

[20] GATT document L/3980.

the customs union was seen as part of a package of measures designed to help Turkey prepare for membership. In 1988, Turkey resumed the reduction of its customs duties and alignment on the CCT.

2.14 The Ankara Agreement and the subsequent instruments concluded in the context of the Association between Turkey and the European Communities during the 1970s were notified to the GATT Contracting Parties under Article XXIV:7 of GATT 1947. The GATT entrusted three separate working parties with the task of examining the different agreements in light of those provisions. Reports of these working parties were adopted by the GATT Council:

(i) Report of the Working Party on the Ankara Agreement, adopted on 25 March 1965 (BISD 13S/59-64);

(ii) Report of the Working Party on the Additional Protocol, adopted on 25 October 1972 (BISD 19S/102-109); and

(iii) Report of the Working Party on the Supplementary Protocols, adopted on 21 October 1974 (BISD 21S/108-112).

2.15 As agreed at a meeting of the Turkey-EC Association Council ("Association Council") held in November 1992,[21] negotiations were initiated between the two parties on the modalities for the completion of the customs union, i.e. for the final phase of the Association. These negotiations were conducted from 1993 to 1995.

2.16 On 6 March 1995, the Association Council took *Decision 1/95*, to enter into force on 1 January 1996.[22] Decision 1/95 set out the modalities for the final phase of the Association between Turkey and the European Communities. In addition to the elimination of customs duties and alignment on the CCT, it contained provisions for the harmonisation of Turkey's policies and practices in all areas covered by the Association where this was deemed necessary "for the proper functioning of the Customs Union". In accordance with Article 65 of Decision 1/95 the parties were to consider, before entry into force, whether those harmonisation provisions (in particular those contained in Article 12) had been fulfilled. Once this requirement was considered satisfied, at a meeting of the Association Council on 30 October 1995, Decision 1/95 was submitted to the European Parliament for its approval and subsequently formally adopted by the Association Council on 22 December 1995. On 22 December 1995, the Association Council also adopted Decision 2/95, in pursuance of Article 15 of Decision 1/95. Decision 2/95 defined the coverage of products for temporary exception from Turkey's application of the CCT in respect of third countries, and fixed the timetable for their alignment to the CCT (from 1 January 1996 to 1 January 2001).

2.17 The entry into force of "the final phase of the Customs Union" between Turkey and the European Communities was notified to the WTO on 22 December 1995, under Article XXIV of GATT.[23] The texts of Decision 1/95 and Decision 2/95 were distributed to Members on 13 February 1996.[24] On 29 January 1996, the CTG adopted standard terms of reference for the examination of the "Customs Union between Turkey and the European Community"[25] ("Turkey-EC customs union"), and referred such examination to the CRTA.[26]

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[21] The Association Council was created by the Ankara Agreement, as the only decision-making body of the Turkey-EC Association.

[22] Decision 1/95 is reproduced in WT/REG22/1.

[23] WT/REG22/N/1.

[24] WT/REG22/1 and WT/REG22/2, respectively.

[25] The terms of reference for the examination are contained in WT/REG22/4. In this Panel report we shall refer to the Turkey-EC customs union without any assessment of the WTO nature of this Article XXIV type of arrangement.

[26] G/C/M/8.

2.18 Turkey and the European Coal and Steel Community ("ECSC") signed an Agreement on 25 July 1996, which entered into force on 1 August 1996.[27] In their joint communication to the WTO, the parties stated that the Agreement was "intended as the complement to the Customs Union in respect of products covered by the European Coal and Steel Community and as a transitional arrangement in respect of such products until … the year 2002".[28]

2.19 On 30 October 1996, Turkey and the European Communities submitted preliminary information to the WTO on "the final phase of the Customs Union", in accordance with the Standard Format for Information on Regional Trade Agreements.[29] In a joint communication dated 24 November 1997,[30] Turkey and the European Communities provided, "[t]o assist Members in the examination of the Customs Union, … details of the quantitative limits applied by Turkey in respect of imports of certain textile and clothing products from certain WTO Members", including the levels of such quantitative limits for 1997.[31] The CRTA met twice to examine, in the light of the relevant provisions of GATT, the Turkey-EC customs union: on 23 October 1996 and on 1 October 1997.[32] Additional written questions from Members were also replied to by the parties.[33] To date, the CRTA has not yet finalized its examination.

2.20 Turkey and the European Communities transmitted copies of their communications to the CRTA, in relation to the quantitative limits applied by Turkey, and to the Textiles Monitoring Body ("TMB"), for information pursuant to Article 3.3 of the ATC.[34] The TMB took note of the information supplied at its meetings held on 11-12 December 1997. and 26-27 May 1998.[35] To date Turkey has notified to the TMB its lists for the first and second stage of integration and advance integration for a product which will be subject to the third stage of integration.[36]

2. Synopsis of recent developments in Turkey-EC trade[37]

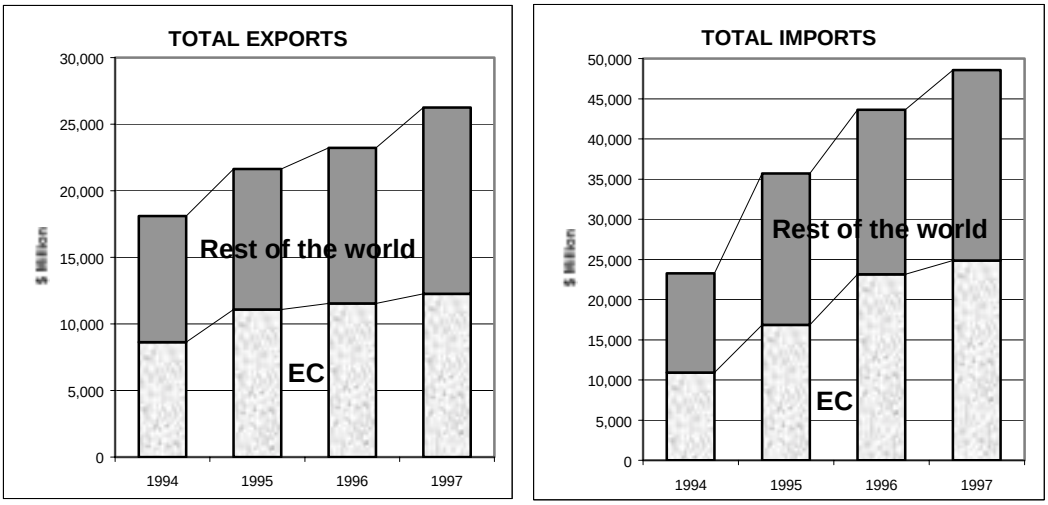
2.21 The European Communities[38] has traditionally constituted the major single market for Turkish goods and Turkey's major supplier, accounting for around 50 per cent of both Turkey's exports and imports. Exports to the European Communities in 1996 and 1997 expanded at a slower rate than those destined to the rest of the world. Imports from the European Communities increased 37 per cent in 1996 but rose by only 7 per cent in the next year; by contrast, Turkey's imports from the rest of the world grew 9 per cent in 1996 and by 16 per cent in 1997. (See Figure II.2.)

2.22 In 1997, Turkey's total exports, by broad product categories,[39] were comprised of agricultural products (17 per cent), textiles (10 percent), clothing (27 per cent) and other industrial products (45 per cent). At a more detailed level, main export groups included: edible fruits and nuts (5 per cent), iron and steel (8 per cent) and electrical machinery and equipment (6 per cent). As much as 95 per cent of Turkish total imports in 1997 were made up of industrial products, including 7 per cent

[27] WT/REG22/1/Add.1.
[28] WT/REG22/N/1/Add.1.
[29] WT/REG22/5.
[30] WT/REG22/7.
[31] A similar communication was circulated to Members on 28 July 1998, containing the levels of the quantitative limits in 1998 (Document WT/REG22/8).
[32] See WT/REG22/M/1 and WT/REG22/M/2 (Notes on the meetings).
[33] WT/REG22/6 and WT/REG22/6/Add.1.
[34] G/TMB/N/308 and G/TMB/N/338.
[35] See G/TMB/R/38 and G/TMB/R/43, respectively.
[36] From the point of view of the TMB, Turkey's status is mixed. While it applies restrictions on imports from certain developing countries, in line with its obligations towards the EC, its own exports to the United States and Canada remain under restraint.
[37] Based on trade statistics provided by the Government of Turkey.
[38] Throughout this section, trade figures relate to the EC-15.
[39] The broad product categories are here defined as follows: agricultural products (Turkish tariff chapters 1 to 23); textiles (50 to 60); clothing (61 to 63); other industrial products (24 to 49 and 64 to 97).

accounted for by imports of textiles and clothing. Major sub-groups among the imported industrial products included: fuels, machinery and chemicals.

Figure II.2 – Turkey's total exports and imports from the European Communities and the rest of the world, 1994-1997



2.23 By broad product categories, the evolution of Turkey's exports to the European Communities during the period 1994-1997 showed some distinct features, when compared to the corresponding developments in Turkey's exports to non-EC countries. For agricultural products, exports to non-EC countries tended to increase (albeit moderately) over practically the whole period, while exports to the European Communities showed increases only in 1995 and 1997. For textiles and clothing, the growth of exports to the European Communities was steady during the period; exports of these products to non-EC countries rose in 1995 and, after virtually stagnating in 1996, increased again in 1997. Exports of other industrial products to the European Communities, after a sharp increase in 1995, slowed down considerably, while those to non-EC countries were steadily up throughout the period, to a level in 1997 46 per cent higher than in 1994. (See Table II.1.)

Table II.1: Turkey's exports to the European Communities and to other countries, by broad product categories, 1994-1997

	Exports to the EC				**Exports to other countries**			
	1994	**1995**	**1996**	**1997**	**1994**	**1995**	**1996**	**1997**
	($ million)				($ million)			
Agricultural products	1,572	1,841	1,729	1,901	2,060	2,132	2,284	2,643
Textiles and clothing	4,150	5,353	5,665	5,933	2,285	2,967	3,031	3,886
Other industrial products	2,913	3,885	4,154	4,413	5,126	5,460	6,360	7,468
Total exports	**8,634**	**11,078**	**11,549**	**12,248**	**9,471**	**10,558**	**11,676**	**13,997**
	(Percentages)				(Percentages)			
Share of "textiles and clothing" in total exports	*48.1*	*48.3*	*49.1*	*48.4*	*24.1*	*28.1*	*26.0*	*27.7*

Source: Government of Turkey.

2.24 By broad product categories, imports into Turkey of agricultural products from the European Communities declined in both 1996 and 1997, while those from other countries continued to grow, albeit at a slower pace. Imports of textiles and clothing from the European Communities more than trebled between 1994 and 1997; those from other countries recovered from the decline in 1996, to reach in 1997 a level 75 per cent higher than in 1994. (See Table II.2.)

Table II.2: Turkey's imports from the European Communities and from other countries, by broad product categories, 1994-1997

	Imports from the EC				Imports from other countries			
	1994	**1995**	**1996**	**1997**	**1994**	**1995**	**1996**	**1997**
	($ million)				($ million)			
Agricultural products	457	1,031	959	755	810	1,591	1,903	1,809
Textiles and clothing	501	828	1,392	1,617	1,136	1,853	1,590	1,994
Other industrial products	10,172	15,216	21,002	22,713	10,409	15,403	16,995	19,912
Total imports	**10,915**	**16,861**	**23,138**	**24,870**	**12,355**	**18,847**	**20,489**	**23,715**
	(Percentages)				(Percentages)			
Share of "textiles and clothing" in total imports	*4.6*	*4.9*	*6.0*	*6.5*	*9.2*	*9.8*	*7.8*	*8.4*

Source: Government of Turkey.

C. QUANTITATIVE LIMITS IN RESPECT OF TURKEY'S IMPORTS OF CERTAIN TEXTILE AND CLOTHING PRODUCTS

1. Historical background

2.25 The gradual removal of QRs in major developed countries during the 1950s, in the wake of general liberalization efforts pursued in the GATT, brought about substantial increases in textiles and clothing imports into major developed countries originating in low-cost countries. To alleviate the difficulties caused to their producers, some importing countries convinced exporters of cotton textiles to conclude voluntary export restraint agreements. In an attempt to find a multilateral solution to the problem, in 1960 the GATT CONTRACTING PARTIES recognized the phenomenon of market disruption, thus setting the ground for selective safeguard action in the area of textile and clothing products (as a departure from the requirements of Article XIX of GATT 1947).

2.26 Thereafter, discriminatory restraints took the form of the 1961 Short-Term Arrangement Regarding International Trade in Cotton Textiles, followed in 1962 by the Long-Term Cotton Textiles Arrangement (1962-1973). The Arrangement Regarding International Trade in Textiles or Multifibre Arrangement ("MFA") entered into force in 1974, extending the coverage of the restrictions on textiles and clothing from cotton products, to include wool and man-made fibre products (and, from 1986, certain vegetable fibre products).[40]

2.27 During its 21 years of existence, from 1974 to 1994, the MFA underwent numerous operational changes and adaptations. The restraints under the MFA developed into a complex network of restrictions, bilaterally negotiated (or imposed in the case of unilateral actions) at short intervals, often every year or so. In the last year of its existence, the MFA had 44 participants, six of which (Canada, Norway, the United States and the European Communities, *plus* Austria and Finland,) applied restraints. Such restraints were used almost exclusively to protect their markets against imports of textiles and clothing from developing countries and, to a lesser extent, from former state-trading countries, also MFA members.

2.28 After more than three decades of special and increasingly complicated regimes governing international trade in textile and clothing products, seven years of negotiations during the Uruguay Round resulted in the ATC. Through the transitional process embodied in the ATC, by 1 January 2005 the extensive and complex system of bilateral restraints will come to an end and importing countries will no longer be able to discriminate between exporters in applying safeguard measures.

[40] Operationally, the MFA (like the cotton arrangements) provided rules for the imposition of restraints, either through bilateral agreements or, in cases of market disruption or threat thereof, through unilateral action. Importing countries were also required, with certain exceptions, to allow for an annual growth rate in the restraints.

2.29 Turkey became a member of the MFA, as an exporting country, in 1981. Since 1979, Turkish textile and clothing products were subjected to restraints in the EC market under the provisions of Article 60 of the Additional Protocol to the Ankara Agreement.[41]

2.30 On 31 December 1994, one day before the ATC came into force, Turkey did not maintain QRs on imports of textile and clothing products. Its exports of certain textile and clothing products were at that time under restraint in the European Communities and other countries' markets under the MFA.

2. Recent background

2.31 In accordance with Article 13 of Decision 1/95, as of 1 January 1996, the customs duties applied by Turkey to the industrial goods imported from third countries were harmonized with the CCT and the previous Mass Housing Fund levy of some 20 per cent, collected from industrial goods, was abolished. With respect to imports of textile and clothing products, the MFN tariffs applied by Turkey were thereby reduced from roughly 10 per cent for textiles and 14 per cent for clothing in 1994 (*plus* the Mass Housing Fund levy) to 9 per cent in 1996.[42]

2.32 Decision 1/95 included specific provisions with respect to trade in textiles and clothing, in particular in Article 12, supplemented by related statements by both parties. Such provisions called for Turkey's adoption of the relevant EC regulations concerning imports of textiles and clothing, in particular Council Regulation 3030/93, which provided for the bilateral agreements with supplier countries to be implemented by a set of EC quantitative limits on certain imports and for a system of import surveillance.

2.33 Two Decrees issued by Turkey's Council of Ministers laid down the basis for the alignment of Turkish commercial policy in textiles and clothing to that of the European Communities: Decree No. 95/6815 on *Surveillance and Safeguard Measures for Imports of Certain Textiles Products*, with respect to products from countries with which Turkey concluded bilateral agreements, and Decree No. 95/6816, concerning the *Surveillance and Safeguard Measures for Imports of Textile Products Originating in Certain Countries not Covered by Bilateral Agreements, Protocols and other Arrangements*, both of which were dated 30 April 1995 and published in the Turkish *Official Gazette* on 1 June 1995. Both Decrees were published with the respective Regulations for their application, under the authority of the Under-Secretariat for Foreign Trade, the Turkish responsible body for determination and calculation of the quota levels on imports of textile and clothing products.

2.34 Early in 1995, in its endeavour to complete Decision 1/95 requirements for the "completion of the Customs Union", Turkey sent proposals to the relevant countries (i.e. those whose imports of textiles and clothing were under restraint in the EC market), including India, to reach agreements for the management and distribution of quotas under a double checking system. A standard formula was proposed for calculating the levels of QRs on textile and clothing products to be introduced by Turkey vis-à-vis all third countries concerned.

2.35 On 31 July 1995, Turkey forwarded to the Indian authorities a draft Memorandum of Understanding on trade in the categories of textile and clothing products on which Turkey intended to introduce QRs. India was invited to enter into negotiations with Turkey, with the participation of the European Communities, to conclude, prior to the completion of the Customs Union, an arrangement covering trade in those products which would be similar to the one already existing between India and the European Communities. India maintained that the intended restrictions were in contravention of Turkey's multilateral obligations and declined to enter into discussions on the conditions proposed by Turkey.

[41] Notified to the Textiles Surveillance Body under Article 7 of the MFA.
[42] The average level of protection of those imports in Turkey was 37 per cent in 1993.

2.36 Agreements providing for restraints similar to those of the European Communities were negotiated by Turkey with 24 countries (WTO Members and non-Members). As provided for in Article 12 of Decision 1/95, the EC Commission cooperated with the Turkish authorities in the preparation of negotiating positions and generally participated in the negotiations themselves. As from 1 January 1996, unilateral restrictions or surveillance regimes were applied to imports originating in another 28 countries (WTO Members and non-Members), including India, with which Turkey could not reach agreement. These restrictions only affected products whose export to the European Communities was also under restraint.

2.37 The quantitative limits established by Turkey for 1996 were allocated on a quarterly basis, through Communiqués published in the *Official Gazette* on 19 December 1995, 13 March, 13 June and 25 September 1996. Quantitative limits for 1997 were allocated on a half-year basis, through Communiqués published in the *Official Gazette* on 7 December 1996 and 12 June 1997. Quantitative limits for the year 1998 were allocated through a Communiqué published in the *Official Gazette* on 18 December 1997.

3. Quantitative limits imposed on certain Turkey's imports of textile and clothing products from India

2.38 Turkey applies QRs, as of 1 January 1996, on imports from India of 19 categories of textile and clothing products. (See the Annex to this report, Appendix 1, for a list of the categories and description of products.)

2.39 In the case of India, the formula used by Turkey to fix the level of the QRs corresponded to either (i) the arithmetical average of imports into Turkey from India for the category of products during the period 1992-1994; or (ii) an amount based on total EC imports for the category of products in question multiplied by the percentage of the basket exit threshold laid down in the bilateral agreement between the European Communities and India in force in 1994, multiplied by the percentage share of Turkish GDP in EC-15 total GDP (i.e. 2.5 per cent), whichever was the higher. To this amount the corresponding growth rates in force in quota years 1994 and 1995 had been added to arrive at a level for 1996. The specific criteria retained for the calculation of the quantitative limits on imports of textile and clothing products into Turkey from India were as follows:

(i) average of Turkish imports in 1992-1994, for calculations on product categories 1, 2, 2a, 3a, and 23; and

(ii) option based on GDP, for calculations on product categories 6, 9, 20, 24 and 29 (because there were no imports into Turkey during 1992-1994); and on product categories 3, 4, 5, 7, 8, 15, 26, 27 and 39 (because its outcome was higher than the alternative calculation based on imports).

2.40 Actual quantitative limits established for 1996-1998 on textile and clothing products imported from India can be found in the Annex to this report, Appendix 2.

4. Statistical analysis of Turkey's imports of textile and clothing products under restraint

(a) Imports of 61 textile and clothing product categories under restraint

2.41 Table II.3 below is based on (i) information provided to the CRTA on the QRs applied by Turkey on imports of certain textile and clothing products from 25 WTO Members (WT/REG22/7) and (ii) import statistics made available by Turkey to the Panel. The data shown below therefore correspond to imports into Turkey of textile and clothing products in the 61 categories identified in the Annex to the document cited under (i) above as being restricted by Turkey for at least one WTO

Member in 1997.[43] The statistics in Table II.3 distinguish imports into Turkey from the EC-15 and those originating in other countries (including India).

Table II.3: Turkey's imports of 61 textile and clothing product categories under restraint, from the EC-15 and other countries, 1994-1997

Origin	Import values				Shares			
	1994	1995	1996	1997	1994	1995	1996	1997
	($ million)				(Percentages)			
EC-15	181	326	646	747	25	25	45	47
Other countries	556	960	802	853	75	75	55	53
Imports from all origins	**736**	**1,286**	**1,448**	**1,600**	**100**	**100**	**100**	**100**

Source: WT/REG22/7 and Government of Turkey.

2.42 For the 61 categories of textiles and clothing under restraint, Turkey's imports from all non-EC countries (including India) accounted for 4.5 and 5 per cent of its total imports from those countries in 1994 and 1995, respectively, (i.e. prior to the introduction of the restraints) and for less than 4 per cent of the corresponding totals in 1996 and 1997. The share of imports of those same product categories in Turkey's total imports from the EC-15 increased from 1.7 per cent in 1994 to 3 per cent in 1997.[44]

(b) Imports of the 19 textile and clothing product categories under restraint for India

2.43 Statistics provided by India show that the value of its exports to Turkey of the 19 product categories under restriction dropped in 1996 and continued to decline in the following year, albeit less markedly; in 1995, exports under those categories had virtually trebled over their level in 1994. Such fluctuations were mainly due to variations in exports of restricted textile products to Turkey. A different behaviour is observed in India's exports to Turkey of other – unrestricted – products during the period 1994-1997: their share in India's total exports of textiles and clothing to Turkey has increased throughout the period, from 32 per cent in 1994 to 87 per cent in 1997. (See Table II.4, and more detailed statistics in the Annex to this report, Appendix 3a.)

Table II.4: India's exports of textiles and clothing to Turkey, 1994-1997

		Export values				Annual change		
		1994	1995	1996	1997	95/94	96/95	97/96
		($ thousand)				(Percentages)		
Textiles	Restricted products	13,960	41,840	21,700	19,570	200	-48	-10
Clothing	Restricted products	252	396	104	297	57	-74	186
Textiles and clothing	**All products**	**20,842**	**94,636**	**69,022**	**147,271**	**354**	**-27**	**113**
	Restricted products	14,212	42,236	21,804	19,867	197	-48	-9
	Other products	6,630	52,400	47,218	127,404	690	-10	170

Source: Government of India.

2.44 Data derived from trade statistics supplied by Turkey on its imports from India of the restricted 19 product categories in 1994 to 1997 differ in magnitude or movement from those provided by India.[45] Nevertheless, they point at similar overall trends, both with respect to imports of product

[43] These product categories are the following: 1-10, 12-24, 26-29, 31-33, 35-37, 39, 46, 50, 61, 67, 68, 70, 72-74, 76-78, 83, 86, 90, 91, 97, 100, 110, 111, 117 and 118.

[44] Shares calculated on the basis of data in Tables II.2 and II.3.

[45] For the restricted product categories, differences are mainly concentrated in textiles. Since differences in trade dollar values are also found in volume terms, and most often pointing in the same direction, the impact of divergent unit values can hardly be the sole explanatory factor. Such differences may derive, not only from the usual time lags of international trade statistics, but also from computation methods. In particular, differences in the data relative to the restrictive product categories could thus be linked to the existence of

categories under restraint and with respect to imports of other textile and clothing products. (See Table II.5, and more detailed statistics in the Annex to this report, Appendix 3b.)

Table II.5: Turkey's imports of textiles and clothing from India, 1994-1997

		Import values				Annual change		
		1994	1995	1996	1997	95/94	96/95	97/96
		($ thousand)				(Percentages)		
Textiles	Restricted products	12,949	45,530	31,651	30,528	252	-30	-4
Clothing	Restricted products	133	153	352	131	15	130	-63
Textiles and clothing	**All products**	**32,457**	**104,678**	**93,992**	**137,343**	**223**	**-10**	**46**
	Restricted products	13,082	45,683	32,003	30,659	249	-30	-4
	Other products	19,375	58,995	61,989	106,684	204	5	72

Source: Government of Turkey.

2.45 In Table II.6, based on Turkish statistics, Turkey's imports of the 19 product categories under restraint for India and of other textile and clothing products are broken down by selected origins, for the 1994-1997 period. Imports from all origins into Turkey of the 19 product categories under restraint for India accounted in both 1994 and 1995 for 24 per cent of Turkey's total imports of textiles and clothing, this share declining to 19 per cent in 1997.

2.46 Turkey's imports of the 19 categories of textiles and clothing under restraint for India from all non-EC countries (including India) accounted for less than 3 per cent of Turkey's imports of all products (including textiles and clothing) from those countries in both 1994 and 1995, and for less than 2 per cent of the corresponding totals in 1996 and 1997. The share of imports of the same 19 product categories in Turkey's imports of all products (including textiles and clothing) from the EC-15 doubled from 0.5 per cent in 1994 to 1.1 per cent in 1997.[46]

Table II.6: Turkey's imports of the 19 textile and clothing product categories under restraint for India, by selected origins, 1994-1997

Origin	Import values				Shares			
	1994	1995	1996	1997	1994	1995	1996	1997
	($ million)				(Percentages)			
EC-15	56	101	237	280	14	16	37	41
Other countries	336	548	400	406	86	84	63	59
of which: India	*13*	*46*	*32*	*31*	*3*	*7*	*5*	*5*
Imports from all origins	**392**	**649**	**637**	**686**	**100**	**100**	**100**	**100**

Source: Government of Turkey.

[Parties' arguments in Section III deleted from this version]

various stages in the process of export/import licensing, which may serve as a source of the statistics. It is however to be noted that India's export data on unrestricted product categories are also largely at variance with the corresponding import data provided by Turkey.

[46] Shares calculated on the basis of data in Tables II.2 and II.6.

IV. ADDITIONAL INFORMATION

4.1 Pursuant to Article 13.2 of the DSU, the Panel sought from the European Communities certain relevant factual and legal information regarding the matters at issue. The Chairman of the Panel therefore addressed the following letter, dated 28 October 1998, to the Permanent Representative of the European Communities in Geneva:

> "I am writing with regard to the Panel on *Turkey – Restrictions on Imports of Textiles and Clothing Products*, Request by India (document WT/DS34). In this context, the Panel has had a first meeting with the parties and has asked them a series of questions in order to help clarify the facts of this dispute and the parties' related legal arguments. As you may be aware, parties in that dispute have invoked and raised arguments that relate to the Agreement between Turkey and the European Communities which these Members have notified to the WTO (document WT/REG22/1).
>
> In order to ensure that the Panel has the fullest possible understanding of this case, and pursuant to Article 13.2 of the DSU, the Panel would like to ask the European Communities for factual or legal information relevant to this case that they would wish to provide (for your information the full list of questions posed to Turkey is attached). In particular, the Panel would invite the European Communities to submit written responses to the following questions:
>
> 1. Can you provide the Panel with information with regard to negotiations which resulted in what was notified to the WTO under WT/REG22/1? Article 12 of Decision 1/95 provides that "From the date of entry into force of this Decision, Turkey shall, in relation to countries which are not members of the Community, apply provisions and implementing measures which are *substantially similar to those of the Community's commercial policy* set out in the following Regulations: (…)" Can the EC provide us with a description of all the alternatives that the EC and Turkey considered in trying to identify textile and clothing policies that would have been "substantially similar" to those of the EC. Was there any effort to look at alternative means of securing the same effect other than adopting exactly the same policy as that of the EC? Did parties consider using rules of origin to ensure that <u>only</u> Turkish exports of textile and clothing products to the EC would benefit from the preferential market access treatment to the EC market as envisaged in the customs union? Was any consideration given to the use of a provisions similar to that of Article 115 of the EC Treaty which has effectively been used amongst EC member states for many years before the completion of the EC single market?
>
> 2. How do you explain that the initial agreement between Turkey and the EC was signed in 1963 and that the transition period until now has lasted some 35 years? How would you qualify the nature of the Agreement notified as WT/REG22/1? Is it an interim agreement that should lead to a customs union by 2005 or would you qualify this agreement implementing a completed customs union?
>
> 3. Do all textile and clothing products circulate freely between EC territory and Turkey's territory? If so, since when? What about other industrial and agricultural goods? What legal means are used to ensure an effective EC border control of these goods under restrictions *vis-à-vis* Turkey?
>
> 4. How does the EC administer and control the respect of the overall EC/India and Turkey/India textile and clothing quotas at EC-Turkey's borders?

5. The agreement between the EC and Turkey provides that the parties maintain antidumping, countervailing and safeguard regimes applicable to imports of textile and clothing products from each other? Have parties used such measures against imports from each other?"

4.2 The EC Representative in Geneva replied substantively as follows:

"In reply to your letter of 28 October 1998, I would like to answer the questions that the Panel has asked of the European Communities pursuant to Article 13.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Before doing so, I would like to clarify that it is not our intention to participate in any other way in this procedure, since India has chosen to direct its complain exclusively against Turkey in spite of the fact that it was clearly indicated to India that the measures at issue were taken in the framework of the formation of the EC/Turkey customs union. The European Communities has taken good note of this deliberate choice of India and our contribution to the debate before this Panel should therefore not be treated as that of a party or a third party to its proceedings.

We are of course pleased to answer the specific questions raised by the Panel under Article 13.2 DSU, but we do not believe it would be appropriate for us, under this provision, to enter into a broader discussion of the factual or legal elements that may be relevant for the resolution of this dispute since this could be confused with the pleading of a case before the Panel. We will therefore stick to the specific questions asked by the Panel and provide the requested factual information to the Panel as objectively as we can."

4.3 The Annex to the EC letter contained replies to the specific questions asked by the Panel, as follows:

Reply to question 1

"The objective from the outset of the negotiations was to include textile and clothing products within the customs union. Turkish exports to the European Union of textiles and clothing amounted to approximately 40 per cent of all Turkish industrial exports to the European Union and it was therefore considered essential that these products formed part of the customs union and hence be in free circulation within the customs union.

The use of rules of origin benefiting only Turkish exports would have been an exception to the principle of free circulation within the customs union and would have required the maintenance of customs and border checks within the customs union designed to ensure that Turkey would not become a transit point of goods in circumvention of the Community's quota system arising from Turkey's adoption of the Community's rates of tariffs, etc.

Article 115 of the EC Treaty lost a considerable degree of relevance following the completion of the EC single market. As such, no serious consideration was given to the use of provisions akin to those of Article 115 of the EC Treaty but it appears very doubtful whether such measures would have been workable or proportionate within the customs union."

Reply to question 2

"The core of the Ankara Agreement signed in 1963 is the establishment of a Customs Union in three stages. The Additional Protocol signed in 1970 and which entered into force in 1973 defined the modalities for implementing the transitional stage which was supposed to end after 22 years (in 1995). In accordance with the planned calendar, the final stage of the Customs Union entered into force on 31 December 1995 (with the adoption of Decision 1/95 of the EC-Turkey Association Council). Decision 1/95 defines the rules which ensure the proper functioning of the Customs Union. Despite the fact that Turkey benefits from certain adaptation periods (until 2001), in some areas such as preferential commercial policy, protection of the intellectual property rights etc, we consider that the customs union has already reached its final phase with regard to the requirement of Article XXIV:8(a) of the GATT 1994. Precise data concerning the trade coverage and other details concerning the functioning of the customs union were submitted to the WTO Committee for Regional Trade Agreements and were also discussed in the recent Trade Policy Review of Turkey. It is worth noting that many provisions in the Customs Union Decision go beyond the definition of a Customs Union under Article XXIV of the GATT 1994."

Reply to question 3

"Industrial products including textiles products have been in free circulation between the EU and Turkey since the entry into force of the customs union on 31 December 1995. Shipment of textiles and clothing requires an ATR document indicating that the goods are in free circulation. No indication of origin is required for goods in free circulation. There is thus no specific EC border control in respect of goods for which Turkey has quantitative restrictions, the Turkish authorities having effected such control on entry of the goods into free circulation in Turkey.

Agricultural products will be included in the customs union following an adaptation period and for the time being enjoy preferential treatment subject to proof of origin including EUR-1 certificates and invoice declarations to enable the identification of the products."

Reply to question 4

"Turkey has adopted all the European Communities's relevant regulations concerning imports of textiles (e.g. Regulation EEC/3030/93, Regulation EEC/517/94 and Regulation EEC/3951/92). Thus the basic administrative principles are the same in both parts of the customs union. The Turkish authorities have observer status in the "management" committee chaired by the Commission set up under the relevant regulations. In addition, the Turkish authorities maintain an inter-departmental committee in order to take any necessary measures to ensure consistency between the EU and Turkey. So far as the management by the Community's integrated system of licensing is concerned, the Turkish authorities have full access to the European Community's computerised licensing system (*Système Integré de Gestion de Licences* or SIGL) and there is a regular exchange of information at administrative level. Thus, there is no administration or control of the overall EC/India and Turkey/India textile and clothing quotas at the EC/Turkey's borders. Once goods enter the customs union pursuant to the parties' respective systems, they are in free circulation and no further controls are necessary."

Reply to question 5

"The Customs Union Decision maintains the possibility for each party to apply trade defense instruments, including anti-dumping measures to the products originating from

the other party. The Community imposed definitive anti-dumping measures on imports of polyester fibres from Turkey in June 1996. Provisional anti-dumping duties were imposed on imports of unbleached cotton fabrics from Turkey in April 1998. However, these expired in October without the imposition of definitive measures."

V. CLAIMS OF THE PARTIES

5.1 **India** requested the Panel to rule that the import restrictions which Turkey had imposed since 1 January 1996 in the context of its trade agreement with the European Communities on textiles and clothing products from India:

(i) were inconsistent with Articles XI and XIII of GATT and Article 2.4 of the ATC and were not justified by Article XXIV of GATT, and;

(ii) impaired benefits accruing to India under Articles XI and XIII of GATT and Article 2.4 of ATC.

5.2 India requested the Panel to recommend that Turkey bring its restrictions into conformity with its obligations under GATT and the ATC, basing its rulings and recommendations on the following findings:

(i) Article XXIV:5 of GATT did not permit Members forming a customs union to impose QRs on imports from third Members;

(ii) to the extent that there was a conflict between the provisions of Article 2.4 of the ATC (which permitted the European Communities but not Turkey to impose restrictions on imports of textiles and clothing products from India) and the provisions of Article XXIV:8 of GATT (which required Members forming a customs union to apply substantially the same restrictions on imports from third Members), the provisions of Article 2.4 of the ATC prevailed; and

(iii) Turkey had not rebutted the presumption that its restrictions on imports of textiles and clothing impaired benefits accruing to India under Articles XI and XIII of GATT and Article 2.4 of the ATC.

5.3 Subsidiarily, if the Panel were to accept the argument by Turkey that Article XXIV of GATT provided a waiver from the obligations under Articles XI and XIII of GATT and Article 2.4 of the ATC for measures necessary for the purposes of a customs union meeting the standards of Article XXIV, India requested the Panel to base its rulings on the following findings:

(i) for the purposes of the EC-Turkey trade agreement, an immediate harmonization of import restrictions on textiles and clothing products was unnecessary, because (a) the European Communities and Turkey were applying different import duties and regulations in respect of many sectors, policy instruments and trading partners and (b) in all areas in which their import duties or regulations differ, the European Communities and Turkey were able to implement border controls ensuring that only products originating in the territories of the European Communities and Turkey benefit from the preferential treatment under the EC-Turkey trade agreement; and

(ii) the type of agreement concluded between the European Communities and Turkey, that is an agreement providing for the establishment of a customs union at a future date, was not governed by the provisions of Article XXIV of GATT on completed

customs unions and Turkey could therefore not invoke those provisions as justification for the restrictions.

5.4 **Turkey** requested the Panel to find that:

(i) India had not sufficiently exhausted the avenues of Article XXII of GATT, Article 4 of the DSU and Article XXIV of GATT in order to bring about an amicable settlement and adjustment;

(ii) India had not complied with the procedural requirements of the ATC;

(iii) the Panel could not substitute itself for the CRTA which had not yet completed its examination of the Turkey-EC customs union;

(iv) since Turkey argued that the measures forming the object of the complaint were a requirement of the Turkey-EC customs union, the Panel could not rule on their legality in the absence of agreed conclusions on the consistency of the Turkey-EC customs union with the obligations of Turkey and the European Communities under GATT;

(v) Turkey had not acted inconsistently with its rights and obligations under GATT and the ATC; and

(vi) as required under Article 3.6 of the DSU, the parties to the dispute should seek a negotiated solution to the matter, taking into account India's commercial interests and Turkey's obligations arising from the Turkey-EC customs union.

[Parties' arguments in Sections VI and VII deleted from this version]

VIII. INTERIM REVIEW[235]

8.1 On 12 March 1999, Turkey and India requested the Panel to review, in accordance with Article 15.2 of the DSU, certain aspects of the interim report that had been transmitted to the parties on 3 March 1999. No request for a further meeting with the Panel was received from either party.

8.2 We have reviewed the arguments and suggestions presented by the parties, and finalized our report, taking into account those comments by the parties which we considered justified. In this context we have made small changes, including those to paragraphs 9.148, 9.151 and 9.191. In addition, we have made other minor linguistic and typographical corrections.

8.3 Turkey submits that, contrary to the Panel's view, it never claimed that the measures which form the object of India's complaint had been taken by another entity than itself. Turkey therefore requests the Panel to modify paragraphs 9.33 to 9.43 of the Interim Panel Report. We note that in its very first submission Turkey wrote: "Given this situation, the Panel should reject India's claim on the basis that India's choice of the respondent in this dispute is incorrect. … The situation here is in fact comparable with a situation where the complainant directs its complaint against country A for a measure taken by country B. … In Turkey's view the same rule must apply in the present case … There is no basis in fact or in law, for the assumption … that Turkey is individually responsible for acts that are collectively taken by the members of the Turkey-EC customs union through the institutions created by the custom union agreement."[236] As we mention in paragraph 9.33 we have examined all alternatives possible to cover Turkey's argument that the measure had been taken by an entity other than Turkey. We were of the view that there were only two other alternatives: the measures could have been those of the Turkey-EC customs union or those of the European Communities. We find that the measures at issue were clearly Turkish measures. We then proceed further (paragraph 9.38) to examine whether the measures at issue could be measures of the Turkey-EC customs union or measures of the European Communities and we find that we have no alternative but to conclude that the measures at issue are only Turkish measures (paragraph 9.40). Having noted that the Turkey-EC customs union is not a Member of the WTO, we also examine the rules of state responsibility in public international law public, and find that in the absence of a specific treaty provision (in the DSU as drafted) individual states remain responsible for any wrongful act committed by their common organ. We see no reason to change these findings. We reach the conclusion that the measures under examination were those of Turkey itself and Turkey alone, and only Turkey could therefore be defendant to this dispute, especially as the Panel was not assessing the WTO compatibility of the Turkey-EC customs union.

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[235] Pursuant to Article 15.3 of the DSU, the findings of the panel report shall include a discussion of the arguments made at the interim review stage. Consequently the following section entitled Interim Review is part of the Findings of this Panel report.

[236] See para. 3.33 above which refers to page 14 of Turkey's request for preliminary ruling: " Given this situation, the Panel should reject India's claim on the basis that India's choice of the respondent in this dispute is incorrect. In order to pursue its claims properly, India should have *chosen both parties to the Turkey-EC customs union* as respondents, not just one of them. The situation here is in fact comparable with a situation where the *complainant directs its complaint against country A for a measure taken by country B.* In such a situation, the complaint would have to be turned down for lack of standing due to the obvious absence of international liability. In Turkey's view, the same rule must apply in the present case, since Turkey alone is not internationally answerable for acts adopted by the *institutions created by the agreement creating the Turkey-EC customs union*. There is no basis, in fact or in law, for the assumption - on which however India's complaint appears to be founded - that Turkey is individually responsible for acts that are collectively taken by the members of the Turkey-EC customs union through the institutions created by the customs union agreement." (emphasis added).

8.4 Turkey also reiterates that its position is that such measures are the basic requirements of the customs union into which it has entered with the European Communities, and as long as the European Communities itself maintains similar measures with their imports of the same products from a number of countries. We refer to our considerations and findings in paragraphs 9.140 to 9.182. We find that there are WTO compatible alternatives for Turkey to form a customs union or an interim agreement leading to a customs union with the European Communities or others. We also find that even if the Turkey-EC customs union agreement did require Turkey to adopt all EC trade policies, an issue that we do not have to address, we consider that such a requirement would not be sufficient to exempt Turkey from its obligations under the WTO Agreement.

8.5 India requests the Panel to review its interpretation of Article XXIV:8(a)(ii) because, according to India it is not based on the language of this provision. The Panel finds that the phrase "substantially the same duties and other regulations of commerce" does not impose an absolute standard and that not "all" the constituents' duties and not all the constituent members' regulations of commerce shall be the same. We find that this standard leaves an element of flexibility to the constituent members. India argues that when the Panel finds that "a situation where the constituent members have comparable trade regulations having similar effects with respect to trade with third countries, would generally meet the requirements of Article XXIV:8(a)(ii)" the Panel is effectively turning the requirement to apply "substantially the same regulations" into "the same regulations on substantially all the trade". We are of the view that the wording of Article XXIV:8(a)(ii) makes it clear that the term "substantially the same" qualifies both the "duties" and the "other regulations of commerce". In other words, we consider that the ordinary meaning of the term "substantially the same … regulations of commerce" in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components; we also consider that in many cases, when constituent members adopt comparable trade regulations having a similar effect, they will be in compliance with the provisions of sub-paragraph 8(a)(ii) whereby constituent members are required to adopt "substantially the same … regulations of commerce". We also consider that the greater the degree of policy divergence, the lower the flexibility as to the areas in which this can occur; and vice-versa. We find as well that this degree of flexibility does not provide Turkey with the right to impose otherwise WTO incompatible quantitative restrictions. On the contrary, we find that Turkey's conditional right to form a regional trade agreement compatible with Article XXIV, without violating Articles XI and XIII and Article 2.4 of the ATC, is confirmed by the flexibility offered by the wording of Article XXIV.

8.6 Finally, in response to India's claim, in its request for review of the interim report, that the Panel should not reach any conclusion on the alternatives open to Turkey when forming a "fully fledged" customs union since Turkey could always have claimed before the CRTA that its customs agreement with the European Communities was not a complete customs union, we would like to reiterate[237] that we are not assessing the nature of the regional trade agreement between the EC and Turkey, nor its stage of integration. In this report, we simply respond to Turkey's defense based on Article XXIV:8(a) and find that even if the Turkey-EC customs union is to be considered a complete customs union as alleged by Turkey, in the present dispute there are alternatives open to Turkey to form a customs union where measures adopted by constituent members would not violate other provisions of the WTO. In the context of an interim agreement leading to a custom union, Turkey would have further flexibility, since compliance with Article XXIV:8(a) is required only at the end of the transitional period leading to the formation of a customs union.

[237] See our statement to this effect in footnotes 241 and 285 hereafter.

IX. FINDINGS

A. PRELIMINARY RULINGS RECALLED

9.1 On 14 August 1998 Turkey requested the Panel to make three preliminary rulings *in limine litis*. On 28 August 1998 we invited India and the third parties to comment in writing on Turkey's request. The Panel held a meeting with the parties only on 19 September 1998 to consider the request and on 25 September 1998, the Panel issued its rulings on the issues raised by Turkey. In its first submission, Turkey also requested the Panel to reject India's complaint on the grounds that the consultations preceding the request for establishment of a panel were defective. In this section, as foreshadowed in our rulings of 25 September 1998, we recall and expand on those rulings rejecting Turkey's first three preliminary objections and then analyze Turkey's claim concerning the inadequacy of the consultations.

1. Article 6.2 of the DSU

9.2 Firstly, in its request for preliminary rulings, Turkey claimed that India's request for the establishment of a panel did not respect the specificity requirements of Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU") in that it failed to identify specifically the measures at issue and the products subject to those measures and that its basic rights of defense and due process were impaired.[238]

9.3 On 25 September 1998 the Panel issued the following ruling on this point:

> "In assessing Turkey's claim that India's request for the establishment of a panel was not sufficiently precise, we consider that it is important that a panel request, which defines the terms of reference, meets this criterion so as to inform the defending party and potential third parties both of the measures at issue, including the products they cover, and of the legal basis of the complaint. This is necessary to ensure due process and the ability of the defendant to defend itself.
>
> We have examined India's request for establishment of the panel (WT/DS34/2). While not identified by place and date of publication, the measures are specified by type (i.e. quantitative restrictions), by effective date of entry into force (1 January 1996) and by product coverage (textiles and clothing, a well defined class of products in the WTO).[239] In our view the panel request meets the minimum requirements of specificity of Article 6.2 of the DSU as interpreted by the Appellate Body in Bananas III and LAN.[240] Even if

[238] Turkey's arguments are further detailed in paras. 3.6 to 3.8, 3.13 to 3.15, 3.19 and 3.21, India's arguments are in paras. 3.9 to 3.12, 3.16 to 3.18, 3.20, 3.22 and 3.23 and the third parties' arguments are in paras. 3.24 and 3.25 above.

[239] [Footnote original]We note also that during the period of consultations Turkey and the EC jointly sent notifications and other communications to the CRTA (WT/REG22/5, WT/REG22/7) and, pursuant to Article 3.3 of the ATC, to the TMB (G/TMB/N/308), in which Turkey lists the new textile import restrictions it adopted following the conclusion of the agreement between the EC and Turkey. In addition, during the meetings of the CRTA (WT/REG22/M1 and M2), and the TMB (meetings of 11-12 December 1997), which preceded the request for the establishment of a panel, the parties discussed the issues relating to this dispute. This confirms to us that Turkey is sufficiently informed of the measures challenged by India in this dispute and the products covered by the measures at issue. Moreover, we note that no comments were made on this issue at any of the meetings of the DSB where the present dispute was discussed (WT/DSB/M13, 15, 42 and 43) and that no Member questioned the scope of the terms of reference in this regard.

[240] Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R ("*EC-Bananas III*") and *European Communities – Customs Classification of Certain Equipment* adopted on 22 June 1998, WT/DS62, 67, 68/AB/R, ("*EC - Computer Equipment*" or "*EC – LAN*").

> we agree that India's request could have been more detailed, we conclude that Turkey is sufficiently informed of the measures at issue and the products they cover, and that our terms of reference are sufficiently clear. Consequently, we reject Turkey's claim that the Panel should refuse to accept India's request *in limine litis* for its failure to respect the basic requirements of Article 6.2 of the DSU."

2. Necessity of Participation of the European Communities

9.4 Secondly, in its request for preliminary rulings, Turkey claimed that the Panel should dismiss India's claims because they are directed only against Turkey while the measures at issue were taken pursuant to a regional trade agreement between Turkey and the European Communities[241], and according to Turkey, the European Communities should also have been a party to the dispute.[242]

9.5 On 25 September 1998, the Panel issued the following ruling on this point:

> "Turkey states that the measures at issue were introduced in the context of the trade agreement concluded with the EC, which Turkey and the EC notified to the CRTA as a customs union (WT/REG/22/1). The Panel will obviously have to assess whether such import restrictions introduced by Turkey in the context of that trade agreement are compatible with the WTO Agreement and its related instruments.
>
> We note that the EC has decided not to participate as a third party in this dispute. We note that the DSU does not allow for any other form of participation in favour of a Member, not party to the dispute, other than the third-party rights under Article 10 of the DSU, which, we also note, have been extended in previous cases to meet the specific circumstances of the case. In the absence of any relevant provision in the DSU, in light of international practice[243], and noting the position of the EC to this point, we consider that we do not have the authority to direct that a WTO Member be made third-party or that it otherwise participate throughout the panel process.
>
> We can find no provision in the DSU that would prevent India from initiating a panel procedure against measures imposed by Turkey in these circumstances. Moreover, we are not aware of any general rule applicable to cases in which disputed measures arise from a bilateral or multilateral agreement, that would prohibit a Member from initiating a dispute settlement procedure against one party to such agreement. Accordingly, we do not accept Turkey's claim that India's request should be rejected at this stage of the panel process because India's request was not directed against all parties to the trade agreement which, according to Turkey, forms the basis for the introduction of the measures at issue. This is without prejudice to our decision whether the said measures are WTO compatible. We would like also to emphasise that we shall ensure due process throughout these panel proceedings and that in this context we are aware of the means existing under the DSU for panels to obtain technical advice and information from any relevant source."

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[241] The official title of that agreement is the Customs Union between Turkey and the Community (see WT/REG22/1). The European Communities is a WTO Member. In this Panel report we shall refer to the Turkey-EC customs union without any assessment of the WTO nature of this Article XXIV type of arrangement.

[242] Turkey's arguments are further detailed in paras. 3.26, 3.28, 3.30, 3.33 and 3.34, India's arguments are in paras. 3.27, 3.29, 3.31, 3.32, and 3.35 to 3.37 and the third parties' arguments are in paras. 3.38 to 3.40 above.

[243] [Footnote original]The Panel examined relevant principles of international law, including the practice of the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua* case ([1984], ICJ Reports, pp.430-431) and the *Phosphate Lands in Nauru* case([1992], ICJ Reports, p.259-262) cases (preliminary objections).

9.6 In terms of Article XXIII of the 1994 General Agreement on Tariffs and Trade ("GATT") and the DSU any Member may initiate a dispute settlement procedure against any other Member if it considers that its rights have been nullified or impaired by this other Member. We note that there is no special provision in the DSU for dispute settlement proceedings involving customs unions or any other type of regional trade agreements. We note also that the Turkey-EC customs union itself is not a Member of the WTO and therefore cannot be the subject of any DSU procedure, as it lacks WTO legal personality.[244]

9.7 We also recall that in the *EC - Bananas III*[245] dispute the Panel and the Appellate Body addressed the compatibility of EC measures adopted pursuant to the Lomé Convention with the WTO Agreement, notwithstanding the EC claim that it was required to adopt the measures pursuant to that Convention and notwithstanding the fact that its Lomé partners were not parties to the dispute.

9.8 It is relevant to recall the case law of the International Court of Justice (ICJ). The ICJ has not declined to exercise jurisdiction in cases similar to this one. For example in the ICJ *Military and Paramilitary Activities in and Against Nicaragua* case, the US argued that the application brought by Nicaragua was inadmissible because Nicaragua had not also impleaded third countries whose participation was essential. The ICJ dismissed this argument, saying:

> "There is no doubt that in appropriate circumstances the Court will decline, …, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision". … Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State… Other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. *There is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties" rule* of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings."[246]

9.9 The ICJ *Phosphate Lands in Nauru* case concerned a proceeding initiated by Nauru against Australia alone in respect of the administration of a fund in favour of Nauru. The case was based on an international treaty whereby Australia, New Zealand and the United Kingdom were co-administrators of the fund. The ICJ exercised jurisdiction despite the absence of the two other administering authorities since the legal interest of those third countries (which could be affected by the result of the dispute) did not form the subject-matter of the dispute which was the legal relationship between Australia and Nauru. The ICJ stated:

> "In the present case, a finding… regarding the existence or the content of responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be

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[244] We recall that in its Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* adopted on 16 January 1998, WT/DS50/AB/R ("*India – Patent*"), the Appellate Body stated: "Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. (…) Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provision of the DSU", para. 92.

[245] Appellate Body Report on *EC - Bananas III*, , paras. 164 -188.

[246] *Military and Paramilitary Activities in and Against Nicaragua* [1984] at 431.

> needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction."[247]

In its separate opinion, Judge Shahabuddeen added:

> "To return to the question under examination, as to whether Australia may be sued alone, I consider that an affirmative answer is required for three reasons. First, the obligations of the three Governments under the Trusteeship Agreement were joint and several. Second, assuming that the obligations were joint, this did not by itself prevent Australia from being sued alone. Third, a possible judgment against Australia will not amount to a judicial determination of responsibility of New Zealand and the United Kingdom."[248]

9.10 The practice of the ICJ indicates that if a decision between the parties to the case can be reached without an examination of the position of the third state (i.e. in the WTO context, a Member) the ICJ will exercise its jurisdiction as between the parties. In the present dispute, there are no claims against the European Communities before us that would need to be determined in order for the Panel to assess the compatibility of the Turkish measures with the WTO Agreement.[249]

9.11 It should be noted that there is no WTO concept of "essential parties". Based on our terms of reference and the fact that we have decided (as further discussed hereafter) not to examine the GATT/WTO compatibility of the Turkey-EC customs union, we consider that the European Communities was not an essential party to this dispute; the European Communities, had it so wished, could have availed itself of the provisions of the DSU, which we note have been interpreted with a degree of flexibility by previous panels[250], in order to represent its interests. We recall in this context that Panel and Appellate Body reports are binding on the parties only.[251]

9.12 Under WTO rules, the European Communities and Turkey are Members with equal and independent rights and obligations. For Turkey, it is not at all inconceivable that it adopted the measures in question in order to have its own policy coincide with that of the European Communities. However, in doing so, it should have been aware, in respect of the measures it has chosen, that its circumstances were different from those of the European Communities in relation to the Agreement on Textiles and Clothing ("ATC") and thus could reasonably have been anticipated to give rise to responses which focussed on that distinction.

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[247] *Certain Phosphate Lands in Nauru* ("*Nauru*"), [1992] ICJ Reports, 240 (June 26); p. 261-262.

[248] *Nauru* case; Separate Opinion of Judge Shahabuddeen, at 271, italics added. A separate opinion is not a dissenting opinion but reflects the additional discussion of one of the Judge of the ICJ.

[249] We are aware that the ICJ has declined to exercise its jurisdiction when it concluded that the real "subject-matter of the dispute" is the legal position of a third country which is not before it. In the *Monetary Gold Removed from Rome in 1943* case, Italy brought a case against the United Kingdom claiming it had priority over both the British and Albanian claims to the gold in question. However, Albania took no part in the dispute. The ICJ declined to exercise its jurisdiction because it would have been necessary to decide upon the international responsibility of Albania - the very subject-matter of the dispute - without her consent. (See [1954] ICJ Reports, p. 32). In the *Case of East Timor*, Portugal complained against Australia concerning a treaty between Australia and Indonesia for the delimitation of the continental shelf between Australia and Indonesian-occupied East Timor. Indonesia had not been impleaded by Portugal and had not applied for permission to intervene as a third party. The ICJ declined to exercise its jurisdiction because it would have had to rule, as a prerequisite, on the lawfulness of the possession of East Timor by Indonesia, which was not present in the case. (See [1995] ICJ Reports, pp. 90-106)

[250] See for instance the Panel Reports on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/Rs ("*EC - Bananas III*"), paras. 7.4-7.9 and on *European Communities – Measures Concerning Meat and Meat Products (EC - Hormones*), adopted on 13 February 1998, WT/DS26, 48/R, paras. 8.12-8.15.

[251] Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, adopted on 1 November 1996 ("*Japan – Alcoholic Beverages*"), p. 13.

9.13 In the context of our concern for due process and pursuant to Article 13 of the DSU, we put a series of questions to the European Communities and invited it to comment on any matter it considered relevant. The European Communities, while responding to the specific questions, did not avail itself of the latter opportunity.[252]

3. The Need to Exhaust TMB Procedures

9.14 Thirdly, in its request for preliminary rulings, Turkey claimed that India was required to exhaust the special dispute settlement procedures under the ATC first before it could refer the matter to the DSB and that consequently, this Panel had not been established properly.[253]

9.15 On 25 September 1998, the Panel issued the following ruling on this point:

> "We note that the special and additional dispute settlement procedures before the Textile Monitoring Body (TMB) apply when measures are imposed pursuant to the ATC and that Article 8.1 of the ATC provides that the TMB is established to examine measures taken under the ATC and their conformity therewith.
>
> We note that Turkey, in its own notifications to the Committee on Regional Trade Agreements (CRTA) and to the TMB (pursuant to Article 3.3 of the ATC), stated that the import restrictions at issue were justified and had been introduced pursuant to its agreement with the EC and in conformity with Article XXIV of GATT 1994. For instance, in its 7 November 1997 notification to the TMB (G/TMB/N/308), Turkey wrote that it was notifying the TMB of the "details of certain quantitative limits introduced by Turkey in respect of imports of certain textile and clothing products into Turkey from certain WTO Members, and necessary to give effect to the Customs Union in conformity with the provisions of Article XXIV of GATT 1994". We also note that the notification to the TMB, for its information, was made pursuant to Article 3.3 of the ATC, which refers to "any new restrictions (…) taken under any GATT 1994 provision".
>
> In our view India's claim under Article 2.4 of the ATC is a reflection of its claims under GATT 1994. This is to say that India does not claim a violation of the ATC except in so far as the ATC, in Article 2.4, prohibits the imposition of restrictions inconsistent with GATT 1994. Article 2.4 of the ATC provides that all new import restrictions on textile and clothing products are prohibited, except if justified under the ATC or under GATT 1994.
>
> As noted above, Turkey itself has indicated that its new restrictions on textile and clothing products are justified under and have been imposed pursuant to Article XXIV of GATT 1994, and as such can be exempted from the general prohibition against new restrictions mentioned in Article 2.4 of the ATC.
>
> Since the measures at issue are alleged to have been imposed pursuant to GATT 1994 (and India's claim relates to Turkey's alleged justification pursuant to GATT 1994), we reject Turkey's *in limine litis* request that the TMB should have been seized of the matter under Article 8 of the ATC prior to its referral to the DSB. This ruling is without prejudice to our eventual decision on whether the said measures at issue constitute a WTO compatible justification pursuant to Article 2.4 of the ATC and other WTO rules."

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[252] For further information on the details of this procedure and the Panel's invitation to the European Communities, see paras. 4.1 to 4.3 above.

[253] Turkey's arguments are further detailed in paras. 3.41 to 3.44 , India's arguments are in paras. 3.45 to 3.49 and the third parties' arguments are in para. 3.50 above.

9.16 In our view, the determination of this case depends on the Panel's assessment of Turkey's defense that its measures were taken in the context of its customs union with the European Communities, and so for Turkey, were authorized by Article XXIV of GATT. We consider that this is not a matter for the TMB, whose jurisdiction is limited by Article 8.1 of the ATC to the examination of measures taken under the ATC and their conformity therewith. (We address further the relationship between the role of the TMB and that of panels in paragraphs 9.82 to 9.85).

9.17 In reconsidering our rulings of 25 September 1998, we find no substantive basis to call them into question.

4. Inadequacy of the Consultations

9.18 Turkey also raised a fourth procedural exception for which it did not request an immediate *in limine litis* ruling by the Panel. In its first submission, Turkey asserts that India has not sufficiently exhausted the consultations requirements of Article XXII of GATT 1994 and Article 4 of the DSU in order to bring about a mutually acceptable solution to the dispute.[254]

9.19 For Turkey, the principle of procedural economy as well as the spirit of the WTO dispute settlement mechanism require that panel procedures be considered as *ultima ratio* means to solve conflicts between Members for which they are unable to find a negotiated solution. For Turkey, India failed to comply with this principle and the spirit of the DSU. While Turkey offered to enter into negotiations on the issues in dispute with India, India refused to enter into such negotiations, in as much as it refused to deal with the issues in dispute in consultations under Article XXII of GATT.

9.20 India responded[255] that on 21 March 1996, it requested formal consultations with Turkey under the DSU regarding the matter of the unilateral imposition of quantitative restrictions by Turkey on imports of a broad range of textile and clothing products from India as from I January 1996. This request was accepted by Turkey on 1 April 1996. In a letter confirming this, Turkey stated that it had agreed to enter into consultations "on textiles and clothing restrictions applied by Turkey" at a mutually acceptable time and venue. Further, Turkey considered that "the European Communities as our partner in the customs union should also be represented in the consultations". On 4 April 1996, India proposed that consultations should be held in Geneva on 18-19 April 1996, and stated that India could not accept Turkey's view that the European Communities should participate in these consultations since, under GATT and WTO practice, consultations under Article XXIII:1 of GATT 1994 were bilateral in nature. India requested that Turkey confirm the venue and time proposed for consultations to be held without the participation of the European Communities. On 16 April 1996, Turkey replied that "the Turkish authorities would be prepared to hold with their Indian counterparts the consultations requested by India ... on the understanding that representatives of the European Communities would also be participating. This meeting could be held on 18 April 1996 from 3:30 p.m. to 6:00 p.m. as suggested by India". India stated that despite this very short notice, it ensured the presence of its delegation at the consultations but the delegation of Turkey did not attend the scheduled meeting nor did it provide an explanation for its absence. India submitted that it sent another communication to Turkey, on 18 April 1996, proposing to enter into bilateral consultations on 19 April 1996. When India endeavoured to confirm the date and venue of the consultations, it was informed that Turkey was not in a position to enter into these consultations without the participation of the European Communities, and that this would be conveyed to India in writing by close-of-business on 19 April 1996. India submits that the communication from Turkey, dated 19 April 1996, was received on 22 April 1996.

9.21 India argued that its recourse to the provisions of GATT 1994 and the DSU regarding consultations was frustrated. Its request for bilateral consultations had been made in good faith, in

[254] Turkey's arguments are further detailed in paras. 6.1, 6.2, 6.5 and 6.6 above.
[255] India's arguments are further detailed in paras. 6.3, 6.4, 6.7 to 6.10 above.

full transparency and with a view to reaching a mutually satisfactory solution. For India, since Turkey did not enter into these consultations within the 30-day period provided for in Article 4.3 of the DSU, Turkey violated Articles 3 and 4 of the DSU, and in particular contravened the provisions of Article 3.10 of the DSU, and therefore the dispute remained unresolved.[256]

9.22 Firstly, we note that in *EC – Bananas III* the panel concluded that the private nature of the bilateral consultations means that panels are normally not in a position to evaluate how the consultations process functions, but could only determine whether consultations, if required, did in fact take place.[257] In this case, the parties never consulted, as Turkey declined to do so without the presence of the European Communities.

9.23 In *Korea – Taxes on Alcoholic Beverages* the panel concluded that:

> "… the WTO jurisprudence so far has not recognized any concept of "adequacy" of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. … We do not wish to imply that we consider consultations unimportant. Quite the contrary, consultations are a critical and integral part of the DSU. But, we have no mandate to investigate the adequacy of the consultation process that took place between the parties and we decline to do so in the present case."[258]

9.24 We concur with this statement. We note also that our terms of reference (our mandate) are determined, not with reference to the request for consultations, or the content of the consultations, but only with reference to the request for the establishment of a panel.[259] Consultations are a crucial and integral part of the DSU and are intended to facilitate a mutually satisfactory settlement of the dispute, consistent with Article 3.7 of the DSU. However, the only function we have as a panel in relation to Turkey's procedural concerns is to ascertain whether consultations were properly requested, in terms of the DSU, that the complainant was ready to consult with the defendant and that the 60 day period has lapsed before the establishment of a panel was requested by the complainant. We consider that India complied with these procedural requirements and therefore we find it necessary to reject Turkey's claim.

B. MAIN CLAIMS OF THE PARTIES

9.25 India claims that the quantitative restrictions imposed by Turkey on imports of textile and clothing products from India since 1 January 1996 are inconsistent with Articles XI:l and XIII of GATT and with Article 2.4 of the ATC. India also claims that Article XXIV does not constitute a defense to such violations.

9.26 Turkey, in response, claims that the restrictions it applies on imports of nineteen categories of certain textile and clothing products from India are justified under Article XXIV of GATT, as these measures were adopted pursuant to (and on the occasion of the formation of) its customs union with the European Communities.

9.27 Turkey considers that Article XXIV of GATT recognizes that WTO Members have a right to form customs unions and that this right provides such a regional trade agreement with a "shield" from

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[256] India added that the DSB was informed of this situation on 24 April 1996; WT/DSB/M/15, para. 3.

[257] Panel Report on *EC - Bananas III*, paras. 7.18-7.19 (not appealed).

[258] Panel Report on *Korea – Taxes on Alcoholic Beverages*, upheld by the Appellate Body, adopted on 17 February 1999, WT/DS75, 84/R ("*Korea – Alcoholic Beverages*"), paras. 10.19, (not appealed).

[259] See for instance the Appellate Body Report on *EC - Bananas III*, paras. 139-144; the Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/AB/R ("*Brazil – Desiccated Coconut*"), page 22; and the Appellate Body Report on *India – Patent*, paras. 86-96.

all other WTO obligations. In the context of invoking Article XXIV of GATT, Turkey argues that its customs union with the European Communities is consistent with Article XXIV in that 1) the new regime is overall less restrictive than its previous one, 2) the restrictions challenged by India are of a temporary nature, 3) the customs union has liberalized Turkey's trade with third countries, and 4) the customs union will be deepened further including in the area of trade legislation. In particular with reference to import restrictions, Turkey argues that 1) Article XXIV:5 provides a derogation from other GATT provisions in the case of the formation of a customs union, and 2) GATT does not prohibit all new restrictions which may be required by customs unions.

9.28 In addition, Turkey argues 1) that these measures constitute a "requirement" (by the European Communities and also of Article XXIV); that it adopt the European Communities' common commercial policy, including the arrangements relating to trade in textiles and clothing; 2) that there is no GATT-consistent alternative to these restrictions if it wants to include textile and clothing products (which constitute 40 per cent of Turkey's exports to the European Communities) in the customs union; and 3) that in this context, the WTO Agreement makes no distinction between the formation of a new customs union and accession to an existing customs union.

9.29 Turkey argues that, since it has formed a customs union with the European Communities which, under the ATC, is entitled to maintain import restrictions on the same 19 categories of textiles and clothing, Turkey's parallel import restrictions are not new restrictions in the sense of Article 2.4 of the ATC, being justified by Article XXIV. For Turkey, the said measures are therefore not inconsistent with Article 2 of the ATC. Finally, in its second submission, Turkey claims that India has not suffered any nullification of benefits, as its exports to Turkey have generally increased since the entry into force of the customs union.

9.30 In response to Turkey's argument that the provisions of Article XXIV constitute a derogation or complete defense (possibly as *lex specialis*) to all claims, India argues that the obligations under Articles XI:1 and XIII of GATT and 2:4 of the ATC are not modified by Article XXIV:5(a) of GATT 1994, which, according to India, requires Members forming a customs union not to raise the general incidence of regulations of commerce imposed on trade with third Members. As to Turkey's arguments that it was required to follow the EC commercial policy in the sector of textiles and clothing and that it had no alternative but to do so, India responds that the prohibitions of Articles XI and XIII of GATT and Article 2.4 of the ATC are not modified by Article XXIV:8(a)(ii) of GATT. For India, pursuant to Article XXIV:8(a)(ii), the European Communities and Turkey could have maintained different external textile policies at least for a certain period since their agreement is only an interim agreement and Turkey has not become a member of the European Communities. Turkey claims that its customs union with the European Communities was complete as of 1 January 1996 and is not an interim agreement or any form of transitional agreement, as defined by Article XXIV.

9.31 In response to Turkey's argument that the Panel should not substitute itself for the CRTA by examining the WTO compatibility of the Turkey-EC customs union, India agrees that it is not challenging the consistency of the Turkey-EC trade agreement with Article XXIV. Instead India states that it is requesting this Panel to rule that Turkey does not have the right to impose discriminatory restrictions on imports of textiles and clothing from India, irrespective of whether Turkey's agreement with the European Communities is consistent with Article XXIV. In response to Turkey's allegation that India's rights have not been nullified or impaired by its textile and clothing policy, India challenges the accuracy of the statistics submitted by Turkey and argues that, in any case, Article 3.8 of the DSU establishes that any breach of a GATT obligation constitutes *prima facie* impairment and nullification of benefits, which have been considered to include benefits denied due to changes in competitive opportunities.

C. MEASURES AT ISSUE

1. Identification of the Measures at Issue

9.32 India claims that the import restrictions in place since 1 January 1996 on 19 categories of textile and clothing products violate the provisions of Articles XI and XIII of GATT and Article 2.4 of the ATC.[260] We invited Turkey to confirm that the quantitative restrictions at issue are those listed in India's first submission and to provide us with the Official Gazette which published the establishment of such quantitative restrictions for the years 1996, 1997 and 1998. In response to a question from the Panel at the second substantive meeting, Turkey acknowledged that the quantitative restrictions in place correspond to the measures referred to by India in its first submission. Turkey noted that those quantitative restrictions had been notified to the WTO, i.e. to the CRTA and to the TMB. We conclude that the parties agree that the quantitative restrictions at issue are those listed by Turkey in its responses to the Panel's various questions on this issue and annexed to the present findings (see Annex to this report, Appendix 1).

2. Attribution to Turkey of the Measures at Issue

9.33 Although Turkey does not deny the existence of such quantitative restrictions on imports, it argues that since it duly notified its various trade agreements with the European Communities to the appropriate bodies of the GATT 1947 and of the WTO, it cannot be held individually liable for these quantitative restrictions as they result from the implementation of its customs union with the European Communities. Turkey argues that India has directed its complaint against Turkey concerning a measure taken by another entity (the Turkey-EC customs union or the European Communities). In Turkey's view, it is not individually responsible for acts that were collectively taken by the members of the Turkey-EC customs union through the institutions created by the agreement.

9.34 Turkey submits that the "nationality" of the measures at issue also relates to a fundamental aspect of the nature of a customs union. For Turkey, when two Members enter into a customs union, there is a fundamental change in the relationship between them and in their relationship with other WTO Members.

9.35 We comment briefly below on the issue of the responsibility of parties to a customs union *vis-à-vis* third countries. As to the question of "whose measures these import quantitative restrictions are?", three answers are possible: they are either Turkey's measures, the European Communities' measures, or the Turkey-EC customs union's measures.

9.36 As to whether the measures at issue are Turkish measures, we note that the measures were implemented through formal action by Turkey and that the measures were published by Turkey in its Official Gazette. The first Turkey-EC joint notification to the TMB refers to "details of certain quantitative limits introduced by Turkey"[261] and the second one to "details of changes in respect of quantitative limits applied by Turkey"[262] and both notifications list the measures at issue, i.e. restrictions imposed on 19 categories of textile and clothing products. In other words, the measures under examination were enacted, implemented and are now applied, by the Turkish government and do not impose any obligation on any other national or supranational authorities. Thus, on their face,

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[260] Turkey, in its *in limine litis* preliminary request, claimed that the product coverage of India's request was not sufficiently detailed and precise. In our preliminary ruling of 25 September 1998 we rejected this claim by Turkey as further detailed in paras. 9.2 and 9.3 above.

[261] G/TMB/N/308. In the notification to the WTO the terms used are "details of the quantitative limits applied by Turkey in respect of imports of certain…", WT/REG22/7.

[262] G/TMB/N/326. In the notification to the WTO the terms used are "details of the quantitative limits applied by Turkey in respect of imports of certain…"; WT/REG22/8.

the measures at issue appear to be measures taken by Turkey and enforceable on Turkish territory only.

9.37 We also note that the measures are applied by Turkey and that they are mandatory, i.e. they leave no discretion to Turkish authorities but to enforce the measure. It is customary practice of GATT/WTO dispute settlement procedures to address applied measures. In addition, previous adopted GATT panels have always considered that mandatory legislation of a Member, even if not yet in force or not applied[263], can be challenged by another WTO Member.

9.38 However, in view of Turkey's contention that these import restrictions are measures of another entity,[264] we proceed to address the issue of whether such measures can be those of the European Communities or of the Turkey-EC customs union.

9.39 While the European Communities also maintains restrictions against imports from India on the same 19 categories at issue, it does so pursuant to its "Council Regulation (EEC) 3030/93 on common rules for imports of certain textile products from third countries", adopted by the Council of the European Communities on 12 October 1993.[265] This regulation applies only to the European Communities' customs territory.[266] It is not enforceable in Turkey as an EC measure as such. On 7 January 1997 the European Communities notified the second stage of its integration programme to take effect by 1 January 1998; such notifications were made only with reference to the European Communities' quota levels (based on their previous 1990 level). [267] Thus, the measures at issue cannot be considered to be EC measures. Moreover, the European Communities itself stated that the measures had been adopted by Turkey, that Turkey itself was ensuring the surveillance of such quotas at its borders, and that the European Communities and Turkey have their respective systems of border control.[268]

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[263] See for instance the Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136 ("*US - Superfund*"), paras. 5.2.1-5.2.2; Panel Report on *EEC – Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132, paras. 5.25-5.26; Panel Report on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, para 5.39.

[264] See paras. 3.33 and 8.3 above.

[265] That regulation was adopted in the context of the MFA; this regulation was later amended in 1995, Regulation (EC) No. 1616/95 (OJ No. L154, 5.7.1995, p.3) to take into account Council regulation (EC) No 3036/94 establishing economic outward processing arrangements applicable to certain textiles and clothing products reimported into the Community after working or processing in certain third countries. See footnote 14 of Decision 1/95 (see WT/REG22/1).

[266] See documents G/TMB/N/60, notified on 28 February 1995.

[267] In its notification (G/TMB/N/207), the European Communities consistently refers to categories of product that represent 17.99 per cent of 1990 EC imports (by volume) and therefore does not include any quantity covering the territory of Turkey. We note that the letter from European Communities Permanent Representative stated that "The European Community and Turkey form a customs union and have consulted prior to notifying their second stages of integration". This appears to refer to the consultation process under the Turkey-EC customs union prior to the identification of which products are to be integrated. It is also a recognition that each party to the customs union must adopt its own measures. (The European Communities' first integration process stage was notified as G/TMB/N/1.)

[268] See para. 4.3 above, third response of the European Communities to the Panel's questions: "There is thus no specific EC border control in respect of goods for which Turkey has quantitative restrictions, *the Turkish authorities having effected such control on entry of the goods* into free circulation in Turkey" (emphasis added). To the Panel's fourth question, the European Communities answered: "Turkey has adopted all the European Communities' relevant regulations concerning imports of textiles … Thus the *basic administrative principles* are the same in *both parts of the customs union*. … Thus, there is no administration or control of the overall EC/India and Turkey/India textile and clothing quotas at the EC/Turkey's borders. Once goods enter the customs *union pursuant to the parties' respective systems*, they are in free circulation… "(emphasis added). Since Turkey has its own specific quotas and so does the European Communities, Turkey and the European

9.40 As to the issue of whether the measures at issue should be considered to be measures of the Turkey-EC customs union as such, we note that according to the Permanent Court of International Justice[269], the assessment whether any customs union (or another legal entity) has a legal personality distinct from that of its constituent countries is to be based on an examination of the treaty forming such customs union and the relevant circumstances. Such determination will therefore always be made on a case by case basis. We note that the Turkey-EC customs union agreement does not have any legislative body which would have the constitutional authority to enact laws and regulations that would be, as such, applicable to the territory of the customs union. Under the Turkey-EC customs union, the only institutional body with legislative features is the Association Council, the powers of which were first defined in the Ankara Agreement.[270] Paragraph 1 of Article 22 of the Ankara Agreement states that the Association Council shall have the power to take decisions. Although each of the two parties are "bound to take the steps involved in the execution of the decisions adopted", these decisions "shall be taken unanimously" (Article 23 of the Ankara Agreement) and there is no further enforcement process. The Turkey-EC Customs Union Joint Committee can only "carry out exchange of views and information, formulate recommendations to the Association Council and deliver opinions with a view to ensuring the proper functioning of the Customs Union" (Article 52 of the Decision 1/95 of the Turkey-EC customs union).[271] Article 55 imposes on Turkey and the European Communities the obligation to notify each other of the adoption of any new legislation that may affect each other or the functioning of the customs union. Article 58 also envisages the situation of "discrepancies between Community and Turkish legislation". This is a recognition that each party to the customs union may adopt measures, to some extent different, and which may not be fully consistent with one another; it provides confirmation of the ability of the parties to act independently and that Turkey maintains that sovereign right.[272] Since the actions of the Association Council require

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Communities must control their own import restrictions. This is to say that Indian textile and clothing products are not imported into Turkey on the basis of the European Communities' quantitative restrictions on Indian products, but rather only on the basis of the Turkish quantitative restrictions on Indian products (through the issuance of export licenses by India and import licenses by Turkey against the Turkish quota levels). Once entered into the customs union, say at the India/Turkey border, the products are described as being able to move freely into the EC, the same as Turkish products.

[269] *Customs Regime between Germany and Austria*, PCIJ, Series A/B, No. 41, at 49.

[270] Paragraph 1 of Article 22 of the Ankara Agreement reads as follows: "For the achievement of the aims laid down in the agreement and in the cases covered by the latter, the Association Council shall have the power to take decisions. Each of the two parties shall be bound to take the steps involved in the execution of the decisions adopted. The Association Council may also formulate any necessary recommendations" (GATT document L/2155/Add.1, p. 13). Article 23 of the Ankara Agreement specifies that both parties are represented in the Association Council and that its decisions "shall be taken unanimously".

[271] See WT/REG22/1.

[272] The Permanent Court of International Justice (PCIJ) concluded in *the Customs Regime between Germany and Austria*, that the wording of the customs union was determinant as to whether a member lost its sovereignty. An example of a customs union where member states appear to have retained full sovereignty and independence *vis-à-vis* third countries is the customs union between the Czech Republic and the Slovak Republic. It can be noted that in such a customs union, the parties have not created any autonomous institution capable of enacting legislation or providing for the legal personality of the customs union, independent and autonomous from that of each member state. Consequently, to take one example, when the Czech Republic and the Slovak Republic wanted to enter into a free trade agreement with Slovenia, Poland, Hungary and Romania, each of them (the Czech Republic and the Slovak Republic) signed individually and independently the so-called CEFTA. It is not the Czech-Slovak customs union, as an entity, which did so. The same is also true for the recent free trade agreement between Turkey and Lithuania, which is parallel to the EC-Lithuania free trade agreement. Again it is not the Turkey-EC customs union which concluded one single free trade agreement with Lithuania, but the EC and Turkey, individually, signed separate agreements. As far as the Turkey-EC custom union treaty is concerned, we have already concluded above, that the institutions existing in the context of the customs union do not have the legal capacity to legislate (there is only a provision that any legislation or measure adopted by either party (the EC or Turkey) must be notified to the other party and consulted upon.) The terms of the Turkey-EC customs union agreement provide no indication of a transfer of sovereignty of the member states either to an institution established under the customs union, nor to the EC. In WTO terms, unless a customs union is provided with distinct rights and obligations (and therefore some WTO legal personality,

independent implementation by the parties to the customs union without any enforcement process either individually or jointly; since the Association Council cannot force the parties to act[273]; and since there is no other provision that would lead us to conclude that either of the two parties, or some collective entity on behalf of them, could enact legislation applicable to both of them; we consider the measures at issue taken, implemented and enforced by the Turkish government itself, applied on Turkish territory only, can only be Turkish measures.

9.41 Importantly, we note that the WTO dispute settlement system is based on Member's rights; is accessible to Members only; and is enforced and monitored by Members only.[274] The Turkey-EC customs union is not a WTO Member, and in that respect does not have any autonomous legal standing for the purpose of WTO law and therefore its dispute settlement procedures. Moreover, the European Communities' import restrictions appear *a priori* to be WTO compatible and could not be the object of any panel recommendation that the European Communities brings its measure into conformity with the WTO Agreement, as required by Article 19 of the DSU.

9.42 Finally, we note that in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the Turkey-EC customs union. In the *Nauru* case one of the conclusions of Judge Shahabuddeen's separate opinion was:

> "… the [International Law Commission] considered, that *where States act through a common organ, each State is separately answerable for the wrongful act of the common organ*. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded as technically as a common organ. …".[275] (Emphasis added.)

9.43 The International Law Commission (ILC) had stated in its commentaries to its adopted report:

> "A similar conclusion is called for in cases of parallel attribution of single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, *the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then the two or more States will concurrently have committed separate, although identical, internationally wrongful acts*. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other."[276] (Emphasis added.)

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such as the European Communities) each party to the customs union remains accountable for measures it adopts for application on its specific territory. See also Jennings, R., Watts, A., Oppenheim's International Law (1996), 9th ed., Vol. 1 (Peace), Introduction and Part 1, p. 255.

[273] In the *Reparations for Injuries* case, the ICJ stated that, where a group of states claims to be a legal entity distinct from its members, the test is whether it was in "such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect."(See ICJ Rep (1949), p. 178 and also *Western Sahara* case (1975), p. 63; see Jennings, R., Watts, A., Oppenheim's International Law (1996), *Op.cit*., p. 119.)

[274] See Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/AB/R ("*US – Shrimp*"), para. 101.

[275] *Nauru* case, Separate Opinion of Judge Shahabuddeen, at 284. Clark, R., Book review of Nauru: Environmental Damage Under International Trusteeship (C. Weeramantry), *The International Lawyer* Vol. 28, No. 1, at 186.

[276] See the Yearbook of the International Law Commission, 1978, Vol.II, Part Two, at 99. These commentaries were adopted by the Commission in its session of 8 May to 28 July 1978. Article 27 on state

3. Conclusion

9.44 In light of the foregoing, we conclude that the measures at issue are quantitative restrictions adopted by the Turkish government in 1996, 1997 and 1998 (and listed in the Annex to this report, Appendix 2) against 19 categories of textile and clothing products imported from India. Even if these measures are taken in the ambit of a customs union, they are implemented, applied and monitored by Turkey, for application in the Turkish territory only. Therefore they are Turkish measures.

D. SCOPE OF THE DISPUTE

9.45 We note that, at least initially, both parties argued explicitly that the Panel should not assess the compatibility of the Turkey-EC regional trade agreement with the provisions of Article XXIV. In its second submission, however, Turkey argues that the Panel cannot assess the WTO compatibility of any specific measure adopted in the context of the formation of a regional trade agreement, separately and in isolation from an assessment of the overall compatibility of this regional trade agreement with Article XXIV of GATT.

9.46 Turkey's main defense to India's claims of discriminatory quantitative restrictions is that the measures at issue were adopted as a consequence of its regional trade agreement with the European Communities which, it argues, is a fully complete customs union explicitly authorized and favoured by Article XXIV of GATT. For Turkey, Article XXIV of GATT, in allowing the formation of customs unions, necessarily authorizes measures such as those adopted by Turkey and challenged by India. For Turkey, the alignment of its textiles and trade policy with that of the European Communities is not only an integral part of such Turkey-EC customs union but is inherent and necessary for its formation in view of the important share of the textile and clothing sector in its trade with the European Communities. Turkey argues that the WTO compatibility of an Article XXIV type agreement, and all its related measures, is to be determined exclusively with reference to Article XXIV of GATT (and the 1994 Understanding on Article XXIV) and not by any other provisions of the WTO Agreement.

9.47 In response to Turkey's defense, India argues that the provisions of Article XXIV do not constitute a waiver from other WTO obligations, including the general prohibition against discriminatory import restrictions contained in Articles XI and XIII of GATT and Article 2.4 of the ATC.

9.48 Turkey's argument has both procedural and substantive aspects. Firstly, we must decide whether the WTO dispute settlement proceedings can be used to challenge measures adopted by one or more Members on the occasion of the formation of a customs union in which it (or they) participate. Secondly, if so, we must consider the extent to which a panel is authorized or needs to examine the overall consistency of the customs union with WTO provisions. Finally, we must determine whether the test for assessing the WTO compatibility of these specific measures is provided for in the provisions of Article XXIV only. If this is not the case, we will then need to examine the meaning of the provisions of Article XXIV to assess whether Article XXIV authorizes measures like those under examination. We deal with this final determination later in Section G below.

9.49 As to the first issue of whether the WTO dispute settlement procedures can be invoked to challenge a measure adopted on the occasion of the formation of a customs union, we note paragraph 12 of the Understanding on Article XXIV of GATT 1994 which provides:

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responsibility to which these commentaries refer was adopted at the ILC session of 6 May to 26 July 1996. These commentaries and the report were submitted in the same years to the United Nations General Assembly for its consideration.

> "12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to *any matters arising from the application* of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreement leading to the formation of a customs union or free-trade area." (Emphasis added.)

9.50 We understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV, that panels have jurisdiction to examine "any matters 'arising from' the application of those provisions of Article XXIV". For us, this confirms that a panel can examine the WTO compatibility of one or several measures "arising from" Article XXIV types of agreement, as also argued by the United States in its third-party submission.[277] This indicates that, although the right of WTO Members to form regional trade arrangements is "an integral part" of the set of multilateral disciplines of GATT and now WTO[278], the DSU procedures can be used to obtain a ruling by a panel on the WTO compatibility of any matters arising from such regional trade arrangements. For us, the term "any matters" clearly includes specific measures adopted on the occasion of the formation of a customs union or in the ambit of a customs union.

9.51 Thus, we consider that a panel can assess the WTO compatibility of any specific measure adopted by WTO Members at any time and we cannot find anything in the DSU, Article XXIV or the 1994 GATT Understanding on Article XXIV that would suspend or condition the right of Members to challenge measures adopted on the occasion of the formation of a custom union.

9.52 As to the second question of how far-reaching a panel's examination should be of the regional trade agreement underlying the challenged measure, we note that the Committee on Regional Trade Agreements (CRTA) has been established, *inter alia*, to assess the GATT/WTO compatibility of regional trade agreements entered into by Members, a very complex undertaking which involves consideration by the CRTA, from the economic, legal and political perspectives of different Members, of the numerous facets of a regional trade agreement in relation to the provisions of the WTO. [279] It appears to us that the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the CRTA since, as noted above, it involves a broad multilateral assessment of any such custom union, i.e. a matter which concerns the WTO membership as a whole.

9.53 As to whether panels also have the jurisdiction to assess the overall WTO compatibility of a customs union, we recall that the Appellate Body stated[280] that the terms of reference of panels must refer explicitly to the "measures" to be examined by panels. We consider that regional trade agreements may contain numerous measures, all of which could potentially be examined by panels, before, during or after the CRTA examination, if the requirements laid down in the DSU are met. However, it is arguable that a customs union (or a free-trade area) as a whole would logically not be a "measure" as such, subject to challenge under the DSU.[281]

9.54 We consider that the question of whether panels have the jurisdiction to assess the overall compatibility of a customs union is not in any event an issue on which it is necessary for us to reach a decision in this case; we reach this conclusion in light of paragraphs 9.51 to 9.53 above and in recognition of the principle of judicial economy, as initially developed in the *US – Wool Shirts*[282] case

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[277] See paras. 7.116 to 7.118 above.

[278] See a similar parallel drawn by the Appellate Body in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R ("*US – Shirts and Blouses*") at page 16, concerning the right to use transitional safeguard measures under the ATC.

[279] The mandate of the CRTA can be found in WT/L/127. See para. 2.7 above.

[280] Appellate Body Report on *Guatemala – Anti-Dumping Investigation regarding Portland Cement From Mexico*, adopted on 25 November 1998, WT/DS60/AB/R ("*Guatemala – Cement*"), paras. 76, 86.

[281] We are aware of the EC proposal contained in MTN.TNC/W/125 and the report of the 36th Meeting of the Trade Negotiating Committee MTN.TNC/40.

[282] Appellate Body Report on *US – Shirts and Blouses*, page 17.

and qualified by the Appellate Body in the recent *Australia – Salmon* case[283], under which panels do not need to address all the claims and arguments raised by the parties to the dispute. We recall the distinction between claims and arguments (*EC – Hormones*[284]) and understand that some latitude is left to panels to address only arguments that they consider are relevant to resolve the dispute between the parties, which is the main purpose of DSU proceedings. Accordingly, we find that, in order to address the claims of India, it will not be necessary for us to assess the compatibility of the Turkey-EC customs union agreement with Article XXIV as such (in the sense of addressing all aspects of the customs union and all the measures adopted by Turkey and the European Communities in the context of their customs union agreement).

9.55 In our view, it will be sufficient for us to address the relationship between the provisions of Article XXIV and those of Articles XI and XIII of GATT and Article 2.4 of the ATC. We shall have to do so as India's claims are based on an alleged violation of those articles, and Turkey's defense is based on the application, and, in its view, the "primacy", of Article XXIV over those provisions. Our examination will be limited to the question whether in this case, on the occasion of the formation of the Turkey-EC customs union, Turkey is permitted to introduce WTO incompatible quantitative restrictions against imports from a third country, assuming *arguendo* that the customs union in question is otherwise compatible with Article XXIV of GATT. We shall thus limit ourselves to addressing the parties' arguments submitted in this context only and refrain from any discussion as to how an overall compatibility assessment of a customs union should be performed. Our analysis of Article XXIV is limited to defining, in particular, its relationship with Articles XI and XIII of GATT (and Article 2.4 of the ATC) and to ensuring that our interpretation of the WTO provisions applicable to the present dispute, does not prevent Turkey from exercising its right to form a customs union.

9.56 We reject therefore Turkey 's argument, in paragraph 9.45 above, to the extent that it would oblige us to assess the GATT/WTO compatibility of the Turkey-EC customs union in order to assess the compatibility of the specific measures at issue.[285]

E. BURDEN OF PROOF

9.57 The rules on burden of proof are now well established in the WTO and can be summed up as follows:

(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

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[283] Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, para 223: "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. *A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members*." (emphasis added).

[284] Appellate Body Report on *European Communities – Measures Concerning Meat and Meat Products* ("*EC – Hormones*"), adopted on 13 February 1998, WT/DS26, 48/AB/R, paras. 155-156; see also the Appellate Body Report on *EC - Bananas III*, paras. 145-147.

[285] We consider that this Turkey-EC regional trade agreement falls under the ambit of Article XXIV for the purpose of the CRTA's examination. We are of the view that, for our purposes, we do not have to assess the precise relationship of the Turkey-EC agreement with Article XXIV, e.g. whether it is a free-trade agreement or a customs union or an interim agreement leading to a free-trade area or customs union. We recall that in this report, we shall refer to the Turkey-EC customs union without any assessment of the WTO nature of this Article XXIV type of arrangement.

(c) it is for the party asserting a fact to prove it.[286]

9.58 It is therefore for India to demonstrate *prima facie* that Turkey's measures violate the provisions of Articles XI and XIII of GATT and Article 2.4 of the ATC. Turkey does not deny the existence of quantitative restrictions but submits an affirmative defense based on the application of Article XXIV of GATT. In response to a direct question by the Panel, Turkey stated that it does not invoke any defense other than that based on Article XXIV in support of its claim that it is not violating Articles XI or XIII of GATT, or Article 2.4 of the ATC. We note in this context that Hong Kong, China has argued that since Article XXIV was an exception invoked by Turkey, it was for Turkey to bear the burden of proof.[287]

9.59 Accordingly, we will first examine India's claims and the GATT/WTO treatment of import restrictions generally, and then more specifically in the sector of textiles and clothing. Secondly, we shall examine the applicability of Article XXIV and Turkey's defense based, in particular, on paragraphs 4, 5(a) and 8(a)(ii) of Article XXIV of GATT.

F. CLAIMS UNDER ARTICLES XI AND XIII OF GATT AND ARTICLE 2.4 OF THE ATC

9.60 India claims that the Turkish measures violate the provisions of Articles XI and XIII of GATT and Article 2.4 of the ATC. Turkey claims that its rights pursuant to Article XXIV of GATT prevail over any obligations contained in Articles XI and XIII of GATT and Article 2.4 of the ATC, and therefore India's claims should be rejected.

1. Articles XI and XIII of GATT

9.61 The wording of Articles XI and XIII is clear. Article XI provides that as a general rule (we note the wording of the title of Article XI: "*General Elimination* of Quantitative Restrictions"), WTO Members shall not use quantitative restrictions against imports or exports.

> "Article XI
>
> *General Elimination of Quantitative Restrictions*
>
> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member."

9.62 Article XIII provides that if and when quantitative restrictions are allowed by the GATT/WTO, they must, in addition, be imposed on a non-discriminatory basis.

> "Article XIII
>
> *Non-discriminatory Administration of Quantitative Restrictions*
>
> 1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the

[286] Panel Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted on 22 April 1998, WT/DS56/R, paras. 6.34 - 6.40.

[287] See para. 7.7 above. We note that Japan, Thailand and the Philippines also identified Article XXIV as an exception: see Japan's arguments in para. 7.23, Thailand's arguments in para. 7.100 and the Philippines' arguments in para. 7.36 above.

like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."

9.63 The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection. Tariffs, to be reduced through reciprocal concessions, ought to be applied in a non-discriminatory manner independent of the origin of the goods (the "most-favoured-nation" (MFN) clause). Article I, which requires MFN treatment, and Article II, which specifies that tariffs must not exceed bound rates, constitute Part I of GATT. Part II contains other related obligations, *inter alia* to ensure that Members do not evade the obligations of Part I. Two fundamental obligations contained in Part II are the national treatment clause and the prohibition against quantitative restrictions. The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection "of choice". Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.

9.64 Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. In the sector of textiles and clothing, quantitative restrictions were maintained under the Multifibre Agreement (further discussed below). Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report *EEC – Imports from Hong Kong*.[288]

9.65 Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing. This recognition is reflected in the GATT 1994 Understanding on Balance-of-Payments Provisions[289], the Agreement on Safeguards[290], the Agreement on Agriculture where quantitative restrictions were eliminated[291] and the Agreement on Textiles and Clothing (further discussed below) where MFA derived restrictions are to be completely eliminated by 2005.

9.66 The measures at issue, on their face, impose quantitative restrictions on imports and are applicable only to India.[292] We consider that, given the absence of a defense by Turkey (other than its defense based on Article XXIV of GATT) to India's claims that discriminatory import restrictions

[288] Panel Report on *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, ("*EEC – Imports from Hong Kong*").

[289] See for instance paras. 2 and 3 of the GATT 1994 Understanding on the Balance-of-Payments Provisions which provide that Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes.

[290] The Agreement on Safeguards also evidences a preference for the use of tariffs. Article 6 provides that provisional safeguard measures "should take the form of tariff increases" and Article 11 prohibits the use of voluntary export restraints.

[291] Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a "tariffication" exercise to transform quantitative restrictions into tariff based measures.

[292] We note, however, that Turkey maintains other quantitative restrictions against textiles and clothing imports from other countries on the same and/or other products; see para. 6.12 above. See also WT/REG22/7.

have been imposed, India has made a *prima facie* case of violation of Articles XI[293] and XIII of GATT.

2. Article 2.4 of the ATC[294]

9.67 India claims that the measures under examination violate Article 2.4 of the ATC, in that they constitute new measures not authorized by the ATC and for which there is no GATT justification. Turkey claims that the measures under examination are not new, since the European Communities had similar restrictions in place when Turkey and the European Communities formed their customs union, and such restrictions are justified by Article XXIV of GATT.

(a) Regulatory framework of the ATC

9.68 The ATC provides for a maximum transitional period of ten years for the integration of all remaining quantitative restrictions in the sector of textiles and clothing that had been maintained under the old Multifibre Arrangement ("MFA"). Article 2 is the core of the ATC[295] and contains two key requirements for the transitional process that leads to the re-integration of the textiles and clothing sector into the general rules of GATT 1994. Paragraph 1 of Article 2 of the ATC requires that all former MFA or MFA-type restraints be notified to the TMB in order to be carried over into the ATC. Article 2.6 to 2.11, sets out the procedures for the progressive integration of the products covered by the ATC into GATT 1994 rules and disciplines. The ATC provides therefore exceptions to the general prohibitions contained in Articles XI and XIII against discriminatory quantitative restrictions in allowing some Members (those who had MFA restrictions in place and who have notified the TMB within 60 days of the entry into force of the WTO Agreement) to maintain such restrictions for a maximum period of 10 years. In that sense the MFA defined the reach of the general prohibition against quantitative restrictions in the area of textiles and clothing.

9.69 The lists of restrictions notified pursuant to Article 2.1 set the starting point for the treatment of the restraints carried over from the former MFA regime. Four WTO Members notified the TMB pursuant to Article 2.1 of the ATC: Canada, the European Communities, Norway and the United States. We consider that the notification requirement of 60 days referred to in Article 2.1 of the ATC is mandatory both for formal and substantive reasons. The wording of Article 2.1 is unequivocal with the use of the term "shall". Moreover, since the purpose of the ATC is to provide exceptions to the general application of Articles XI and XIII of GATT during an integration period to be completed by 1 January 2005, these exceptions should be interpreted narrowly.[296] Stemming from this provision, only the four

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[293] We note that the measures at issue do not qualify for any of the exceptions under Article XI of GATT.

[294] In interpreting the ATC and its importance in the WTO Agreement, it should also be clear from the object and purpose of the ATC, and from the well-known circumstances of the conclusion of the Uruguay Round, that the phasing out of the textile and clothing restrictions was a fundamental component of the WTO Agreement for developing countries.

[295] As discussed in paras. 2.25 to 2.30 above, trade in this sector of textile and clothing products was governed by special regimes outside the normal GATT rules: the Short Term Arrangement Regarding International Trade in Cotton Textiles (STA) in 1961, the Long Term Arrangement Regarding International Trade in Cotton Textiles (LTA) from 1962 to 1973 and the Arrangement Regarding International Trade in Textiles, also known as the Multifibre Arrangement or MFA, from 1974 to 1994. These special regimes essentially allowed for an extensive and complex system of bilateral import and export restrictions. The ATC provides for a set of rules, the purpose of which is that through a transitional process, embodied in the ATC, this sector is to be fully integrated into WTO rules by 1 January 2005. The two main avenues used by the ATC are 1) mandatory annual level increases of remaining quantitative restriction and 2) and an integration process by stages of all textile and clothing products into the general GATT rules.

[296] See for instance in Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998, WT/DS54, 55, 59 and 64/R, ("*Indonesia – Autos*") (Not appealed), para. 14.92, where the period allowed for notification to the TRIMS Committee under Article 5 of the TRIMS Agreement, in

Members above had the right to and did notify measures which allowed them to maintain MFA-derived quantitative restrictions for a maximum period of 10 years during which import quotas must increase annually until the products they cover are integrated into GATT. In the absence of an exception under the ATC or a justification under GATT, no new quantitative restrictions introduced by a Member can benefit from the exceptions provided for in Article 2.1 of the ATC after this 60 day period.

9.70 Article 2.4 of the ATC provides that:

> "4. The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions.[297] Restrictions not notified within 60 days of the date of entry into force of the WTO Agreement shall be terminated forthwith."

9.71 The prohibition on "new restrictions" must be interpreted taking into account the preceding sentence: "The restrictions notified under paragraph 1 shall be deemed to constitutes the *totality of such restrictions* applied by the respective Members on the day before the entry into force of the WTO Agreement". The ordinary meaning of the words indicates that WTO Members intended that as of 1 January 1995, the incidence of restrictions under the ATC could only be reduced. We are of the view that any legal fiction whereby an existing restriction could simply be increased and not constitute a "new restriction", would defeat the clear purpose of the ATC which is to reduce the scope of such restrictions, starting from 1 January 1995 (but for the exceptional situations referred to in Article 2.4 of the ATC). Thus, we consider that, setting aside the possibility of exceptions and justifications mentioned in Article 2.4 of the ATC, any increase of an ATC compatible quantitative restriction notified under Article 2.1 of the ATC, constitutes a "new" restriction.

9.72 On 28 February 1995 (therefore within the 60 day period of Article 2.1 of the ATC), the European Communities notified its previous restrictions maintained under the MFA.[298] This notification referred to restrictions applicable only to EC territory. After the period of 60 days (under Article 2 of the ATC) the European Communities is prohibited from notifying any new restrictions or changes to existing and notified restrictions, except adopted in compliance with the ATC or any other provisions of GATT 1994. Apart from these special cases the European Communities is not entitled to notify any increase of its MFA derived restrictions. Immediately before the date of the entry into force of the ATC, Turkey was a member of the Multifibre Arrangement (as an exporting country) and did not maintain any restrictions pursuant to Article 4 of the MFA or notified under Article 7 or 8 of the MFA in force on the day before the entry into force of the WTO Agreement. Since Turkey did not have any MFA restrictions in place, it could therefore not make any notification pursuant to Article 2.1 of the ATC. Accordingly, any restrictions on textiles and clothing applied by Turkey appear on their face to be "new", as defined in Article 2.4 of the ATC with reference to those countries who had MFA restrictions and notified them within 60 days.

(b) Quantitative restrictions permitted under the ATC

9.73 The ATC allows new restrictions in the case of safeguard measures (Article 6 of the ATC) or pursuant to Articles 2.14 and 7 of the ATC when a Member does not comply with the requirements of the agreement. We note that there is no provision in the ATC for general exceptions or security exceptions nor any other provisions on regional trade agreements.

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order for a Member to benefit from the transition provisions of the TRIMS Agreement, was considered mandatory.

[297] [Footnote original]The relevant GATT 1994 provisions shall not include Article XIX in respect of products not yet integrated into GATT 1994, except as specifically provided in paragraph 3 of the Annex.

[298] G/TMB/N/60.

9.74 We note that on 27 February 1995[299] Turkey notified the first stage of its integration programme to the TMB; in doing so Turkey is entitled, pursuant to Article 6.1 of the ATC, to make use of the special safeguard mechanism. It should be noted that under the ATC the right to maintain MFA derived quantitative restrictions and the integration process by stages are not related. The provisions of the ATC make clear that the fact that a product has not yet been re-integrated into the general GATT rules does not in any manner imply a right to introduce new import restrictions under Article 2.1 of the ATC on such products. The main benefit for Members resulting from the notification of an integration programme within 6 months of the entry into force of the WTO Agreement, is the use of the special safeguard mechanism under the ATC. There is no relation between the safeguard provisions of the ATC and the right to introduce new quantitative restrictions under Article 2.1 of the ATC. On 27 December 1996, Turkey notified the second stage of its integration programme[300]to take effect on 1 January 1998. On the same day, Turkey also notified, early, the provisions of the third stage of its integration programme[301] to take effect on 1 January 2003. All these notifications relate to imports of textiles and clothing into Turkey only. (We also note that the products covered by the measures at issue are not listed therein.)

(c) The Turkish measures under the ATC - are these new measures?

9.75 Article 3.3 of the ATC provides for notification of "new restrictions" or "changes in existing restrictions". It reads as follows:

> "3. During the duration of this Agreement, Members shall provide to the TMB, for its information, notifications submitted to any other WTO bodies with respect to any *new restrictions or changes in existing restrictions* on textile and clothing products, taken under any GATT 1994 provision, within 60 days of their coming into effect." (emphasis added)

9.76 In their joint communication dated 7 November 1997[302], Turkey and the European Communities notified the TMB pursuant to Article 3.3 of the ATC:

> "In addition Turkey and the European Communities have the honour to copy to the Chairman of the Textiles Monitoring Body for information a communication to the Chairman of the Committee on Regional Trade Agreements (CRTA) annexed to which are details of certain quantitative limits *introduced by Turkey* in respect of imports of certain textile and clothing products into Turkey from certain WTO Members, and necessary to give effect to the Customs Union in conformity with the provisions of Article XXIV of GATT 1994." (emphasis added)

9.77 On 6 May 1998, the European Communities and Turkey sent a second notification under Article 3.3 of the ATC to the TMB,[303] which reads as follows:

> "Turkey and the European Communities … concerning details of changes in respect of the *quantitative limits applied by Turkey* in respect of imports of certain textile and clothing products from certain WTO Members in conformity with its commitments arising out of the customs union and with the provisions of Article XXIV of GATT 1994." (Emphasis added.)

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[299] G/TMB/N/44.
[300] G/TMB/N/228.
[301] G/TMB/N/240.
[302] G/TMB/N/308.
[303] G/TMB/N/326.

9.78 In light of Article 3.3 of the ATC, Turkey (and the European Communities) must consider that these measures are either "new" or "changes" to existing restrictions. As discussed above,[304] the measures at issue can only be considered to be, in WTO terms, Turkish measures. Since Turkey did not have any restrictions in place on 1 January 1995 that it could change, any such import restriction is, by definition, "new" for Turkey in the sense of the ATC. In this regard we cannot accept Turkey's argument that its measures are not new because the European Communities (its customs union partner) had a similar measure in place. Conceivably, a change of geographical coverage could constitute a "change" to an "existing" restriction (as could be the case on the occasion of an enlargement of a customs union - an issue which in this case we do not need to address). But since the measures at issue were introduced and are applied by Turkey,[305] and in view of our previous conclusion that the measures at issue are not EC measures but Turkish measures,[306] Turkey's quantitative restrictions cannot be considered to be changes to the existing EC restrictions.

9.79 We need, however, to examine the possibility of exceptions or justifications under Article 2.4 of the ATC and whether, any such Turkish measures could otherwise be legitimized in the context of the application of an Article XXIV type of agreement, escaping thereby the prohibition of Article 2.4 of the ATC against the introduction of new restrictions.

9.80 In the absence of any ATC justification claimed for the Turkish measures and given the reference to Article XXIV in the Article 3.3 notification, it would seem that any such justification must be based on Article XXIV. We address below whether the formation of a customs union presents an opportunity to adopt measures which would otherwise be WTO incompatible, (unless, as noted by India, these are inherent to the very conclusion of the customs union.) We also consider the argument that if a WTO compatible measure was already in place for one Member forming the customs union, the other constituent member(s), in an effort to harmonize their trade policies, may be authorized to introduce a similar restriction, thereby legitimizing what would otherwise constitute a new restriction in the sense of the ATC. In Section G below, we shall develop our interpretation of the language of Article XXIV and the flexibility it may provide to Members forming such a customs union, namely in their efforts to adopt "substantially the same duties and other regulations of commerce". This possibility would not, in our view, change the nature of the restrictions at issue as being "new restrictions" in the sense of Article 2.4 of the ATC, in so far as Turkey is concerned. It remains to be decided whether Article XXIV authorizes the introduction of such new ATC restrictions.

9.81 Therefore, at this stage of our analysis, we consider that the measures at issue are new measures in the sense of Article 2.4 of the ATC.

(d) Jurisdiction of the TMB versus that of the Panel

9.82 We refer to our preliminary ruling on the jurisdiction of the TMB in paragraph 9.15 above. In order to consider the claim of India under Article 2.4 of the ATC (and following our preliminary ruling of 25 September 1998), we now address further the issue of the relationship between the jurisdiction of the Panel and that of the TMB. We consider, based on the interpretation by the Appellate Body in *Guatemala – Cement*[307] with regard to the relationship between the DSU and the Antidumping Agreement, that the provisions of the ATC (providing jurisdiction to the TMB to examine measures applied pursuant to the ATC) and the provisions of the DSU (providing jurisdiction for panels to interpret any covered agreement, including the ATC) may both apply together.

[304] See para. 9.44 above.

[305] See also the European Communities' responses to the Panel's questions, referred to in footnote 268 above and paras. 4.2 and 4.3 above, where it was said by the European Communities that Turkey itself ensures the surveillance of its own quantitative restrictions at the Turkey/India border.

[306] See paras. 9.33 to 9.44 above.

[307] Appellate Body Report on *Guatemala – Cement*, para. 75.

Therefore even if the TMB has jurisdiction to determine what constitutes a "new" measure in the sense of the ATC and whether a violation of the ATC has taken place, we remain convinced that a panel is entitled to interpret the ATC to the extent necessary to ascertain whether Turkey benefits from a defense to India's claims under Articles XI and XIII of GATT based on the provisions of the ATC.

9.83 We consider, in any case, that the measures under examination are not measures applied pursuant to the ATC itself and therefore the ATC cannot provide such a defense. As discussed above, the ATC authorizes some exceptions to the general prohibitions against import restrictions contained in Articles XI and XIII of GATT (e.g., existing MFA restrictions notified within 60 days of the entry into force of the WTO Agreement (Article 2), safeguard measures pursuant to Article 6 of the ATC and measures adopted in the context of Articles 7 and 2.14 of the ATC).

9.84 On their face, the introduction of the Turkish measures do not correspond to any of the above situations, as noted also by Thailand in its third party submission[308]. We note that the ATC does not contain any provision dealing with regional trade agreements or any other general or specific exceptions. We conclude that in the present case, as acknowledged by the parties,[309] the measures at issue do not benefit from any circumstances specified in the ATC that would prevent the application of Article 2.4 of the ATC or Articles XI and XIII of GATT. We note also that Turkey has notified the said import restrictions to the TMB under Article 3.3 of the ATC which refers explicitly to "new restrictions or changes … taken under any GATT 1994 provision". Article 3.4 of the ATC suggests that the ATC envisages that non-ATC matters (such as those notified under Article 3.3 and the reverse notification pursuant to Article 3.4) will be dealt with "under relevant GATT 1994 provisions or procedures in the appropriate WTO body". Turkey does not claim that it benefits from an exemption to the prohibitions of Articles XI and XIII of GATT that is contained in the ATC, but rather one that derives from Article XXIV. It appears to us that the matter at issue involves a GATT provision rather than the ATC. The fact that the products under examination are textiles and clothing does not imply that it is the ATC exclusively which deals with the measures at issue. In fact GATT rules are generally applicable to all textile and clothing products and the ATC is applicable by exception principally to allow the maintenance for a limited period of time of MFA-derived quantitative restrictions and the use of the special safeguard mechanism.

9.85 Turkey's main defense is that its measures were adopted in the context of the formation of a customs union and are compatible with Article XXIV which is the only applicable provision. Clearly the interpretation of Article XXIV is not a matter covered by the provisions of the ATC, and could not fall under the exclusive jurisdiction of the TMB.[310] Having decided that the measures under examination are Turkish measures and not EC measures, we find that the ATC does not provide any exception to the prohibitions against quantitative restrictions contained in Articles XI and XIII of GATT.

[308] See paras. 7.76 and 7.77 above.

[309] See para. 6.26 (for Turkey) and paras. 3.47 and 3.48 (for India) above.

[310] We recall the provisions of Article 8.1 of the ATC: " In order to supervise the implementation of this Agreement, to examine all measures taken under this Agreement and their conformity therewith, and to take the actions specifically required of it by this Agreement, the Textiles Monitoring Body ("TMB") is hereby established …".

3. Conclusions on India's claims under Articles XI and XIII of GATT, and Article 2.4 of the ATC

9.86 Consequently, unless the measures under examination are justified by Article XXIV (Turkey's defense that we examine below) they are inconsistent with the provisions of Articles XI and XIII of GATT and they would necessarily violate also Article 2.4 of the ATC.[311]

G. TURKEY'S DEFENSE BASED ON ARTICLE XXIV OF GATT

9.87 We shall now proceed to examine Turkey's defense based on the application of Article XXIV and determine whether it rebuts what appears to be *prima facie* evidence of violations of Articles XI and XIII of GATT and Article 2.4 of the ATC.

9.88 Turkey argues that the measures at issue do not violate Articles XI and XIII of GATT or Article 2.4 of the ATC because they were implemented in relation to the formation of its customs union with the European Communities, which it considers to be compatible with the provisions of Article XXIV of GATT. For Turkey, the provisions of Article XXIV are concerned with the scope of application of GATT, both generally and in particular circumstances. As such, Article XXIV should not be regarded as a "justification", a "defense", an "exception" or a "waiver". In Turkey's view, the special nature of Article XXIV is evidenced by the fact that Article XXIV is in Part III of GATT, and not in Part II together with other provisions on commercial policies. For Turkey, Article XXIV, paragraphs 5 to 9, is to be viewed as *lex specialis* for the rights and obligations of WTO Members at the time of formation of a regional trade agreement. In other words, in Turkey's view, the WTO consistency of the measures challenged by India depends on the WTO consistency of the Turkey-EC customs union (of which they are an integral part) and the WTO consistency of both the customs union and its measures is to be determined with reference to the provisions of paragraphs 5 to 9 of Article XXIV only and no other GATT provisions.

9.89 India considers that all GATT rules define the limits of applicability of the GATT. India is of the view that, if Turkey’s argument were accepted, Members forming a customs union could legally circumvent the WTO procedural and substantive requirements with respect to quantitative restrictions, which the signatories of the WTO agreements agreed to permit only in exceptional circumstances. In respect of such Members, the WTO agreements could no longer operate as a legal framework providing effective assurances of market access and the WTO dispute settlement procedures would be rendered ineffective.

9.90 In order to analyze Turkey's arguments, which we consider are properly labelled a defense[312] to India's claims, we firstly recall certain basic interpretative principles applicable in WTO dispute settlement proceedings. Secondly, we examine the provisions of Article XXIV generally. Thirdly, we consider the meaning of Article XXIV:5 and, finally that of Article XXIV:8, which constitute the heart of Turkey's defense to India's claims.

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[311] The Panel is aware of the Appellate Body statement in *EC - Bananas III* that when two provisions are both applicable, a panel should proceed to apply the more specific provision first. However, such an exercise is not necessary here as what is examined is the relationship between Article XXIV and quantitative restrictions (either under Articles XI and XIII of GATT or the ATC).

[312] We note, from our research, that during the negotiation of Article XXIV, participants typically referred to Article XXIV as an "exception" for customs unions and free-trade areas. See also footnote 287 above.

1. General Interpretative Principles

(a) Vienna Convention on the Law of Treaties

9.91 In its examination of Article XXIV, the Panel is guided by the principles of interpretation of public international law (Article 3.2 of the DSU) which include Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). As provided for in these articles and as applied by panels and the Appellate Body, we interpret the provisions of Article XXIV using first the ordinary meaning of the terms of that provision, as elaborated upon by the 1994 Understanding on Article XXIV, in their context and in light of the object and purpose of the relevant WTO agreements. If need be, to clarify or confirm the meaning of these provisions, we may refer to the negotiating history, including the historical circumstances that led to the drafting of Article XXIV of GATT. We note also the prescription of Article XVI:1 of the WTO Agreement which provides that "… the WTO shall be guided by the decisions, procedures and customary practices followed by CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".[313]

(b) WTO rules on conflicts

9.92 As a general principle, WTO obligations are cumulative and Members must comply with all of them at all times unless there is a formal "conflict" between them. This flows from the fact that the WTO Agreement is a "Single Undertaking".[314] On the definition of conflict, it should be noted that:

> "… a conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. ... There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another."[315]

9.93 This principle, also referred to by Japan in its third party submission,[316] is in conformity with the public international law presumption against conflicts which was applied by the Appellate Body in *Canada – Periodicals*[317] and in *EC – Bananas III*[318], when dealing with potential overlapping coverage of GATT 1994 and GATS, and by the panel in *Indonesia – Autos*[319], in respect of the provisions of Article III of GATT, the TRIMs Agreement[320] and the SCM Agreement.[321] In *Guatemala – Cement*[322], the Appellate Body when discussing the possibility of conflicts between the provisions of the Anti-dumping Agreement[323] and the DSU, stated: "A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them."

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[313] See Appellate Body Report on *Japan – Alcoholic Beverages*, p. 14.

[314] See the Appellate Body statement in *Brazil – Desiccated Coconut*, page 12. The WTO is a single undertaking except for the plurilateral agreements for the non-signatories.

[315] Wilfred Jenks, "The Conflict of Law-Making Treaties", The British Yearbook of International Law (1953) at p. 426-427.

[316] See para. 7.22 above.

[317] Appellate Body Report on *Canada – Certain Measures Concerning Periodicals*, adopted on 30 July 1997, WT/DS31/AB/R, ("*Canada - Periodicals*"), page 19.

[318] Appellate Body Report on *EC - Bananas III*, paras. 219-222.

[319] Panel Report on *Indonesia – Autos*, para. 14.28.

[320] The Agreement on Trade-Related Investment Measures.

[321] The Agreement on Subsidies and Countervailing Measures.

[322] Appellate Body Report on *Guatemala – Cement*, para.65.

[323] The Agreement on the Implementation of Article VI of GATT 1994.

9.94 We recall the Panel's finding in *Indonesia – Autos*, a dispute where Indonesia was arguing that the measures under examination were subsidies and therefore the SCM Agreement being *lex specialis,* was the only "applicable law" (to the exclusion of other WTO provisions):

> "14.28 In considering Indonesia's defence that there is a general conflict between the provisions of the SCM Agreement and those of Article III of GATT, and consequently that the SCM Agreement is the only applicable law, we recall first that in public international law there is a presumption against conflict.[324] This presumption is especially relevant in the WTO context[325] since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation[326] pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words."

9.95 In light of this general principle, we will consider whether Article XXIV authorizes measures which Articles XI and XIII of GATT and Article 2.4 of the ATC otherwise prohibit. In view of the presumption against conflicts, as recognized by panels and the Appellate Body, we bear in mind that to the extent possible, any interpretation of these provisions that would lead to a conflict between them should be avoided.

(c) Principle of effective interpretation

9.96 Finally we would also like to recall the principle of effective interpretation[327] whereby all provisions of a treaty must be, to the extent possible, given their full meaning so that parties to such a

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[324] [Footnote original]In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the same parties. Second, the treaties must cover the same substantive subject matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. "... [T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. ... Not every such divergence constitutes a conflict, however. ... Incompatibility of contents is an essential condition of conflict". (7 Encyclopædia of Public International Law (North-Holland 1984), page 468). The *lex specialis derogat legi generali* principle "which [is] inseparably linked with the question of conflict"(Idem., page 469) between two treaties or between two provisions (one arguably being more specific than the other), does not apply if the two treaties ".. deal with the same subject from different points of view or [is] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with, those of the other" (Wilfred Jenks, "The Conflict of Law-Making Treaties", The British Yearbook of International Law (BYIL) 1953, at 425 *et seq.*). For in such a case it is possible for a state which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary. See also E.W. Vierdag, "The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions ", BYIL, 1988, at 100; Sir Robert Jennings/Sir Arthur Watts (ed.), Oppenheim's International Law, Vol. I., Parts 2 to 4, 1992, at 1280; Sir Gerald Fitzmaurice, "The Law and procedure of the International Court of Justice", BYIL , 1957, at 237; Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, 1984, at 97.

[325] [Footnote original]In this context we note that the WTO Agreement contains a specific rule on conflicts which is however limited to conflicts between a specific provision of GATT 1994 and a provision of another agreement of Annex 1A. We do not consider this interpretative note in this section of the report because we are dealing with Indonesia's argument that there is a general conflict between Article III and the SCM Agreement, while the note is concerned with specific conflicts between a provision of GATT 1994 and a specific provision of another agreement of Annex 1A.

[326] [Footnote original]"This would correspond to the ruling of the Appellate Body when it stated that a treaty may not be interpreted so as to reduce whole clauses to "inutility". See footnote 649 *supra*."

[327] The principle of effective interpretation or "l'effet utile" or in latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to

treaty can enforce their rights and obligations effectively. We note that the Appellate Body has referred to this principle on several occasions.[328] We understand that this principle of interpretation prevents us from reaching a conclusion on the claims of India or the defense of Turkey, or on the related provisions invoked by the parties, that would lead to a denial of either party's rights or obligations.

2. Overview of Article XXIV of GATT

9.97 In examining of Article XXIV, we are well aware that regional trade agreements have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade.[329] We have also undertaken a detailed analysis of the negotiating history of Article XXIV. We note that the wording of Article XXIV is of sub-optimal clarity and has been the object of various, sometimes opposing, views among individual contracting parties and Members and in the literature. We are also aware that the economic and political realities that prevailed when Article XXIV was drafted, have evolved and that the scope of regional trade agreements is now much broader than it was in 1948. Pursuant to the Vienna Convention on the Law of Treaties, we begin our analysis of the terms of Article XXIV together with those of GATT 1947, GATT 1994, the 1994 Understanding on Article XXIV in their context and in the light of the object and purpose of the WTO Agreement, GATT, the ATC and the relevant provisions on regional trade agreements.

9.98 As a means of increasing freedom of trade, Article XXIV recognizes that, subject to certain conditions, customs unions and free-trade areas between WTO Members are desirable. To this end Article XXIV provides for the possibility that Members forming a customs union may depart, as to the trade between themselves, from the most-favoured nation principle, in conformity with the conditions of Article XXIV.[330] There are a number of indications of the broad desirability of Article XXIV agreements as a means of increasing freedom of trade. For example, paragraph 4 of Article XXIV provides that:

> "The Members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between economies of the countries parties to such agreements."

9.99 Similarly, the preamble of the GATT 1994 Understanding on Article XXIV, which was added to GATT 1994 as a result of the Uruguay Round, reiterates that:

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all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty. For a discussion of this principle see also the Yearbook of the International Law Commission, 1966, Vol II A/CN.4/SER.A/1966/Add.1 p. 219 and following. See also *E.g.*, *Corfu Channel* Case, (1949) I.C.J. Reports, p. 24; *Territorial Dispute* Case (Libyan Arab Jamahiriya v. Chad), (1994) I.C.J. Reports, p. 23; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è éd. (1994) para. 17.2; D. Carreau, Droit International (1994), para. 369.

[328] See for instance the statement of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R ("*US – Gasoline*"):"An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"; also the Appellate Body Report on *Japan – Alcoholic Beverages*, p. 12; Appellate Body Report on *United States – Restrictions on Imports of Cotton and Man-Fibre Underwear*, adopted on 25 February 1997, WT/DS24/AB/R, p. 16.

[329] We refer to our discussion in paras. 2.2 to 2.9 above.

[330] We note in this context the statement of the Appellate Body in *EC - Bananas III*, para. 191: "Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV".

> "such contribution to the expansion of world trade may be made by closer integration between the economies of the parties to such agreements".

9.100 This is also reflected in paragraph 7 of the Singapore Ministerial Decision:[331]

> "7. We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system."

9.101 This recognition of the desirability of regional trade agreements is not without qualification, however. Article XXIV:4 appears also to recognize that some of these agreements may have detrimental effects and therefore the rest of paragraph 4 of Article XXIV provides:

> "They also recognize that the purpose of a customs union and a free-trade area should be to facilitate trade between constituent territories *and not to raise barriers to the trade of other Members with such territories*." (emphasis added)

9.102 This is reiterated in the preamble of the GATT 1994 Understanding on Article XXIV which provides that:

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

9.103 The terms of Article XXIV thus confirm that WTO Members have a right, albeit conditional, to conclude regional trade agreements.

9.104 In this regard, Article XXIV:5 provides that:

> "Accordingly, the provisions of this Agreement [GATT 1994] shall not prevent, as between the territories of Members, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that … :"

9.105 We note that, at the very beginning of Article XXIV:5, the use of the word "Accordingly" indicates that the conditional right to form a regional trade agreement has to be understood and interpreted within the parameters set out in paragraph 4, since the word "Accordingly" refers back to that paragraph, which is the only paragraph addressing customs unions and free-trade areas in Article XXIV that precedes paragraph 5. Thus, the purpose of such a regional trade agreement "should be to facilitate trade between constituent territories *and not to raise barriers to the trade of other Members with such territories*" (emphasis added). In addition, we note that paragraphs 5 (in its proviso), 6 and 8, in particular, contain requirements that such agreements must meet. We consider these requirements in more detail later.

9.106 With the intent of enabling Members as a whole to monitor the formation of such regional trade agreements, Article XXIV:7 provides that:

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[331] See WT/MIN(96)/DEC.

> "(*a*) Any Member deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the Members and shall make available to them such information regarding the *proposed* union or area as will enable them to make such reports and recommendations to Members as they may deem appropriate."[332] (emphasis added)

Paragraph 7 of the GATT 1994 Understanding on Article XXIV provides that:

> "Review of Customs Unions and Free-Trade Areas
>
> 7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate."

9.107 Traditionally in GATT, regional trade agreements were examined by working parties. In the WTO, such agreements are now examined by the Committee on Regional Trade Agreements (CRTA).[333] In the history of GATT, except in the case of the 1994 customs union between the Czech Republic and the Slovak Republic, the CONTRACTING PARTIES were never able to conclude whether or not a regional trade agreement was fully compatible with GATT. Today, under the WTO, Members have yet to conclude that a regional trade agreement is in full compliance with the WTO Agreement. In short, virtually all working party reports on regional trade agreements have been inconclusive.[334]

9.108 We note also that Article XXIV:10 of GATT provides for the possibility of an approval by WTO Members of a regional trade agreement that would not be fully compatible with the provisions of Article XXIV, if such a proposed regional trade agreement respects the key provisions of Article XXIV ("provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article").

3. Article XXIV:5(a)

(a) Arguments of the parties

9.109 Turkey claims that Article XXIV:5 of GATT 1994 authorizes the formation of a customs union, as defined by Article XXIV:8(a), provided that the conditions of Article XXIV:5(a) are met.

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[332] The rest of paragraph 7 reads: "(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the Members find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the Members shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations."

[333] The examination of regional trade agreements is subject to the same law and similar modalities as they were under GATT; see para. 2.7 above.

[334] This is in part due to the GATT/WTO practice of decision-making by consensus whereby the consensus of contracting parties (including the parties to the regional trade agreement) was needed for a recommendation to be made in terms of Article XXIV:7(a). The impossibility for GATT CONTRACTING PARTIES and still today, WTO Members, to reach any such conclusion is also due, *inter alia*, to disagreement on the interpretation of Article XXIV.

Turkey argues that the provisions of Article XXIV:5(a) should be read as permitting, at the time of the completion of a customs union, the introduction of restrictive regulations of commerce to the trade of third countries, provided that the overall incidence of duties and other regulations of commerce was not higher or more restrictive after the completion of the customs union than before. Turkey claims that the overall incidence of duties and other regulations of commerce of the constituent members of the Turkey-EC customs union is not higher or more restrictive after the completion of the customs union than before.

9.110 In Turkey's view, the fact that Article XXIV does not prohibit Members from introducing new restrictions is confirmed in the last sentence of paragraph 2 of the GATT 1994 Understanding on Article XXIV, which states, *inter alia*, that:

> "for the purposes of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required".

9.111 For Turkey, if it had been the intention of Members to ban the imposition of new quantitative restrictions whenever a customs union was being instituted, the reference to "other regulations of commerce" in Article XXIV:5 would have been a redundant provision.

9.112 Turkey further argues that the derogation envisaged by Article XXIV:5 is not limited to a particular GATT rule, but encompasses all those rules from which a derogation is necessary to permit the formation of customs unions. In support of this argument, Turkey notes that the opening clause of Article XXIV:5 is drafted in language similar to the language used in the opening clause of Article XX: "the provisions of this Agreement shall not prevent the formation of customs unions provided that …". For Turkey, this wording demonstrates that the derogation refers to all the provisions of the GATT, and not just to those contained in Article II, which are more specifically mentioned in Article XXIV:6.[335]

9.113 For India, the terms of Article XXIV:5 do not provide a legal basis for measures otherwise incompatible with GATT/WTO rules. This provision merely authorizes the formation of a customs union or free-trade area, nothing else. Its terms consequently exempt from the other obligations under the GATT only measures inherent in the formation of a customs union or a free-trade area. For instance, a customs union or a free-trade area could only be formed by the granting of preferential treatment inconsistent with Article I and Article XXIV clearly provides a justification therefor. However, customs unions and free-trade areas could be formed without the introduction of new quantitative restrictions on imports from third Members inconsistent with Article XI of GATT. There is, in particular, nothing that requires Members forming a customs union to impose new restrictions on imports from one particular third Member, inconsistently with Articles XI and XIII of GATT and Article 2.4 of the ATC.

9.114 India also refers the Panel to Article XXIV:6, as part of the context of paragraph 5, which recognizes that on the occasion of the creation of a customs union, tariff bindings may be increased. India argues that there is no corresponding mechanism for renegotiation and compensation for Members affected by the introduction or increase of quantitative restrictions which are otherwise WTO incompatible. For India, this is a logical consequence of the principle that increasing tariffs is not as such WTO incompatible, as tariffs are negotiable (and renegotiable under Article XXVIII), whereas quantitative restrictions are in general prohibited and may only be imposed in circumstances narrowly defined in the WTO agreements. Given that rules governing quantitative restrictions are

[335] In this context, Turkey recalls that it had offered to enter into negotiations to address India's concerns with regard to the change in its external trade regime, but that India had not wished to participate in such negotiations.

fundamentally different from the rules governing tariffs, there is no basis to apply Article XXIV:6 by analogy to quantitative restrictions. Moreover, for India, paragraph 4 of the GATT 1994 Understanding on Article XXIV makes it explicit that paragraph 6 of Article XXIV establishes the procedures to be followed when a Member forming a custom union proposes to increase a bound rate of duty. Had the Uruguay Round negotiators meant to extend Article XXIV:6 to quantitative restrictions, they would have formulated this provision accordingly.

9.115 According to Turkey, it could not be inferred from the fact that Article XXIV:6 only refers to increases of customs duty rates that the intention behind Article XXIV:5(a) is to prohibit the introduction of restrictive measures as part of a common regulation of commerce of a customs union. For Turkey, such an interpretation would be difficult to reconcile with Article XXIV:5(a), which provides a test for the GATT consistency of a customs union requiring, *inter alia*, that regulations of commerce of a customs union shall not on the whole be more restrictive than the regulations of commerce applicable in the constituent territories prior to the formation of the customs union. For Turkey, it would make little sense to provide for an evaluation of the overall incidence of regulations of commerce if, as India asserts, the regulations of commerce of the Turkey-EC customs union cannot be determined by pre-existing restrictive measures applied by the European Communities.

(b) Analysis of Article XXIV:5(a)

(i) Ordinary meaning of the terms of Article XXIV:5(a)

9.116 Article XXIV:5(a) provides as follows:

> "5. Accordingly, *the provisions of this Agreement shall not prevent*, as between the territories of contracting parties, *the formation of a customs union* or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
>
> (*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;" (emphasis added)

9.117 With respect to tariffs, paragraph 2 of the GATT 1994 Understanding on Article XXIV makes it clear that it is the level of the "applied duties" that are to be taken into account by Members in their "evaluation under paragraph 5(a) of Article XXIV":

> "For this purpose the duties and charges to be taken into consideration shall be the applied rates".

9.118 By requiring an examination of changes in applied duties, the provisions of Article XXIV:5(a) are made unambiguously distinct from those in Article XXIV:6, since the level of applied duties, unlike bound tariffs, is not regulated in the WTO framework of rights and obligations. Since the analysis of applied duties is a basic tool in appraising the impact of actual border barriers on trade opportunities, we consider that the requirement of an overall assessment of the incidence of duties based on applied duties clearly points at the economic nature of the assessment under paragraph 5(a).

9.119 The same conclusion is applicable in relation to the overall assessment of the incidence of other (non-tariff) regulations of commerce, in respect of which paragraph 2 of the Understanding on Article XXIV provides:

> "… It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required."

9.120 Thus, the terms of paragraph 5(a) of Article XXIV, as elaborated upon and clarified by the GATT 1994 Understanding on Article XXIV, provide for an "economic" test for assessing whether a specific customs union is compatible with Article XXIV. In the context of the overall assessment of the potential trade impact of any such customs union, (a task envisaged to be performed by the WTO membership through the CRTA[336]), duties and all regulations which existed in one or more of the constituent members and/or form part of the customs union treaty must be taken into account. While there is no agreed definition between Members as to the scope of this concept of "other regulations of commerce", for our purposes, it is clear that this concept includes quantitative restrictions. More broadly, the ordinary meaning of the terms "other regulations of commerce" could be understood to include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g. sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any other trade-related domestic regulation, e.g. environmental standards, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept.

9.121 We note that the language of paragraph 5(a) of Article XXIV is general and not prescriptive. While it authorizes the formation of customs unions, it does not contain any provision that either authorizes or prohibits, on the occasion of the formation of a customs union, the adoption of import restrictions otherwise GATT/WTO incompatible, by any of the parties forming this customs union. For example, the terms of paragraph 5(a) do not permit or prohibit or otherwise regulate increases of bound tariffs, which is an issue dealt with in paragraph 6 of Article XXIV. Rather, paragraph 5(a) provides for an economic assessment (to be performed by the WTO membership as a whole) of the overall effect of the applied tariffs and other regulations of commerce resulting from the formation of the customs union.[337] While the wording of paragraph 5(a) assumes that, as a result of a customs union, some (applied) duties may be higher, and/or other regulations of commerce may be more restrictive than before, it does not specify whether such a situation may occur only through GATT/WTO consistent actions or may occur through GATT/WTO inconsistent actions. What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.

9.122 In other words, we consider that the terms of paragraph 5(a) do not address the GATT/WTO compatibility of specific measures that may be adopted on the occasion of the formation of a new customs union. We note that the standard terms of reference used by the CRTA for the examination of regional trade agreements confirm that the CRTA, in its overall assessment, shall not determine the WTO compatibility of specific measures.[338] The terms of Article XXIV:5(a) only provide that, for a

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[336] In this respect we note the standard terms of reference used by the Council for Goods for examining regional trade agreements, as set out in WT/REG3/1.

[337] The assessment, with respect to applied tariffs, is based on two comparable trade-weighted averages of applied tariffs, calculated by the Secretariat in accordance with the methodology described in paragraph 2 of the Understanding: (a) an average representing the pre-customs union situation; and (b) another average reflecting the situation just after the formation of the customs union. To compute the figure under (a), all applied tariffs (by tariff line) of all parties to the customs union are averaged using - as weights - the corresponding values of their imports from non-preferential origins; the figure under (b) is obtained by averaging the tariffs (to be) applied by the customs union, using the same values as trade weights.

[338] "This implies that a working party established to examine a notification under paragraph 7(a) of Article XXIV has the mandate to examine the incidence and restrictiveness of *all duties and regulations of commerce, in particular those governed by the provisions of the Agreements contained in Annex 1A of the WTO Agreement*. However, it should be kept in mind that the purpose of an examination in the light of paragraph 5(a) of Article XXIV *would not be to determine whether each individual duty or regulation existing or introduced on*

customs union to be compatible with Article XXIV of GATT and the 1994 GATT Understanding on Article XXIV, the overall impact of the applied tariffs and other regulations of commerce resulting from the formation of the customs union must not be more restrictive than that of its constituent members prior to its formation.

9.123 It is important to emphasize that this interpretation does not render paragraph 5(a) a nullity,[339] as suggested by Turkey. In terms of our reading of paragraph 5(a), it continues to play an important role in ensuring that the occasion of the formation of a customs union is not used to increase trade barriers overall, even if the parties' previous concessions allowed such an increase (e.g., in the case of increased applied rates below tariff levels bound by all parties). Indeed, that purpose is in fact emphasized by the focus on "applied", and not on bound, tariff rates.

(ii) The immediate context of Article XXIV:5(a)

9.124 Our interpretation of the terms of Article XXIV:5(a) is supported by their context. That context in the first place consists of the other provisions of Article XXIV relating to regional trade agreements.

Article XXIV:5(b)

9.125 Our interpretation of paragraph 5(a) is also supported by the similar wording contained in paragraph 5(b) in relation to free-trade areas. In paragraph 5(b), which is concerned with free-trade areas, it is stated that "… the duties and other regulations of commerce maintained in *each* of the constituent territories … shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories …" (emphasis added). We note that the terms of paragraph 5(b) are very similar to those in paragraph 5(a). In free-trade areas, however, constituent members are not required to harmonize their other trade regulations with third countries. Therefore, constituent members of a free-trade area could not argue that the terms of paragraph 5(b) would authorize them to violate other provisions of the WTO Agreement in their efforts to harmonize their external trade policies, since they are not required to do so. Consequently, we see no basis for arguing that the terms of paragraph 5(a) authorize constituent members of a customs union to adopt GATT-inconsistent measures. The same terms being used in paragraphs 5(a) and 5(b) should not lead to different interpretations.

Article XXIV:4

9.126 We also note that Article XXIV:4 provides that the purpose of a customs union should not be to raise barriers to the trade of other Members. While not expressed as an obligation, paragraph 4 (and its elaboration in the fifth paragraph of the Preamble of the GATT 1994 Understanding on Article XXIV) argues against an interpretation of paragraph 5(a) that would read into that paragraph an exception to GATT rules that prohibit specific trade barriers. This view is also expressed by Japan and Hong Kong, China in their third party submissions.[340] With the use of the term "Accordingly", the language of paragraph 4 is specially relevant to the application and interpretation of the provisions in paragraph 5, and argues against any interpretation in favour of exceptions or deviations (not elsewhere foreseen) to the general GATT prohibition against the use of quantitative restrictions. This is also noted by the Philippines.[341]

Article XXIV:6

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the occasion of the formation of a customs union is consistent with all provisions of the WTO Agreement; it would be to ascertain whether on the whole the general incidence of the duties and other regulations of commerce has increased or become more restrictive.", Understanding read out by the Chairman of the Council for Trade in Goods - 20 February 1995, WT/REG3/1 (emphasis added).

[339] See our discussion on the general rule of effective interpretation in para. 9.96 above.

[340] See Japan's argument in para. 7.21 and Hong Kong, China's argument in para. 7.10 above.

[341] See para. 7.43 above.

9.127 Furthermore, Article XXIV:6 provides that if a Member "proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply". Thus, in the adoption of the common external tariff of a customs union, compensation is due if a pre-existing tariff binding is exceeded. We note that there is no parallel provision to compensate Members for the introduction of quantitative restrictions. In our view, this is the case because quantitative restrictions are generally prohibited by GATT/WTO, while increases of tariffs above their bindings, if re-negotiated, are WTO compatible.

9.128 We also consider that this reference to Article XXVIII in Article XXIV provides evidence of the application of the other GATT provisions to measures adopted on the occasion of the formation of a customs union. The purpose of such specific reference to Article XXVIII, is to allow for the re-negotiation of the tariff bindings outside the time and prior notification constraints of Article XXVIII (including Article XXVIII*bis* and the GATT 1994 Understanding on Article XXVIII).

Article XXIV:8

9.129 Another element relating to the context is the scope and ordinary meaning of the terms of sub-paragraph 8(a)(ii) which define how Members forming a customs union should act *vis-à-vis* third country Members. For our analysis of Article XXIV:8(a) we refer to our discussion in paragraphs 9.142 to 9.169 below, where we address Turkey's argument that it is required to adopt the EC's commercial trade policy including quantitative restrictions in the sector of textile and clothing products.

Article XXIV in Part III of GATT

9.130 An additional element relating to the context is the fact that Article XXIV is found in Part III of GATT, a section of GATT distinct from Part I and Part II. Part I contains the main foundations of GATT: the most-favoured nation clause (Article I) and the tariff commitments or bindings (Article II). Part II contains a set of disciplines, the purpose of which is mainly to ensure the effectiveness of the tariff commitments. This is evident from the prohibition against quantitative restrictions (Article XI) and the national treatment obligation (Article III). We note that Article XXIV is not listed with the general exceptions (Article XX) or the security exception (Article XXI), both of which are in Part II.

9.131 Turkey concludes from the positioning of Article XXIV in Part III, that Article XXIV constitutes a self-contained regime for the formation of regional trade agreements, i.e. if the requirements of Article XXIV are met, other GATT rules do not apply to measures related to the formation of a customs union.

9.132 We note that Part III contains different types of provisions, some of a more institutional nature (Article XXV for instance), others dealing with Members' basic rights, such as Article XXVIII, and Article XXIV. We also note that Article XXIV itself deals with various elements such as the territorial application of GATT, frontier traffic and customs unions and free-trade areas. We have examined thoroughly the negotiating history of Article XXIV which, however, is not instructive in this respect. There is no text associated with Part III that suggests that it is fundamentally different from Part II, although Parts II and III entered into force at different dates.[342] In the Havana Charter, the provisions on

[342] We recall also that in the *European Communities – Measures Affecting the Importation of Certain Poultry Products*, adopted on 23 July 1998, WT/DS69/7, the Appellate Body concluded that the prohibitions contained in Article XIII were applicable to negotiations taking pace pursuant to Article XXVIII, a provision also contained in Part III of GATT. Clearly provisions of Part III of GATT do not in themselves argue for a distinct regime from those contained in Part II of GATT.

regional trade agreements were included in the commercial policy chapter in a section on special provisions (among which were the general exceptions found today in Article XX of GATT). Yet we are not aware that the provisions of the Havana Charter on customs unions were thought to be fundamentally different from those of GATT. We can read that the drafters were of the view that customs unions and free-trade areas (a concept that came in later in the negotiations) were of the nature of this so-called "exception" but the discussions are not illuminating on the scope or even the nature of this provision and the relevance of its "location" in the GATT. We hesitate to draw from this examination the conclusion proposed by Turkey.

9.133 Moreover, the interpretation advanced by Turkey which pertains to propose a test as to the treatment of measures that are associated with the "formation" of a customs union, is problematic. The temporal and substantive breadth of this concept would be crucial to the interpretation of Article XXIV under Turkey's argument, yet Article XXIV does not define such a concept.[343] There are important difficulties in relation to the interpretation of the term "formation" when considered in relation to the present case.[344] For us this argument of Turkey is not substantiated and we therefore reject it.

(iii) Conclusion based on the ordinary meaning of the terms and their immediate context

9.134 We shall examine the wider context of Article XXIV:5(a) and 8(a) as well as the object and purpose of GATT and the WTO Agreement, together with the practice of GATT CONTRACTING PARTIES and WTO Members with regard to these provisions, after our examination of the wording of Article XXIV:8(a). So far, based on the ordinary meaning of the terms and their immediate context, we find that the language of Article XXIV:5(a) is not prescriptive as to whether a specific measure may be adopted on the occasion of the formation of a customs union. From the terms of Article XXIV:5(a) and their immediate context, we find that there is a basis for the provisions of the sub-paragraph 5(a) to be informed by, and interpreted consistent with, the language of paragraph 4 against the raising of trade barriers. Consequently, we find that there is no legal basis in Article XXIV:5(a) for the introduction of quantitative restrictions otherwise incompatible with GATT/WTO; the wording of sub-paragraph 5(a) does not authorize Members forming a customs union to deviate from the prohibitions contained in Articles XI and XIII of GATT or Article 2.4 of the ATC. We find that the terms of sub-paragraph 5(a) provide for a prohibition against the formation of a customs union that would be more restrictive, on the whole, than was the trade of its constituent members (even in situations where there are no WTO-incompatible measures).

4. Article XXIV:8

(a) Arguments of the parties

9.135 Turkey submits also that Article XXIV:8(a)(ii) requires it to apply to third countries the same regulations of commerce, including import restrictions as those applied by the European Communities to the same third countries, since the term *regulations of commerce* has traditionally been interpreted as incorporating quantitative restrictions.[345] For Turkey, this is precisely the reason why Article 12 of Decision 1/95 unequivocally envisages the wholesale adoption by Turkey of the European Communities' Common Commercial Policy Instruments, as well as the European Communities'

[343] What would be the minimum required scope for measures to qualify as being part of the "formation"? Would all measures that lead to, or are alleged to lead to, harmonization of policies be covered? Should there be a minimum or maximum time-frame to determine such "formation" period? Should the formation be required to correspond to any announced transitional period of interim agreements?

[344] We note that Turkey's first agreement with the European Communities was signed on 12 September 1963; see paras. 2.10 to 2.13 above. We note in passing that this situation is not unusual and reflects the reality of the ways in which Article XXIV type agreements are negotiated and presented to the WTO Members. But it is also evident that the present wording of Article XXIV on interim agreements is not adequate and does not reflect the present realities of the way regional trade agreements are negotiated and presented to the CRTA.

[345] See BISD 35S/293, para. 45.

Customs Code, in the area of textiles and clothing products, prior to the completion of the customs union. Article 12(1) specifies the external trade measures to be adopted by Turkey towards third countries, which constituted the critical mass of commercial policy regulations applied by the European Communities and appropriate measures are envisaged to prevent trade diversion to the European Communities over Turkey's customs territory.

9.136 In India's view, however, Article XXIV:8(a) merely defines the requirements to be fulfilled by a regional trade agreement to qualify as a customs union within the meaning of Article XXIV[346]. This provision could not reasonably be interpreted to imply that Members, in fulfilling that requirement, are entitled to ignore their WTO obligations, such as those prohibiting import restrictions from third Members. For India, Article XXIV:4 makes it clear that the purpose of a customs union is not to raise barriers to the trade of third countries.

9.137 India notes that while Turkey claims it is obliged by Article XXIV:8 to adopt common quantitative restrictions with the European Communities for textiles and clothing products, it is also claiming the right to follow divergent trade policy practices and to adopt different instruments in other areas. India notes in this respect differences *inter alia* in external trade policies on agriculture, steel and other sensitive industrial products, as well as in relation to anti-dumping, countervailing and safeguards measures. India also adds that there is additionally no requirement that Members fulfil the requirements of Article XXIV:8(a) immediately.

9.138 For Turkey, India's interpretation of Articles XXIV:5 and XXIV:8(a)(ii) is overly restrictive. Turkey is of the view that any interpretation of Article XXIV which could lead to the conclusion that in certain circumstances, WTO Members with diverging external trade regimes were legally inhibited from forming a customs union, is in contradiction with the objective clearly stated in Article XXIV:4.

9.139 Turkey submits further that, since, in order to qualify as a customs union, the Turkey-EC customs union must cover substantially all trade - as required by Article XXIV:8(a)(i) - it has obviously to cover trade in textiles and clothing products, which represents 40 per cent of Turkey's exports to the European Communities. For such trade in textiles and clothing to be covered, the constituent members of the Turkey-EC customs union must have common tariffs and a common foreign trade regime with other countries in accordance with Article XXIV:8(a)(ii). For Turkey, such common regulation of commerce, as determined by restrictive measures which the European Communities applies in conformity with WTO rules, must cover goods imported into the Turkey-EC customs union *via* Turkey. For Turkey, there is no alternative: in the context of the formation of its customs union with the European Communities, it was required to adopt the European Communities' external trade policy in textile and clothing products.

9.140 We understand that Turkey is referring to two different requirements: 1) the requirement that it adopt the European Communities' external textile policy in order to form a customs union compatible with Article XXIV:8(a)(ii), and 2) the requirement in its specific customs union agreement with the European Communities that it adopt that European Communities' policy. We shall examine the second requirement in paragraphs 9.178 to 9.182 of this Panel report.

(b) Analysis of Article XXIV:8(a)

9.141 We note Turkey's arguments that if it wants to exercise its right to form a customs union with the European Communities, it has no alternative but to adopt exactly the same external trade policy as that of the European Communities and consequently, if need be, it is authorized by the provisions of Article XXIV:8(a)(ii) to violate the prohibition of Articles XI and XIII of GATT (and Article 2.4 of the ATC). We shall first examine the wording of Article XXIV:8(a)(i) and XXIV:8(a)(ii) and consider whether these provisions require Turkey to do what it claims to be required to do, namely to

[346] See India's argument in para. 6.86 and Turkey's response in para. 6.94 above.

violate Articles XI and XIII of GATT and Article 2.4 of the ATC. In this context we shall discuss the relationship between Article XXIV and Article XI of GATT. Finally, we will examine whether our interpretation of Article XXIV in the present case would prevent Turkey from exercising its right to form a customs union.

(i) The terms of paragraph 8(a)

9.142 Paragraph 8(a) of Article XXIV reads as follows:

> "8. For the purposes of this Agreement:
>
> (*a*) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
>
> (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories, and,
>
> (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;"

It is accepted that quantitative restrictions, such as the measures at issue in this case, are "restrictive regulations of commerce" for the purposes of Article XXIV:8(a).

9.143 We note the definition of a customs union as being "the substitution of a single customs territory for two or more customs territories". The term "customs territory" is defined in paragraph 2 of Article XXIV as being:

> "For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories."

9.144 With regard to the external dimension of any such customs union, the implied ultimate (and ideal) situation is that a complete single common foreign trade regime is adopted by the constituent members of the customs union.

9.145 We note that sub-paragraph 8(a)(i) of Article XXIV governs the internal trade between constituent members of a customs union. Sub-paragraph 8(a)(ii) governs the trade of the constituent members with third countries, and not the trade between the constituent members themselves.

9.146 The terms of sub-paragraph 8(a)(i) offer some flexibility to the constituent members of a customs union as also noted by Hong Kong, China.[347] The standard is that "substantially all the trade between the constituent territories" must be fully liberalized among the constituent Members. This, in practice, can be accomplished only by providing preferential treatment to goods originating in the constituent territories.[348] We are mindful that sub-paragraph 8(a)(i) is not directly relevant to this

[347] See para. 7.15 above.

[348] Thus, in our view, sub-paragraph 8(a)(i) authorizes, for example, the members of a customs union to grant each other treatment notwithstanding the provisions of Article I:1 of GATT. We note in this context the statement of the Appellate Body in *EC - Bananas III*, para. 191: "Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV". This was also

case, as India's claims do not concern any preferential treatment accorded by Turkey and the European Communities to each other as part of their customs union, but rather with the treatment of their trade with non-members of the customs union, i.e. Turkey's imposition of quantitative restrictions on Indian textiles and clothing.[349] This is an issue mainly for consideration in light of Article XXIV:8(a)(ii), and the relationship between the two sub-paragraphs 8(a)(i) and 8(a)(ii).

9.147 In considering Turkey's Article XXIV:8(a) defense, we are mindful of the need to interpret Article XXIV in a manner to avoid conflicts with other WTO provisions (see paragraph 9.95 above). The issue we must consider now is whether Articles XI (and XIII) of GATT, on the one hand, and Article XXIV:8(a)(ii), on the other hand, may be interpreted so as to avoid a conflict requiring that one provision yields to the other. For the reasons explained below, we believe that, in this case, the flexibility inherent in sub-paragraph 8(a)(ii) allows for harmonious interpretation. That interpretation is in accordance with the context of the sub-paragraph 8(a)(ii) and the object and purpose of the WTO Agreement, and, at the same time, fully respects Turkey's right to enter into a customs union with other Members.

9.148 As Japan and Hong Kong, China stressed[350], we note at the outset that the terms of sub-paragraph 8(a)(ii) do not explicitly authorize Members of a customs union to violate GATT rules in their relations with non-constituent members. Nor do they implicitly require such a result. Indeed, the terms of sub-paragraph 8(a)(ii) allow for flexibility in the creation of a common commercial policy, as the standard used is that "substantially the same duties and other regulations of commerce are [to be] applied by each of the members of the [customs] union". We are aware that GATT CONTRACTING PARTIES and WTO Members have never reached agreement on the interpretation of the term "substantially" in the context of Article XXIV:8. The ordinary meaning of the term "substantially" in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression "substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union" would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.[351]

9.149 We note also that sub-paragraphs 8(a)(i) and 8(a)(ii) address distinct but inter-linked policies. Therefore, the inclusion of a sector within the coverage of a customs union, i.e. the removal of all trade barriers in respect of products of that sector between the constituent members of the customs union, does not necessarily imply that those constituent members must apply identical barriers or barriers having similar effects to imports of the same products from third countries.

9.150 We note, however, in the terms of sub-paragraph 8(a)(i), the possibility for parties to a customs union to maintain certain restrictions of commerce on their trade with each other, including quantitative restrictions ("…where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX"). This implies that even for "substantially all trade originating in the constituent countries" to be covered (here, for instance, textile and clothing products), certain WTO compatible restrictions

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recognized in a prior non-adopted Panel Report on *EEC – Member States' Import Regimes for Bananas*, DS32/R, para. 358: " … it [Article XXIV] merely provides them [contracting parties] with a justification for not applying to imports originating in such a union or area the restrictive import measures that they were permitted to impose under other provisions of the General Agreement".

[349] We are aware of the statement of the Appellate Body in the *EC – Computer Equipment* which should be understood in the context of the internal market of the EC : "96.…. However, the European Communities constitutes a customs union, and as such, once goods are imported into any Member State, they circulate freely within the territory of the entire customs union. The export market, therefore, is the European Communities, not an individual Member State." This Appellate Body statement referred to the "constant prior practice" of the European Communities. However, we are not addressing the situation of the internal market of the European Communities or the trade relations between the European Communities and Turkey.

[350] See Japan's argument in para. 7.25 and Hong Kong, China's argument in para. 7.16 above.

[351] We have also examined the French and Spanish versions of Article XXIV which confirm that flexibility is left to the constituent members.

can be maintained. This implies that internal quantitative restrictions can be used in the event that only one of the constituent territories has in place a restriction on imports from third countries. If such pre-existing import restrictions were WTO compatible, the maintenance of an internal import restriction between the two constituent countries would ensure that the protection afforded by the original WTO compatible quota would not be circumvented. The maintenance of such an internal restriction can obviate the need for identical external trade policies. We note also that the plain meaning of the wording used in these two sub-paragraphs implies a difference in approach between efforts at internal trade liberalization among constituent members of a customs union where the maintenance of some quantitative restrictions (as restrictive regulations of commerce) is explicitly permitted (see paragraph 8(a)(i)), and their respective external policies with third countries where paragraph 8(a)(ii) contains no specific authorization relating to the maintenance of quantitative restrictions.

9.151 Having said this, and recognizing such flexibility, many questions remain unanswered. We consider, however, that if the ideal situation were to be one where the policies of the constituent members are identical, there is nevertheless a wide range of possibilities left for Members to identify how they can form their customs union and to what extent and how, they should put in place their internal trade and their common foreign trade polices. Considering this wide range of possibilities, we are of the view that, as a general rule, a situation where constituent members have "comparable" trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii). The possibility also exists of convergence across a very wide range of policy areas but with distinct exceptions in limited areas. The greater the degree of policy divergence, the lower the flexibility as to the areas in which this can occur; and vice-versa. In our view, our interpretation of sub-paragraph 8(a)(ii) allows Members to form a customs union, as in this case, where one constituent member is entitled to impose quantitative restrictions under a special transitional regime and the other constituent member is not.[352]

9.152 This interpretation seems to be confirmed by the effective practice of the Turkey-EC customs union. We note that in some sectors such as those relating to agriculture, steel etc, identical trade policies are not being applied by the constituent members. We note also that Decision 1/95 envisages that the European Communities may continue to apply its system of certificates of origin should Turkey fail to conclude agreements with third countries, similar to the agreements already in place between those countries and the European Communities.[353] Thus, there are administrative means, as stated by the United States[354], available to the European Communities and Turkey, and in particular rules of origin, as suggested by Hong Kong, China[355], in order to ensure that no trade diversion occurs, while respecting the parameters of sub-paragraph 8(a)(i) and at the same time of sub-paragraph 8(a)(ii), recalling that the two sets of policies under sub-paragraphs 8(a)(i) and 8(a)(ii) are distinct and the relationship between them is a flexible one.

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[352] Our discussion of the flexibility offered by Article XXIV:8(a) is without prejudice to the further flexibility that may exist during the transition period of an interim agreement leading to a customs union.

[353] Article 12 of Decision 1/95 (WT/REG22/1) provides that: "2. In conformity with the requirements of Article XXIV of the GATT Turkey will apply as from the entry into force of this Decision, substantially the same commercial policy as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing. The Community will make available to Turkey the cooperation necessary for this objective to be reached. 3.Until Turkey has concluded these arrangements, the present system of certificates of origin for the exports of textile and clothing from Turkey into the Community will remain in force and such products not originating from Turkey will remain subject to the application of the Communities Commercial Policy in relation to the third countries in question… In the absence of such modalities, the Community reserves the right to take, in respect of imports into its territory, any measure rendered necessary by the application of the said Arrangement."

[354] See the United States' argument in para. 7.112 above

[355] See Hong Kong, China's argument in para. 7.18 above.

9.153 Our interpretation of Article XXIV:8(a) is not such as to render Turkey's right to form a customs union a nullity. We note that Turkey's exports of textiles and clothing to the European Communities represent 40 per cent of its total exports to the European Communities. If Turkey wants to cover such trade and to ensure that it benefits from the advantages of the customs union, it can do so and comply with sub-paragraph 8(a)(i). In its discussion of the interpretation and application of sub-paragraph 8(a)(ii), Turkey's reference to the fact that textiles and clothing represents 40 per cent of its trade with the European Communities, is therefore of no relevance. With regard to its external trade policies, calculations based on import statistics provided by Turkey to the Panel show that, in 1995, 1996 and 1997, (a) textile and clothing imports from all non-EC countries (including WTO Members and non-Members) into Turkey represented between 8 and 9 per cent of Turkey's total imports from those countries[356]; (b) imports from non-EC countries of the products covered by all categories under restriction by Turkey represented 4.5 per cent of Turkey's total imports from those countries[357]; and (c) imports from non-EC countries of the products covered by the 19 categories under restriction from India represented less than 3 per cent of Turkey's total imports from those countries.[358] It should be noted that the figures in (b) and (c) above, include both imports from WTO Members and non-Members. Thus, a variation in policy relevant to WTO Members on at most 4.5 per cent of Turkey's external trade, in any event of a temporary nature,[359] could not be considered in this case to jeopardise the requirement of Article XXIV:8(a)(ii) that substantially the same regulations of commerce are to be applied by Turkey and the European Communities to third countries. The fact that this proportion of trade is regulated in a different way by Turkey, cannot be seen to contradict the requirements of Article XXIV:8(a)(ii). As noted above, we consider that it is for the CRTA to assess the GATT/WTO compatibility of customs unions such as the Turkey-EC customs union and that in any case our terms of reference do not request us to do so. We, for our part, have endeavoured to ensure that our interpretation is not such as to prevent Turkey from exercising its WTO right to form a customs union.

9.154 Independently of the fact that constituent members could agree that some of their foreign trade policies may not be identical, we consider that the terms of sub-paragraph 8(a)(ii) do not address the issue of whether an otherwise WTO incompatible import restriction could be introduced among the identical or different trade policies on formation of a customs union. In our view, the terms of Article XXIV:8(a)(ii) do not provide any authorization for Members forming a customs union to violate the prescriptions of Articles XI and XIII of GATT or Article 2.4 of the ATC.

(ii) Immediate context

9.155 The conclusion that Article XXIV:8(a)(ii) should be read as not authorizing the violation of Articles XI and XIII of GATT or Article 2.4 of the ATC in the circumstances of this case is supported by the same contextual analysis that we developed relating to paragraph 5(a) (see paragraphs 9.124 to 9.133 above), and in particular, our analysis of paragraphs 4 and 6 of Article XXIV.

(iii) Conclusion

9.156 We conclude, based on the ordinary meaning of its terms and their immediate context, that Article XXIV:8(a) does not address explicitly the issue of the GATT/WTO compatibility of the measures adopted by constituent members of a customs union in their effort to align substantially all their duties and regulations of commerce *vis-à-vis* third countries. In any case, we consider that, in this case, Article XXIV:8(a)(ii) does not authorize Turkey, in forming a customs union with the European

[356] See Table II.2 above.

[357] See paras. 2.41 and 2.42 above.

[358] This results from the fact that, Turkey as an important clothing manufacturer, imports mainly textile products and these are only partially represented in the restricted categories (only 6, out of the 19 categories, refer to textile yarn or fabrics). (See para. 2.46 above and Annex to this report, Appendix 1.)

[359] The European Communities' MFA-derived quantitative restrictions must be eliminated by 1 January 2005.

Communities, to introduce quantitative restrictions on textile and clothing products that would be otherwise incompatible with GATT/WTO, nor does it require that Turkey introduce restrictions on imports of textiles and clothing which would be inconsistent with other provisions of the WTO Agreement.

(c) The wider context of Article XXIV:5 and 8 and the object and purpose of the agreements

9.157 We consider that the wider context of sub-paragraphs 5(a) and 8(a) and Article XXIV generally, as well as the object and purpose of the WTO Agreement, and GATT 1994, including the GATT 1994 Understanding on Article XXIV, are also relevant to the interpretation of Article XXIV and confirm our interpretation of the provisions of sub-paragraphs 5(a) and 8(a) of Article XXIV.

9.158 We note that the Preamble to the GATT 1947 (now GATT 1994) provides that:

> "Recognizing that their relations in the field of trade …should be conducted with a view to … and *expanding the production and exchange of goods*," (emphasis added)

9.159 Such language suggests that a global objective of GATT 1947 was, and of GATT 1994 is, to increase trade by reducing (making less restrictive) tariffs and lowering non-tariff barriers. It is a dynamic objective. The use of regional trade agreements to achieve that objective is legitimized by the first sentence of Article XXIV:4:

> "The contracting parties recognize the desirability of *increasing freedom of trade* by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements." (emphasis added)

9.160 Already then it was clear to CONTRACTING PARTIES that the overall objective of GATT and for that matter, regional trade agreements, should not be to raise barriers to trade. This is also noted in the Philippines' submission.[360] This is reflected in the wording of the second sentence of paragraph 4 of Article XXIV:

> "They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories *and not to raise barriers to the trade of other contracting parties* with such territories." (emphasis added)

and in the Preamble to GATT 1947:

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

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

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

and in the Preamble to the WTO Agreement:

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[360] See para. 7.41 above.

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

9.162 We also recall the Singapore Ministerial Declaration:

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

9.163 From the above cited provisions,[361] we draw two general conclusions for the present case. Firstly, the objectives of regional trade agreements and those of the GATT and the WTO have always been complementary, and therefore should be interpreted consistently with one another, with a view to increasing trade and not to raising barriers to trade, thereby arguing against an interpretation that would allow, on the occasion of the formation of a customs union, for the introduction of quantitative restrictions. Secondly, we read in these parallel objectives a recognition that the provisions of Article XXIV (together with those of the GATT 1994 Understanding on Article XXIV) do not constitute a shield from other GATT/WTO prohibitions, or a justification for the introduction of measures which are considered generally to be *ipso facto* incompatible with GATT/WTO. In our view the provisions of Article XXIV on regional trade agreements cannot be considered to exempt constituent members of a customs union from the primacy of the WTO rules. In this context we also note the Singapore Ministerial Declaration where Members stated: "We reaffirm the primacy of the multilateral trading system…".

(d) GATT/WTO practice

9.164 Turkey also refers to the practice of the GATT CONTRACTING PARTIES to support its view that, on the occasion of the creation of a customs union, individual GATT contracting parties and now WTO Members have been authorized to introduce new, otherwise GATT/WTO incompatible, import restrictions.[362] Article 31.3(b) of the VCLT provides that the "context" of a provision to be interpreted, includes "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Article XVI:1 of the Agreement Establishing the WTO provides that the WTO shall be guided by the customary practices followed by the CONTRACTING PARTIES.

9.165 We recall the statement of the Appellate Body in *Japan – Alcoholic Beverages*:[363]

> "Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[364] An isolated act is generally not sufficient to establish subsequent practice;[365] it is a sequence of acts establishing the agreement of the parties that is relevant.[366]"

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[361] We note that the wording of Article V of GATS refers to the same concepts.

[362] Turkey alludes to GATT practice, albeit not in great detail. See paras. 6.58 to 6.61 above.

[363] Appellate Body Report on *Japan – Alcoholic Beverages*, pp. 12-13.

[364] [Footnote original]Sinclair, The Vienna Convention on the Law of Treaties (2nd ed., 1984), p. 137; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités" (1976-III) 151 Recueil des Cours p. 1 at 48.

[365] [Footnote original]Sinclair, *supra*., footnote 24, p. 137.

[366] [Footnote original](1966) Yearbook of the International Law Commission, Vol. II, p. 222; Sinclair, *supra*., footnote 24, p. 138.

9.166 After examination of GATT/WTO practice, and as noted by the United States[367] and the Philippines[368], it is quite evident that no consensus was reached, nor was any practice agreed upon regarding Article XXIV of GATT. For example in 1957, the Report of the Sub-Group B (Quantitative Restrictions) of the GATT Committee on the European Economic Community,[369] which examined the conformity of the Treaty of Rome with the provisions of Article XXIV, stated that:

> "4. Most members of the Sub-Group (…) [were of the] view [that] countries entering a customs union would continue to be governed by the provisions of Article XI prohibiting the use of quantitative restrictions as well as by the other provisions of the Agreement (…). Further, adherence to these provisions would in no case prevent the establishment of a customs union. Since paragraph 8 (*a*) (i) permitted where necessary the use of quantitative restrictions for balance-of-payments reasons, it followed that the use of quantitative restrictions by individual countries within the union for these reasons could not be regarded as preventing the formation of a customs union as defined in Article XXIV. (…)
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> 6. (…). Moreover they [most members of the Sub-Group] pointed out that if paragraph 8 (*a*) (ii) were interpreted to require a common level of quantitative restrictions against third countries, this would be incompatible with the explicit permission in paragraph 8 (*a*) (i) for the use of quantitative restrictions within the system for balance-of-payments reasons since it would appear not to be practicable to have a common level of quantitative restrictions against third countries in a situation where countries within the customs union made use of their right to impose such restrictions against their partners. Moreover, the effect of such an arrangement would be that some country or countries in the union would be imposing quantitative restrictions not required by their own individual balance-of-payments position and would, therefore, be raising barriers to trade with other contracting parties."

9.167 Upon accession to the European Communities (Denmark, Ireland and United Kingdom in1973; Greece in 1982; Spain and Portugal in 1985; Austria, Finland and Sweden in 1994), those countries imposed new quantitative restrictions in accordance with the European Communities' commercial policy. These actions were not universally accepted by GATT CONTRACTING PARTIES. For example, it was the position of some of the GATT contracting parties that:

> "… the accession [of Greece] was *not in conformity* with the relevant provisions of the General Agreement, *including those relating to the application and administration of quantitative restrictions*. Neither the EC nor Greece were waived in any respect under the provisions of Article XI and XIII of the GATT by concluding and implementing the Act." [370] (emphasis added)

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[367] See para. 7.88 above.

[368] See para. 7.107 above.

[369] BISD 6S/68, pp. 78-79, adopted on 29 November 1957.

[370] *Report of the Working Party on the Accession of Greece to the European Communities*, adopted on 9 March 1983, BISD S30/169, p. 186 (emphasis added). Reinforcing this point of view is a statement made by a member of the same Working Party Report regarding Greece's accession to the EC: "… [the] quotas [established under the EC common trade policy are] contrary to the provisions of Article XI and XIII and … neither the EC nor Greece [are] relieved of their obligations under these Articles by virtue of having concluded the Act." (p. 186). That member furthermore noted that all the "members [to that Working Party] therefore fully [reserve] their rights under the General Agreement following the accession of Greece to the European Communities" (pp. 188-189).

9.168 In the Working Party that considered the accession of Portugal and Spain to the European Communities, some contracting parties[371] expressed their views as follows:

> "Some delegations expressed concerns which related to the introduction in Portugal and Spain of new quantitative restrictions some of which were discriminatory and inconsistent with Articles XI, XIII and XXIV: 4…
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> …Since Article XXIV did not provide a waiver from obligations contained in Articles XI and XIII and did not allow or require a country acceding to a customs union to adopt the more restrictive trade régime of the customs union, they called on the Communities and Spain to eliminate all GATT inconsistent measures …".

9.169 In light of these positions taken by individual GATT contracting parties[372] before the entry into force of the WTO Agreement and therefore the ATC, we cannot conclude that there is "subsequent practice" (as that term is used in the VCLT) or "customary practices" (as used in Article XVI:1 of the WTO Agreement) that could be regarded as an agreement or acceptance (even implicit) that paragraphs 5(a) or 8(a)(ii) of Article XXIV authorize or require the introduction of otherwise GATT/WTO inconsistent measures upon the formation of a customs union. We recall, as noted in paragraph 9.71 above, that the ATC has put in place new disciplines regarding the introduction of quantitative restrictions in the sector of textiles and clothing whereby, as of 1 January 1995, the global level of quantitative restrictions in that sector could only decrease (setting aside the possibility for ATC compatible safeguards measures).

(e) Temporary nature of the Turkish quantitative restrictions

9.170 Turkey also argues that because its import restrictions at issue are essentially temporary in nature, since under the ATC all quantitative restrictions should be phased out by 1 January 2005, it should be authorized to maintain them, even if they appear to be GATT/WTO incompatible.

9.171 We consider that the duration of quantitative restrictions does not alter the nature of such measures. The GATT/WTO prohibition against quantitative restrictions does not provide for any allowance for "short-time quantitative restrictions" or any similar time consideration. In the present case, a measure which is not in conformity with the WTO Agreement cannot become WTO compatible just because of its limited duration. We must therefore reject this latter argument by Turkey. Indeed, the transitional nature of the ATC and the possibility under Article XXIV to phase in a customs union argues against an exception in favour of temporary measures.

(f) The absence of recommendations pursuant to Article XXIV:7 of GATT

9.172 Turkey also argues that the fact that no Article XXIV:7 recommendation has ever been made to parties to a customs union to change or abolish any import restrictions, and in particular that no

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[371] *Report of the Working Party on the Accession of Portugal and Spain to the European Communities*, adopted on 19-20 October 1988, BISD 35S/293, p. 315.

[372] It is also worth recalling the conclusions of the following GATT Panel Report which, although not adopted, confirm that some contracting parties opposed interpretations such as those suggested by Turkey, thereby denying the existence of any international customary practice. In the non-adopted Panel Report on *EEC – Tariff Treatment of Citrus Products from Certain Mediterranean Countries*, L/5776, paras. 3.12-3.22, the EEC argued that the non-recommendations by Working Parties which had examined the Treaty of Rome itself and other related agreements constituted tacit acceptance by the CONTRACTING PARTIES as a whole as well as the individual contracting parties that these agreements were in conformity with the provisions of Article XXIV, and that therefore the United States could not contest its preferential trade agreement with the Mediterranean Region. The United States' statement in response to the European Communities' argument was that the failure of the CONTRACTING PARTIES to reject the agreements did not imply acceptance nor did it constitute a legal finding of GATT consistency with Article XXIV.

such recommendation has ever been made in respect of the previous Turkey-EC trade agreements, suggests that its measures are therefore WTO compatible. Turkey adds that up until now no contracting party or a WTO Member ever challenged measures similar to those under examination.

9.173 We recall that the European Communities made a similar argument before the panel in *EEC – Imports from Hong Kong* when it argued that quantitative restrictions had been accepted by contracting parties, that their violation had become negotiable and that this was tantamount to a tolerance:

> "15.…This proved, according to the EC, that quantitative restrictions had become a general problem and had gradually come to be accepted as negotiable, and that Article XI could not and had never been considered to be a provision prohibiting residual restrictions irrespective of the circumstances specific to each case."

This argument was rejected by the panel. It further discussed the consequences of a situation where during many years there had been no challenge to such a measure:

> "28. With regard to Article XI … The Panel acknowledged that there exist quantitative restrictions which are maintained for other than balance-of-payments reasons. It recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore *the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties*. In fact, contracting parties and in particular Hong Kong have made it clear that the discussions on quantitative restrictions which have taken place in the GATT over the years were without prejudice to the legal status of the measures or the rights and obligations of GATT contracting parties. The Panel observed that, while most of the measures had been notified to the GATT in the past, the measures on watches had not been notified.
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> 29. The Panel considered the argument put forward by the European Communities that the principle referred to as "the law-creating force derived from circumstances" could be relevant in the absence of law. It found, however, that in the present case such a situation did not exist, *and the matter was to be considered strictly in the light of the provisions of the General Agreement*." (Emphasis added)

9.174 We agree with these findings. We note that until the adoption of paragraph 12 of the GATT 1994 Understanding on Article XXIV, it was not always clear whether specific measures adopted on the occasion of the formation of a customs union, could be challenged under Article XXII and XXIII of GATT. We note also that with regard to the interpretation of Article XXIV, the difficulty in securing a definitive interpretation from WTO Members because of the wide range of issues involved, and because Members are often parties to one or more regional trade agreements, and the rather unclear wording of Article XXIV, may explain the absence of challenges under GATT. However, we cannot draw any conclusion as to the GATT/WTO compatibility of the measures at issue on the basis of the absence of past challenges.

(g) Offer to negotiate

9.175 Turkey also argues that it offered compensation to India which, contrary to 24 other exporting countries, has consistently declined to accept to enter into negotiations towards a mutually agreed solution. India responds that the introduction of GATT/WTO-inconsistent quantitative restrictions is generally prohibited by the WTO Agreement, and not otherwise authorized by Article XXIV, and that it cannot be forced to accept compensation for a WTO illegal measure.

9.176 We note that Article XXIV:6 provides for a special procedure for renegotiation of tariff increases. This provision does not refer to any form of compensation for the introduction of quantitative restrictions. Indeed, we consider that members cannot be forced to negotiate or accept compensation in respect of GATT/WTO incompatible quantitative restrictions. We also recall the conclusion of the panel in *EEC– Imports from Hong Kong* that quantitative restrictions prohibited by GATT, cannot be negotiated.

9.177 Therefore the Panel considers that the refusal of India to enter into negotiations with Turkey in respect of compensation does not undermine its right to challenge Turkey's measures.

(h) The requirements of the Turkey-EC Customs Union Agreement itself

9.178 Turkey also argues that it was "required"' by the very terms of its customs union agreement with the European Communities to adopt the WTO compatible import restrictions of the European Communities in the sector of textiles and clothing. In our view, however, a bilateral agreement between two Members, such as that between the European Communities and Turkey, does not alter the legal nature of the measures at issue or the applicability of the relevant GATT/WTO provisions.

9.179 We note also that Article 12.2 of Decision 1/95 (WT/REG22/1) provides:

> "2. In conformity with the requirements of Article XXIV of the GATT, Turkey will apply as from the entry into force of this Decision, *substantially the same commercial policy* as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing. The Community will make available to Turkey the cooperation necessary for this objective to be reached."

It is clear to us that the italicised language indicates that Turkey has some flexibility under this provision.

9.180 We recall that in the *EC – Bananas III* dispute the European Communities raised similar arguments with regard to what it was required to do pursuant to the Lomé Convention with the ACP countries. The European Communities argued that the panel should not have examined the content of the Lomé Convention and should have deferred to the common understanding of the parties. In that case the panel and the Appellate Body did examine the Lomé convention (for the purpose of assessing the scope of the Lomé waiver) and concluded that unless explicitly authorized by the waiver the provisions of the Lomé convention could not alter the rights and obligations of WTO Members including those of the European Communities.

9.181 We note in this context the relevance of Article 41 of the VCLT, which provides that:

> "Two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if … (b) the modification in question is not prohibited by the treaty and (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations".

9.182 Consequently, even if the Turkey-EC customs union agreement did require Turkey to adopt all EC trade policies, an issue that we do not have to address, we consider that such requirement would not be sufficient to exempt Turkey from its obligations under the WTO Agreement.

(i) Further considerations

9.183 Our analysis would not be complete without addressing the argument that when, prior to forming the customs union, a constituent member has a WTO right, that Member may, on the

occasion of the formation of a customs union, "pass" or "extend" such right to the other constituent members. We find that this proposition cannot be sustained for the following reasons.

9.184 We note that such a legal fiction or concept is not referred to in Article XXIV, in the WTO Agreement or in public international law.[373] The WTO system of rights and obligations provides, in certain instances, flexibility to meet the specific circumstances of Members. For instance, the ATC has grand-fathered certain MFA derived rights regarding import restrictions for specific Members and Articles XII, XIX, XX and XXI of GATT authorize Members, in specific situations, to make use of special trade measures. We consider that, even if the formation of a customs union may be the occasion for the constituent member(s) to adopt, to the greatest extent possible, similar policies, the specific circumstances which serve as the legal basis for one Member's exercise of such a specific right cannot suddenly be considered to exist for the other constituent members. We also consider that the right of Members to form a customs union is to be exercised in such a way so as to ensure that the WTO rights and obligations of third country Members (and the constituent Members) are respected, consistent with the primacy of the WTO, as reiterated in the Singapore Declaration.

9.185 On a further matter, we have provided above our legal analysis of Article XXIV:8(a)(ii). We would add a brief general observation on Turkey's claim that it was "required" to adopt exactly the same trade policies as those of the European Communities and consequently that the provisions of Article XXIV do not leave any alternative to Members which intend to form a customs union. If we were to hypothesize such a complete lack of flexibility in the terms of Article XXIV, and that Turkey's foreign trade regime in consequence had to be completely and immediately identical to that of the European Communities, in order to comply with the provisions of Article XXIV:8(a)(ii) (and further assuming that, as in the present case, the European Communities can but is not obliged to maintain quantitative restrictions on textiles and clothing whereas Turkey cannot), it would imply that the European Communities would have to align its textiles and clothing regime to that of Turkey and immediately phase-out its import restrictions. This would go against the clear wording of Article XXIV in that it would arguably prevent Turkey from exercising its right to form a customs union with the European Communities because in practice it appears inconceivable that the European Communities would proceed with such a customs union if the "price" were to be that it must phase out its quantitative restrictions regularly notified to the TMB (and eventually, as a result, have to raise tariffs substantially in order to maintain the same overall level of protection). Turkey itself has noted[374] that such a scenario "is almost certainly not feasible". We recall the international law principle of effective interpretation whereby all provisions of a treaty must be given their full meaning and must ensure the overall consistency of the treaty and its effective application. We consider that Members have a right, albeit conditional, to form regional trade agreements. Therefore, Turkey's argument cannot be sustained since it would produce the above absurd result, i.e. that the European Communities would be forced to choose between its ATC rights and a customs union with Turkey. Consequently, there must be another realistic interpretation of Article XXIV, and there is, that reconciles the various interests of Members. In our view, the conclusion we have reached does so,

[373] See for instance, O'Connell, The Law of State Succession, Cambridge Press, 1956, Chapter V Extension of Treaties of the Successor State to Territory Incorporated where the author concludes that "… it would appear that treaties do not extend, as a general rule, and in the absence of clear intention to the contrary, to territories which remain after their incorporation invested with some degree or other of autonomy. The Permanent Mandates Commission reported in 1923 that 'the special international conventions entered into by a State do not apply *de jure* to territories in regard to which the state in question had been entrusted with a mandate, even when those conventions are applicable to contiguous territories placed under the sovereignty of the same state". See also Lasok, D., Lasok K., Law and Institutions of the European Union (1996), 6th ed., Vol.1; Jennings and Watts, Oppenheim's International Law (1996), 9th ed., Vol 1 (peace), Parts 2 to 4, p. 1261; Resolution on the White Paper "Preparing the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union", COM (95)0163-C4-0166/95, OJ No C141, p. 135, 1996/05/13; and Articles 15 and 29 of the VCLT.

[374] See para. 6.111 above.

and respects legal principles of 1) interpretation against conflicts and 2) for an effective interpretation of treaties.

5. Conclusion

9.186 We have considered the proposition that Article XXIV is *lex specialis* and is purported to be a self-contained regime insulated from the other provisions of GATT and the WTO Agreement. We are not convinced by this argument. The relationship between Article XXIV and GATT/WTO seems to us to be self-evident from the wording and context of Article XXIV.

9.187 The wording of Article XXIV:4 refers to the objectives of Article XXIV, in the same terms as used in the Preamble to GATT 1947 (now GATT 1994); the same objectives are repeated in the GATT 1994 Understanding on Article XXIV and in the Preamble of the WTO Agreement. Paragraph 6 also refers to the provisions of Article XXVIII and provides specific procedures for the re-negotiation of tariff bindings, confirming thereby the applicability of other GATT provisions. To us, this confirms the nature of the WTO Agreement, as a single undertaking and that the provisions of Article XXIV are to be applied together with and not separately from the rest of the WTO Agreement. The Appellate Body has indeed repeated on several occasions that the WTO Agreement contains several obligations which must be complied with simultaneously, unless there is a conflict between the said provisions. Moreover we have noted that the wording of Article XXIV:4, with its reference to "should not raise barriers to trade" which appeared in GATT 1947, has continued to be determinative of the parameters of Article XXIV as evidenced by the wording of the GATT 1994 Understanding on Article XXIV and the Singapore Ministerial Declaration.

9.188 With regard to the specific relationship between, in the case before us, Article XXIV and Articles XI and XIII (and Article 2.4 of the ATC), we consider that the wording of Article XXIV does not authorize a departure from the obligations contained in Articles XI and XIII of GATT and Article 2.4 of the ATC. We base our findings on the nature of the conditional right established in Article XXIV as opposed to the clear and unambiguous obligation in Article XI prohibiting the use of quantitative restrictions, notwithstanding the specific contrary practice which has in the past existed in the sector of textiles and clothing but which the ATC represents a collective commitment to terminate. As further discussed above, we consider that it is possible, and even necessary in order to avoid a conclusion that would lead to politically and economically absurd results, to interpret the provisions of Article XXIV in such a way as to avoid conflicts with the prescriptions of Articles XI and XIII of GATT, and Article 2.4 of the ATC.

9.189 As we have noted, paragraphs 5 and 8 of Article XXIV provide parameters for the establishment and assessment of a customs union, but in doing so allow flexibility in the choice of measures to be put in place on the formation of a customs union. In this context we recall the use of the terms "substantially all the trade" and "substantially the same duties and other regulations of commerce". While the meaning of these terms is not precisely clear in relation to what and how much constitute "substantially", they do confirm clearly that in both cases the standard is not all. These provisions do not, however, address any specific measures that may or may not be adopted on the formation of a customs union and importantly they do not authorize violations of Articles XI and XIII, and Article 2.4 of the ATC. Moreover, we note that paragraph 6 of Article XXIV provides for a specific procedure for the renegotiation of tariffs which are increased above their bindings upon formation of a customs union; no such provision exists for quantitative restrictions. To the Panel, if the introduction of WTO inconsistent quantitative restrictions were intended to be negotiable on the formation of a customs union, it would seem odd to us that an explicit procedure would exist for changes in GATT's preferred form of trade barrier (i.e. tariffs), while no procedure would be provided for negotiation of compensation connected with imposition of otherwise GATT inconsistent measures. We draw the conclusion that even on the occasion of the formation of a customs union, Members cannot impose otherwise incompatible quantitative restrictions.

9.190 We have further considered, in the context of these conclusions on Turkey's defense based on Article XXIV, the scope of flexibility allowed for in Article XXIV. However, this flexibility does not allow for the introduction of measures otherwise incompatible with the WTO Agreement. We consider that means for securing the objectives of Turkey in relation to the specific circumstances of forming its customs union with the European Communities, exist in the form of alternatives (e.g. increased tariffs, rules of origin, early phase-out, tariffication) to the imposition of quantitative restrictions imposed against imports from third countries, thereby interpreting Article XXIV in such a way as to avoid such conflict with other WTO provisions. In particular, our interpretation of paragraph 8(a)(ii) allows parties to form a customs union, as in this case, where one constituent member is entitled to impose quantitative restrictions under a special transitional regime and the other constituent is not.

9.191 Finally, we recall that the prohibitions against quantitative restrictions in the sector of textiles and clothing constitute a fundamental feature of the WTO Agreement which argues strongly against the introduction of any new such restrictions in that sector. Moreover, considering the flexibility offered by the possibility of "interim agreements" under Article XXIV[375] and the inherently transitional nature of quantitative import restrictions in the sector of textiles and clothing, we find that Turkey was in a position to avoid the violations of Articles XI and XIII[376] of GATT, and Article 2.4 of the ATC.

9.192 Consequently, we reject Turkey's defense that Article XXIV allows it to introduce, upon the formation of its customs union with the European Communities, quantitative restrictions on 19 categories of textile and clothing products, in violation of Articles XI and XIII of GATT and Article 2.4 of the ATC.

H. THE ABSENCE OF NULLIFICATION AND IMPAIRMENT

9.193 In its second submission, Turkey also submits an additional defense to India's claims. Turkey argues that even if the Panel were to conclude that Turkey's measures violated provisions of the GATT and/or the ATC, India's claims should still be rejected as imports of textile and clothing products from India into Turkey have increased since the entry into force of the Turkey-EC customs union. For Turkey, India has, therefore, not suffered any nullification or impairment of its WTO benefits.

9.194 Turkey argues that Article 3.8 of the DSU implies (a) that a proceeding brought by a complaining party against a violation of a WTO rule is and remains based on the purpose to protect benefits against nullification or impairment and (b) that a violation of a WTO rule is not in and by itself a nullification or impairment of benefits of a Member complaining about such violation; a

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[375] For the purpose of this dispute we need not to address further the distinction between an "interim agreement" leading to a customs union and a completed customs union. We indeed state in footnotes 241 and 285 that we do not have to assess the precise relationship of the Turkey-EC agreement with Article XXIV, e.g. whether it is a free-trade agreement or a customs union or an interim agreement leading to a free-trade area or customs union. In this dispute, Turkey claims that its regional trade agreement with the European Communities is a completed customs union. We therefore limit our discussion to responding to Turkey's defense and, as we state in paras. 9.146 to 9.151 above even for completed customs unions, we are of the view that Article XXIV:8(a) leaves flexibility to constituent members of a customs union so that Turkey did not have to violate Articles XI, XIII of GATT and Article 2.4 of the ATC.

[376] We note that even if the quantitative restrictions imposed by Turkey were to be justified under Article XXIV, such a justification of quantitative restrictions introduced in violation of Article XI of GATT could not necessarily permit a violation of Article XIII of GATT. The ATC authorizes discriminatory quantitative restrictions (contrary to Article XIII). In this case the quantitative restrictions imposed by Turkey are not imposed pursuant to the ATC (see our conclusion in para. 9.80). They were not imposed under Article 2.1, or Article 6 as a safeguard measure, or otherwise under any other explicit provision of the ATC. Even if Article XXIV were to justify a violation of Article XI of GATT, such quantitative restrictions would still have to respect the prescriptions of Article XIII. In light of the principle of judicial economy, we consider, however, that we do not need to discuss further, India's claims pursuant to Article XIII of GATT.

violation constitutes only a presumption of nullification or impairment. For Turkey, this is in line with the fact that many domestic jurisdictions require an "interest to sue", i.e. a complainant must show more than that its right was breached. Similarly in international law a complainant must show a legal interest.[377] Turkey argues that WTO law requires that an alleged breach of a Member's right must have an economic impact on the complaining Member.

9.195 Turkey urges the Panel to ignore the conclusions of the panel in *US – Superfund*, and of the Appellate Body in *EC – Bananas III*. Turkey adds that a such presumption of nullification and impairment, in case of a breach of a WTO obligation, does not exist under the GATS[378] or for prohibited subsidies under the SCM Agreement[379] and should, therefore, not be considered a general principle of WTO law.

9.196 For Turkey, India's claims must fail since, according to Turkey, the quantities that could be exported by India under the restrictions of the Turkey-EC customs union exceed, on the average by 134 per cent, India's exports to Turkey in 1994, i.e. the last full year before the tariff reductions provided by the Turkey-EC customs union took place. Turkey also submits that India's exports of the textile products covered by the measures challenged, in the years 1996-1998, remained significantly below the possibilities opened under these measures. In 1996, for 12 out of the 19 categories the amounts licensed remained below 50 per cent of the quotas, and for 8 out of these 19 categories even below 10 per cent. In 1997 for 6 out of the 19 categories the amounts licensed remained below 50 per cent of the quotas. In 1998 for 9 out of 19 categories the amounts licensed remained below 50 per cent of the quotas.[380]

9.197 Finally, Turkey also argues that in rejecting Turkey's offer to negotiate a bilateral limitation on textile and clothing imports (contrary to what some other 24 countries have done), India has itself broken the chain of causation between the measures challenged and the nullification and impairment. For Turkey, there is a general principle of law according to which one may not seek redress for harm that one has brought onto oneself by not taking measures that would have prevented or at least mitigated the harm caused by another party.[381]

9.198 India challenges the accuracy and the relevance of the data submitted by Turkey. India submits that during the year that preceded the imposition of Turkey's restrictions, exports of the clothing items that are now restricted had grown by 57 per cent compared to the previous year. During the year immediately following the imposition of the measures, they declined by 74 per cent. In respect of textiles the situation is even more extreme: the growth rate in the year prior to the introduction of the measures was 200 per cent and the decline in the subsequent year 48 per cent.[382]

9.199 India also insists that the presumption mentioned in Article 3.8 of the DSU is not rebuttable by the submission of evidence alleging no actual adverse effects of the measure. India refers the Panel to the evolution of this principle in GATT law starting with the 1960 decision of the CONTRACTING PARTIES when it was decided that a GATT-inconsistent measure was presumed to cause nullification or impairment and that it was up to the party complained against to demonstrate that this was not the case.[383] This principle was taken over in the dispute settlement procedures adopted at the end of the Tokyo Round,[384] and is now reflected in Article 3.8 of the DSU. For India,

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[377] Turkey refers to South West Africa Cases (Second Phase) ICJ [1966], p. 47; Barcelona Traction Light and Power Co. Ltd , ICJ [1970], p. 32.

[378] The General Agreement on Trade in Services.

[379] The Agreement on Subsidies and Countervailing Measures.

[380] See paras. 6.146 and 6.164 above.

[381] See para. 6.168 above.

[382] See paras. 6.148 and 6.159 above.

[383] BISD S11/99-100.

[384] Paragraph 5 of the Annex to the Understanding on Dispute Settlement adopted on 28 November 1979.

the "adverse impact" of a violation cannot be determined on the basis of the actual impact of the violation on trade flows. India refers the Panel to the adopted Panel Report on *Japan – Leather* in which Japan had argued that, since the quotas had not been fully utilized, they had not restrained trade and had consequently not caused a nullification or impairment of benefits accruing under Article XI of the GATT. The panel rejected the argument on the grounds that:

> "The existence of quantitative restrictions should be presumed to cause nullification or impairment not only because of any effect it had on the volume of trade but also for other reasons, e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans."[385]

For India, this ruling indicates that a demonstration that no adverse trade impact had as yet occurred was insufficient to rebut the presumption. In its view, the rationale of prohibiting quantitative restrictions requires a demonstration that there was no potential future impact.

9.200 India refers also to the *US – Superfund* decision, the reasoning of which, the Appellate Body in *EC – Bananas III* stated, was applicable to the European Communities' obligations under Articles III, XI and XIII of the GATT 1994. For India, the Appellate Body thereby rejected the argument of the European Communities that the benefits accruing to the United States under these provisions had not been impaired because the United States had not exported a single banana to the European Communities, nor was in a position to do so.

9.201 Article 3.8 of the DSU provides that:

> "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

9.202 We recall that in *EC – Bananas III*,[386] the Appellate Body confirms that the principles established in *US – Superfund*:

> "… a demonstration that a measure has no or insignificant effects would not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."[387]

are still most relevant to violations of provisions of GATT 1994.

9.203 We note that some of the statistics provided by Turkey appear to refer to the trade effects of Turkey's entire import policy on textile and clothing products, including the reduced tariffs on some categories. Other statistics refer to the impact of Turkey's import policy in general resulting from the creation of the customs union.[388] With reference to the specific statistics on the 19 categories under restrictions, these statistics show, and both parties agree, that imports of textiles and clothing from India into Turkey significantly declined in 1996 after a substantial increase in 1995.[389] Turkey argues, however, that the year 1995 is atypical because it had already begun to lower its import tariffs in

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[385] Panel Report on *Japan - Measures on Imports of Leather*, adopted on 15/16 May 1984, BISD 31S/94, ("*Japan – Leather*"), p. 113.
[386] Appellate Body Report on *EC - Bananas III*, para. 253.
[387] Panel Report on *US – Superfund*, para. 5.1.9.
[388] See paras. 6.139 to 6.147 above.
[389] See paras 2.43 and 2.44, and Tables II.4 and II.5 above.

preparation for the entry into force of the customs union.[390] India challenges this assertion[391] and argues that the level of its exports of textiles and clothing into Turkey was influenced by the evolution of the market itself as well as by the import regimes of other countries. In support of its view, India argues that for the non-restricted categories, its exports to Turkey also increased substantially in 1995 but did not decline in 1996.[392]

9.204 We are of the view that it is not possible to segregate the impact of the quantitative restrictions from the impact of other factors. While recognizing Turkey's efforts to liberalize its import regime on the occasion of the formation of its customs union with the European Communities, it appears to us that even if Turkey were to demonstrate that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, is would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions. Rather, at minimum, the question is whether exports have been what they would otherwise have been, were there no WTO incompatible quantitative restrictions against imports from India. Consequently, we consider that even if the presumption in Article 3.8 of the DSU were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption that the introduction of these import restrictions on 19 categories of textile and clothing products has nullified and impaired the benefits accruing to India under GATT/WTO.

9.205 As to Turkey's allegations that India has not fully utilized the quotas under examination[393], we recall the conclusion of the adopted panel report in *Japan – Leather* that the existence of quantitative restrictions should be presumed to cause nullification or impairment even if quotas are not fully utilized because they lead to increased transaction costs and would create uncertainties which could affect investment plans (or in this case, trade).

9.206 As to Turkey's arguments that India's refusal to accept compensation has broken the chain of causation, we consider that although parties should clearly favour a mutually acceptable settlement of their dispute as provided for under the DSU, such a solution must be one that is "mutually" acceptable. We can only take note that India considered that the offers by Turkey and the European Communities were not acceptable to it. We recall that when a WTO Member considers that its rights have been nullified by the actions of another Member it is entitled to initiate dispute settlement procedures envisaged in the DSU.[394] We reject therefore Turkey's argument that India's nullification and impairment of its WTO benefits have resulted from India's own action or absence thereof.

I. OUR MAIN FINDINGS RECALLED

9.207 Without prejudice to our detailed analysis above, it may be helpful to provide a brief overview of our main findings. We have found that the measures at issue were Turkish measures, as they were adopted by the Turkish government at a date different from the EC measures, and they were applied and enforced by Turkey alone. In this context we ruled that the European Communities was not an essential party to this dispute, although we invited it to submit to us any relevant facts or arguments that it deemed appropriate. We found that the measures at issue had not been introduced under the ATC, but rather, as submitted by Turkey, in the context of the formation of its customs union with the European Communities. Therefore the matter at issue is not for the TMB and we have jurisdiction to adjudicate on it. We have also found that the measures were "new measures" pursuant to Article 2.4 of the ATC and that, unless they could be justified under a GATT provision, the

[390] See para. 6.147 above.
[391] See paras. 6.148 and 6.149 above.
[392] See para. 6.148 above and Table II.4 above.
[393] See para. 6.164 above.
[394] See for instance the Appellate Body Report on *US – Shirts and Blouses*, p. 13, where it is stated: "If any Member should consider that its benefits are nullified or impaired as the result of circumstances set out in Article XXIII, then dispute settlement is available"; see also the Appellate Body Report on *EC - Bananas III*, paras. 136 and 252-253.

discriminatory quantitative restrictions imposed by Turkey against the imports of 19 categories of textiles and clothing imports from India, would violate Articles XI and XIII of GATT and consequently Article 2.4 of the ATC.

9.208 We then proceeded to examine Turkey's defense based on Article XXIV of GATT. In this context, we decided that we had jurisdiction to examine any specific measure adopted by a WTO Member in the context of a customs union but that, in this case, we did not need, and indeed we were asked by the parties not to assess the overall WTO compatibility of the Turkey-EC customs union. We have found that, as a general principle, Turkey was bound, at all times, by all WTO obligations, unless there was a conflict between any provisions. Since the wording of Articles XI and XIII of GATT and Article 2.4 of the ATC is clear in prohibiting the introduction of quantitative restrictions such as those at issue, we examined the terms of Article XXIV to decide whether Turkey could be exempted from the application of these prohibitions. We found that the provisions of paragraphs 5 and 8 of Article XXIV did not authorize any violation of the WTO obligations, other than the MFN obligation. Indeed, these paragraphs do not provide any indication as to the type of measure to be used in the formation of a customs union but rather provide guidelines for the overall assessment of regional trade agreements. We have therefore concluded that Article XXIV did not authorize the violation of Articles XI and XIII of GATT or Article 2.4 of the ATC. While reaching this conclusion on the basis of the wording of the provisions at issue, we have endeavoured to ensure that our interpretation did not render Turkey's right to form a customs union with the European Communities a nullity, since pursuant to Article XXIV:8(a)(ii), constituent members to a customs union are required to adopt substantially the same regulations of commerce. We found that this standard leaves flexibility to the constituent members. In any event, in the present case, taking into account, *inter alia*, the share of trade affected by the type of measures at issue (quantitative restrictions on textiles and clothing), we found that there were WTO compatible alternatives available to Turkey if it wanted to conclude a customs union with the European Communities. Finally we found that even if the presumption of nullification of Article 3.8 of the DSU were rebuttable, Turkey had not submitted evidence that the benefits accruing to India under the ATC and GATT had not been reduced or nullified by the introduction of WTO incompatible quantitative restrictions.

X. CONCLUSIONS

10.1 We conclude that the measures adopted by Turkey on 19 categories of textile and clothing products are inconsistent with the provisions of Articles XI and XIII of GATT and consequently with those of Article 2.4 of the ATC. We reject Turkey's defense that the introduction of any such otherwise GATT/WTO incompatible import restrictions is permitted by Article XXIV of GATT.

10.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent that Turkey has acted inconsistently with the provisions of covered agreements, as described in the preceding paragraph, it has nullified or impaired the benefits accruing to the complainant under those agreements.

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