WORLD TRADE ORGANIZATION

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(98-1190)

Appellate Body

ARGENTINA - MEASURES AFFECTING IMPORTS OF FOOTWEAR, TEXTILES, APPAREL AND OTHER ITEMS

AB-1998-1

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

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

Argentina, *Appellant*

United States, *Appellee*

European Communities, *Third Participant*

AB-1998-1

Present:

El-Naggar, Presiding Member

Feliciano, Member

Matsushita, Member

I. Introduction: Statement of the Appeal

1. Argentina appeals from certain issues of law covered and legal interpretations developed in the Panel Report, *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*[1] (the "Panel Report"). The Panel was established to consider a complaint by the United States against Argentina concerning certain measures maintained by Argentina affecting imports of textiles, apparel, footwear and other items, in particular, measures imposing specific duties on various textile, apparel or footwear items allegedly in excess of the bound rate of 35 per cent *ad valorem* provided in Argentina's Schedule LXIV[2] and measures imposing a statistical tax of 3 per cent *ad valorem* on imports from all sources other than MERCOSUR countries. The relevant factual aspects of Argentina's import regime for textiles, apparel and footwear are described in the Panel Report, in particular, at paragraphs 2.1 to 2.21.

2. Argentina approved the results of the Uruguay Round of multilateral trade negotiations through Law No. 24.425, promulgated on 23 December 1994, and the bound rate of 35 per cent *ad valorem* included in its Schedule LXIV became effective on 1 January 1995. This binding was generally applicable to imports, with a number of exceptions that are not relevant in this case. In parallel,

[1]WT/DS56/R, 25 November 1997.

[2]See Argentina's Schedule LXIV, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, done at Marrakesh, 15 April 1994.

Argentina maintained a regime of Minimum Specific Import Duties ("DIEM")[3] as from 1993 in respect of textiles, clothing and footwear through a series of resolutions and decrees commencing with Resolution No. 811/93 of 29 July 1993[4] (concerning textiles and apparel) and Resolution No. 1696/93 of 28 December 1993[5] (concerning footwear), with subsequent extensions and modifications.[6] The DIEM were revoked in respect of footwear on 14 February 1997 through Resolution No. 225/97 of the Argentine Ministry of Economy and Public Works and Services, and the Panel decided not to review the consistency with the *WTO Agreement* of the DIEM with respect to footwear.[7] In addition, Argentina imposed, from 1989 to 1994, a 3 per cent *ad valorem* tax which related to the collection of statistical information by the Argentine customs service regarding imports and exports.[8] Through Presidential Decree No. 2277/94 adopted on 23 December 1994[9], the tax was reduced to zero per cent, but was set again at 3 per cent on 22 March 1995 pursuant to Presidential Decree No. 389/95 in respect of certain import transactions. The tax is set out in Argentina's Schedule LXIV, under the heading "other duties and charges", at 3 per cent *ad valorem*.

3. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 25 November 1997. The Panel reached the following conclusions:

(a) the minimum specific duties imposed by Argentina on textiles and apparel are inconsistent with the requirements of Article II of GATT;
(b) the statistical tax of three per cent *ad valorem* imposed by Argentina on imports is inconsistent with the requirements of Article VIII of GATT.[10]

[3]In Spanish, *Derechos de Importación Específicos Mínimos*.

[4]*Boletín Oficial de la República Argentina*, No. 27.692 of 2 August 1993.

[5]*Boletín Oficial de la República Argentina*, No. 27.797 of 30 December 1993.

[6]As further described in Panel Report, paras. 2.7-2.18, these extensions and modifications are found in: Presidential Decree No. 2275/94 of 23 December 1994, *Boletín Oficial de la República Argentina*, No. 28.050 of 30 December 1994; Resolution No. 304/95 (textiles and apparel) and 305/95 (footwear) of the Ministry of Economy and Public Works and Services of 22 September 1995; Presidential Decree No. 998/95 of 28 December 1995, *Boletín Oficial de la República Argentina*, No. 28.301 of 29 December 1995; Resolution Nos. 103/96 of 6 September 1996 and 23/97 of 7 January 1997 of the Ministry of Economy and Public Works and Services, *Boletín Oficial de la República Argentina*, No. 28.561 of 10 January 1997 (footwear); and Resolution Nos. 299/96 of 20 February 1996, 22/97 of 7 January 1997, *Boletín Oficial de la República Argentina*, No. 28.561 of 10 January 1997 and 597/97 of 14 May 1997 of the Ministry of Economy and Public Works and Services, *Boletín Oficial de la República Argentina*, No. 28.650 of 20 May 1997 (textiles and apparel).

[7]Panel Report, para. 6.15.

[8]*Boletín Oficial de la República Argentina*, No. 26.652 of 12 June 1989.

[9]*Boletín Oficial de la República Argentina*, No. 28.050 of 30 December 1994.

[10]Panel Report, para. 7.1.

The Panel made the following recommendation:

> The Panel *recommends* that the Dispute Settlement Body request Argentina to bring its measures into conformity with its obligations under the WTO Agreement.[11]

4. On 21 January 1998, Argentina notified the Dispute Settlement Body[12] (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review*. On 2 February 1998, Argentina filed an appellant's submission.[13] On 16 February 1998, the United States filed an appellee's submission pursuant to Rule 22 of the *Working Procedures for Appellate Review*. That same day, the European Communities filed a third participant's submission pursuant to Rule 24 of the *Working Procedures for Appellate Review*. The oral hearing, provided for in Rule 27 of the *Working Procedures for Appellate Review*, was held on 23 February 1998. At the oral hearing, the participants and the third participant presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

II. Arguments of the Participants and the Third Participant

A. *Claims of Error by Argentina - Appellant*

5. Argentina appeals certain aspects of the legal findings and conclusions of the Panel. With respect to Article II of the GATT 1994, Argentina requests that we reverse the Panel's findings in paragraph 6.32 and declare that the Panel erred in concluding that Argentina had acted inconsistently with Article II "in all cases" in which Argentina applied the DIEM. With respect to the statistical tax, Argentina asks us to reverse the Panel's findings in paragraph 6.80 of the Panel Report. Finally, Argentina makes certain procedural claims under Article 11 of the DSU.

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[11]Panel Report, para. 7.2.

[12]WT/DS56/8, 21 January 1998.

[13]Pursuant to Rule 21(1) of the *Working Procedures for Appellate Review*.

6. With respect to the Panel's finding in paragraph 6.32 of the Panel Report concerning Article II of the GATT 1994, Argentina submits that the Panel erred in law in interpreting the obligation set out in Article II:1(a) and II:1(b) of the GATT 1994 and the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994* as prohibiting a Member from applying a type of duty other than that which is bound, without taking into account whether the level of protection ensuing from the application of that duty is, or is not, higher than the bound level of protection.

7. According to Argentina, an international legal obligation may be derived only from a formal source creating international law. As regards the WTO, the only obligations by which Members are bound are those which flow from the *Marrakesh Agreement Establishing the World Trade Organization*[14] (the "*WTO Agreement*") and instruments agreed upon under its provisions, as well as amendments under Article X and authoritative interpretations under Article IX. There have been no amendments under Article X nor any authoritative interpretations under Article IX. The relevant provision in the *WTO Agreement* is Article II of the GATT 1994 and the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*.

8. Argentina asserts that Article II of the GATT 1994 must be interpreted in conformity with Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*[15] (the "*Vienna Convention*"). The correct interpretation of Article II of the GATT 1994 should be based on the actual text of Article II, in particular paragraphs 1(a) and 1(b), and on the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*, as well as on GATT practice. The texts of Article II:1(a) and II:1(b) should be read in conjunction with each other. Article II:1(a) lays down a general obligation, and Article II:1(b) defines the scope of that obligation.

9. In Argentina's view, the Panel goes beyond the GATT 1994 in giving an "extensive" interpretation of the scope of the obligation, thereby adding requirements that are not provided for in the GATT 1994 itself. The commitment to accord "treatment no less favourable" does not automatically imply an obligation to apply a "specific type of duty". To assimilate the interpretation of the "duty set forth and provided in the Schedule" with the notion of "bound only *ad valorem*" and to infer that changing this results in "less favourable" treatment not only finds no support in the text of the provisions, but is also not supported by the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*. The object and purpose of Article II:1(a) and (b) can only be to accord treatment

[14]Done at Marrakesh, Morocco, 15 April 1994.

[15]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

no less favourable than that provided for in the National Schedule. Less favourable treatment is accorded when a duty exceeding that set forth in the National Schedule is applied.

10. It is further argued by Argentina that in Article II of the GATT 1994, the bound duty represents a ceiling on the level of protection; the legal obligation deriving from this Article is not to exceed the said ceiling or bound maximum level of protection; and Members are free to choose the form or type of duty applied provided the maximum *level* of protection of the said binding is not exceeded. Thus, a difference in the form of duty applied does *not* necessarily constitute a violation of the bound level.

11. Argentina submits that the Panel has sourced the alleged obligation to apply a type of duty identical to that recorded in the National Schedule in "past GATT practice" and not in a rule or provision contained in Article II of the GATT 1994 or the *Understanding on the Interpretation of Article II:1(b) of the GATT 1994*. The Panel erred in law in interpreting the "legal history and experience" as mandatory "practice", and this subsequently led to the error of placing it on the same footing as "other decisions of the CONTRACTING PARTIES of the GATT 1947".[16] The Panel can only have arrived at its conclusion that there is an obligation beyond the literal meaning of the text by means of interpretation. In terms of "uniformity", "undisputed nature", "repetition" and "continuity", Argentina stresses that "GATT practice" is deficient. Certain GATT working party reports and panel reports, including those cited by the Panel, are contradictory precedents which, in certain cases, lead to an interpretation different from that adopted by the Panel itself.

12. Argentina submits that the Panel concluded that Argentina had violated Article II by applying the DIEM after examining only 124[17] tariff lines out of 940 tariff lines relevant to this dispute. The Panel, therefore, erred in law in considering that Argentina infringed its obligations under Article II of the GATT 1994 *in all cases* in which it applied the DIEM.

13. We are also asked to reverse the Panel's finding in paragraph 6.80 of the Panel Report that the statistical tax of 3 per cent *ad valorem* is in violation of Article VIII:1(a) of the GATT 1994. The Panel is said to have erred in failing to take into account Argentina's obligations to the International Monetary Fund (the "IMF") in its interpretation of Article VIII of the GATT 1994. Argentina contends

[16]Paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

[17]This includes evidence with regard to six tariff lines in the documentation submitted by the United States prior to the second meeting with the Panel. We note that Argentina challenges the Panel's acceptance of this evidence under Article 11 of the DSU. See Part VI of this Report.

that its agreement with the IMF includes an undertaking to impose a tax in the form of a statistical tax. This undertaking is contained in a document entitled "Memorandum on Economic Policy"[18], referred to by Argentina as a "Memorandum of Understanding" between Argentina and the IMF. Argentina asserts that, by its acquiescence, the United States helped to create Argentina's obligation with the IMF, and the United States cannot now deny the binding nature, i.e. its legal effects with regard to Article VIII of the GATT 1994, of that obligation.

14. It is also submitted by Argentina that the Panel disregarded its duty under Article 11 of the DSU by not making an objective assessment of the matter before it. Paragraph 5.3 of the Panel Report ignores an obvious fact and appears to contradict all the reasons given by the Panel regarding burden of proof when dealing with the matter of the DIEM. The Panel's conclusion that the statistical tax was inconsistent with Article VIII of the GATT 1994 does not meet the requirement laid down in Article 12.7 of the DSU that a panel report shall set out "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." The Panel's failure to accede to the request by the United States to consult the IMF regarding the existence of this obligation led to another error in law because the Panel, in effect, ignored relevant opinions that could have helped to form a more complete judgement.

15. In Argentina's view, the Panel also erred in law by excluding from its consideration subsequent legislative developments -- namely, the *Agreement Between the International Monetary Fund and the World Trade Organization* (the "*Agreement Between the IMF and the WTO*") drawn up on the basis of the *Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking* (the "*Declaration on Coherence*") -- and by reaching its conclusion on the statistical tax solely on the basis of Article VIII of the GATT 1994. Argentina argues that the interpretation of the *Agreement Between the IMF and the WTO* is covered by the DSU as it is a legislative development in the terms of Article V.1 of the *WTO Agreement*, and the *WTO Agreement* is included in Appendix 1 of the DSU. Argentina asserts that under paragraph 5 of the *Declaration on Coherence*, the WTO is to cooperate with the IMF and should avoid "the imposition on governments of cross-conditionality or additional conditions". If the *Declaration on Coherence* had been taken into account, the Panel would have had to consider the existence of a cross-obligation within the meaning of paragraph 5 of that Declaration. According to Argentina, this is made even more explicit in paragraph 10 of the *WTO-IMF Agreement*. Thus, the issue at stake is not one of making exceptions, but of interpreting the *WTO Agreement* in the light of its content.

[18]Exhibit S to the United States' first written submission to the Panel.

16. Argentina states that the Panel has placed Article VIII of the GATT 1994 in a "legal limbo", isolated from related agreements and other relevant rules and principles of public international law. The Panel undertook only a partial analysis of the arguments put forward by Argentina, disregarded subsequent legislative developments, and did not take into account previous practice. Referring to the Director-General's Report on implementation of the agreements between the WTO and the IMF and the World Bank[19] and the discussions on this Report at the General Council meeting of 10 December 1997, Argentina argues that the Panel should have considered the need to ensure that the decisions adopted by these bodies are mutually supportive in the context of the provisions endorsed in the *Declaration on Coherence*.

17. It is further claimed by Argentina that the Panel did not comply with its obligation under Article 11 of the DSU on two counts. First, the Panel accepted certain evidence submitted by the United States to the Panel on 21 July 1997, two days before the second meeting of the parties (ten days after the expiry of the time-limit for submitting the respective rebuttals). Argentina states that it objected to the admission of such evidence into the record and drew attention to the impossibility of responding to the evidence within the two-week period granted by the Panel. This evidence related to transactions carried out using the manual customs clearance system and not the MARIA computerized system. The names of the importers, customs identification numbers and, sometimes, the description of the items imported were deleted, thereby making it impossible to verify any of the information submitted within the period granted by the Panel. For Argentina, the Panel's position is difficult to reconcile with "due process", considering that the submission of evidence after the time-limit has expired alters the balance of rights and obligations during examination of the case and, combined with the impossibility of rebuttal within a tight time-limit, disadvantages one party, in this case Argentina. Second, the Panel failed to fulfil its obligation to render an objective assessment of the matter by not acceding to the request of both parties to the dispute to seek information and consult with the IMF so as to obtain its opinion on specific aspects of the statistical tax. The DSU gives panels different tools to fulfil the obligation under Article 11, and one of these is the right to "seek information" provided in Article 13 of the DSU. The Panel did not make use of this means, which would have allowed it to verify the information provided by the parties, which information could have altered the Panel's conclusion regarding the statistical tax. Argentina further argues that the Panel failed to fulfil a general obligation governing procedure in any international dispute, namely to elucidate a fact or investigate an objective claim that both parties to the dispute have expressed as a concern, in order to establish the truth regarding the point raised.

[19]Agreements between the WTO and the IMF and the World Bank, Report by the Director-General on Implementation of the Agreements, WT/GC/W/68, 13 November 1997. Annex I to Argentina's appellant's submission.

B. *Arguments by the United States - Appellee*

18. The United States endorses the findings and conclusions of the Panel in paragraph 6.32 and argues that the Panel correctly concluded, on the basis of the evidence before it, that the application of the DIEM violated Article II of the GATT 1994. The United States also endorses paragraph 6.80 of the Panel Report and argues that the Panel acted consistently with Article 11 of the DSU.

19. With respect to Article II of the GATT 1994, the United States believes that the Panel correctly found that Argentina's specific duties are inconsistent with its *ad valorem* binding, and that the Panel's interpretation of Article II is consistent with principles of public international law, previous decisions of the Appellate Body and prior GATT practice, and gives full meaning to the text of this provision.

20. The United States contends that one of the fundamental objectives of the GATT 1994, expressed in the preamble, is to achieve "the substantial reduction of tariffs". To ensure that tariff concessions, once made, have the full force and effect intended, Article II provides that duty rates identified in a WTO Member's Schedule are maximum limits that may not be exceeded. This is made clear in Article II:1(b) of the GATT 1994. Article II:1(a) goes further; it obligates WTO Members to provide the *quality* of "treatment" provided for in its Schedule. Paragraphs (a) and (b) of Article II:1 together guarantee WTO Members that their exports will not be subjected to duties greater than the amount established in relevant Schedules. They also guarantee that WTO Members will not be able to manipulate the administration of duties so as to collect excessive tariffs. In this way, Article II ensures the security and predictability of tariff concessions.

21. A basic submission of the United States is that Argentina's DIEM afford "treatment less favourable" in violation of Article II because they impair the value of the concessions Argentina made during the Uruguay Round. The DIEM necessarily have the potential to exceed Argentina's bound rate of 35 percent *ad valorem* for some covered items in the future, in view of the fundamental difference between *ad valorem* and specific duties, the disparate ways each affects imported merchandise and the manner in which Argentina fixes the rates of its specific duties.

22. According to the United States, Argentina incorrectly equates the restriction against imposing duties in excess of a bound rate under Article II:1(b) with the broader requirement of Article II:1(a) to afford WTO Members "treatment no less favourable" in respect of goods bound in a Schedule. If Argentina's view were to be accepted, the "treatment no less favourable" requirement of Article II:1(a) would mean nothing more than a commitment to refrain from imposing duties in excess of a bound

rate. In the view of the United States, such a reading would reduce Article II:1(a) to "redundancy or inutility" contrary to the Appellate Body's statements in *United States - Standards for Reformulated and Conventional Gasoline*.[20] In advancing its interpretation of its Schedule, Argentina essentially seeks to achieve what other WTO Members were required to negotiate for during the Uruguay Round.

23. In contrast, the Panel's interpretation gives effect to all relevant parts of the GATT 1994. It gives effect not only to Article II:1(b) -- i.e., by determining that Argentina's specific duties, as applied, exceed Argentina's bound rate -- but also to Article II:1(a), by acknowledging that the inevitable potential to exceed the bound rate inherent in Argentina's tariff regime affords less favourable treatment to low-price future imports. It also preserves the value of Schedules of other WTO Members that reserved the right to apply both *ad valorem* and specific duties. The Panel's decision thus assures the "security and predictability" that Article 3.2 of the DSU demands. The Panel gave proper weight to prior GATT practice. In the view of the United States, the principles established in a number of GATT decisions clearly support the Panel's decision.

24. The United States contends that the Panel correctly concluded that Argentina failed to meet its burden of rebutting the presumption raised by the United States that all of Argentina's specific duties on textiles and apparel violate Article II of the GATT 1994 and that Argentina should conform the measures imposing them to the requirements of Article II.

25. The United States sees no merit in Argentina's argument that the Panel did not adequately consider its contention that the IMF requires Argentina to levy the statistical tax and that this purported requirement establishes an exception to the prohibition contained in Article VIII of the GATT 1994. Argentina failed to establish that the IMF ever imposed or approved such a requirement, and this failure to present the requisite evidence cannot be remedied by Argentina on appeal. Moreover, there is no provision in the *WTO Agreement* that would create the exception to Article VIII that Argentina seeks. The fiscal character of the statistical tax runs counter to Article VIII, which prohibits the "taxation of imports … for fiscal purposes." This prohibition is unqualified. Argentina's statistical tax is not an exchange action and is thus outside the scope of Article XV of the GATT 1994. The *Agreement between the IMF and the WTO* does not address, and does not affect, the substantive obligations of Members under the *WTO Agreement*, or the extent to which the IMF may authorize an exchange control action that is inconsistent with a provision of the GATT 1994. Furthermore, the *Declaration on the Relationship of the World Trade Organization with the International Monetary Fund* (the "*Declaration*

[20]Adopted 20 May 1996, WT/DS2/AB/R, p. 23.

on the Relationship of the WTO with the IMF") does not establish any exception to Article VIII of the GATT 1994. The same is true for the *Declaration on Coherence*.

26. With respect to Article 11 of the DSU, the United States submits that the real question Argentina raises is not whether the Panel has failed to discharge its duty under Article 11, but whether the Panel abused its discretion in accepting the additional examples from the United States by causing such significant prejudice as to deny Argentina fundamental fairness or due process. The United States believes that the Panel did not abuse its discretion in admitting such additional examples which were submitted as part of a claim within the Panel's terms of reference and as part of the natural process of progressively clarifying the parties' positions. Furthermore, Argentina did not demonstrate that it has suffered prejudice from the Panel's acceptance of the evidence in question. At any rate, exclusion of the evidence Argentina now challenges would not alter the outcome of the dispute.

27. The United States also contends that the Panel did not abuse its discretion in not consulting with the IMF. Given that Argentina did not have plausible arguments on the law or facts, the Panel was under no obligation to inquire with the IMF. Furthermore, panels have considerable discretion in determining how they would proceed, and the WTO has not established guidelines regarding factual discovery.

C. *Arguments by the European Communities - Third Participant*

28. With respect to Article II of the GATT 1994, the European Communities submits that it was not necessary, in order to resolve the case before it, for the Panel to have made the finding in paragraph 6.32 of the Panel Report and that violation of Article II of the GATT 1994 exists in respect of all import transactions where duties are imposed which exceed the binding. Argentina's admitted methodology used to establish the DIEM leads to duties in excess of the bindings for all products priced below the "representative price". With respect to Argentina's statistical tax, the European Communities endorses the Panel's finding in paragraph 6.80 of the Panel Report. The European Communities also makes certain comments with respect to Argentina's claims under Article 11 of the DSU.

29. In coming to the conclusion that the Argentine system of DIEM must violate Article II of the GATT 1994 in all cases, the Panel acknowledged that the wording of Article II does not explicitly address the question of whether there is an obligation to use the particular type of duty referred to in the Schedule. The Panel relied instead on past GATT practice. In the view of the European Communities, GATT practice is only relevant for the purpose of interpreting WTO obligations and

cannot constitute a source of obligations in itself. The Panel appears to have treated the past GATT practice to which it refers as a source of law. The past practice referred to by the Panel, according to the European Communities, is far from persuasive.

30. The European Communities believes that the Panel should have taken the wording and context of Article II of the GATT 1994 as its starting point. Article II:1(a) may fulfil a role similar to that of Article III:1. Article II:1(a) "articulates a general principle" which "informs" the rest of Article II. The relevant obligation in Article II:1(a) and II:1(b) is to give treatment "no less favourable" than that provided for in the Schedule and to exempt products of other contracting parties from duties "in excess of those" in the Schedule. The Schedules set out the rates of duty and a duty type. The reference to a type of duty can be explained by the fact that it is necessary to establish a basis for calculation of the amount of duty which can be imposed in each case and not as a commitment to impose duties in that form only.

31. The European Communities contends that no provision of Article II contains obligations relating to the type as opposed to the amount of the duty. Accordingly, the Schedules only bind the amount of the duty which may be imposed in any case, not the type of duty. The European Communities knows of no case where a Member has reserved, in its Schedule, the right to impose a different type of duty even though an overall limit on the amount of duty payable under the other type of duty would not be exceeded. Even if it were considered that the type of duty was also bound independently of the binding of the amount, it would still be necessary to show that the change in the type of duty led to "treatment less favourable" than that resulting from the type of duty referred to in the Schedule.

32. Paragraph 6.31 of the Panel Report suggests that a change in the type of duty "undermines the stability and predictability of Members' Schedules." The European Communities does not consider that this is a matter covered by Article II of the GATT 1994. Another possible basis for a conclusion that the change in the type of the duty leads to "treatment less favourable" than that resulting from the type of duty provided for in the Schedule is suggested in paragraphs 6.46 and 6.47 of the Panel Report. The European Communities does not believe that change in competitive relationships is a correct test to apply in this case. The wording of Article II:1(a) of the GATT 1994 makes it clear that the obligation not to exceed the tariff binding applies to each individual import transaction and that it is not possible for a Member to compensate higher duties on some transactions, or on some tariff lines, with lower duties elsewhere.

33. In respect of the statistical tax, the European Communities agrees with Argentina that it is not sufficient for the Panel to state that "there is no evidence that Argentina was requested by the International Monetary Fund ("IMF") to impose an import tax that would violate the provisions of the WTO Agreement" in order to conclude that there can be no question of conflicting obligations. An obligation can also arise if Argentina made the commitment without it having been requested. However, the only document on which Argentina relies, in arguing that it is under an obligation to the IMF to maintain a 3 per cent statistical tax, is the Memorandum on Economic Policy. In the view of the European Communities, this is a unilateral communication to the IMF, not an agreement, which mentions only a 3 per cent temporary import surcharge on certain imports. That this document did not create an obligation to maintain the 3 per cent statistical tax is also indicated by the fact that Argentina reduced the tax to 0.5 per cent and replaced it with a general increase in tariffs of 3 per cent.

34. The European Communities agrees with the Panel that Argentina's argument that it was under a conflicting obligation to the IMF should be rejected. An obligation of Argentina to the IMF in relation to a statistical or import tax, assuming it to exist, will, in accordance with the principle of *pacta tertiis nec nocent nec prosunt*, not in itself be of any consequence to the WTO, the United States or the European Communities. The conditions for the operation of the principle of acquiescence in international law are not met in the present case. A legal basis within the *WTO Agreement* itself is necessary for the alleged obligation to have the effect of excusing the violation of Article VIII of the GATT 1994.

35. According to the European Communities, the *Declaration on Coherence* may be relevant for the purpose of interpreting the procedural provisions of the *WTO Agreement*, but cannot provide an exception to any of the substantive WTO obligations invoked in this case. The *Declaration on the Relationship of the WTO with the IMF* forms part of the context of the *WTO Agreement* to be taken into account in its interpretation. The *Agreement Between the IMF and the WTO* is not a covered agreement for the purpose of the DSU. In any event, it does not contain any provision relevant to this dispute. In the view of the European Communities, the arguments of Argentina in respect of this Agreement amount to an allegation that the Panel failed to fulfil a procedural obligation to consult the IMF.

36. If Argentina were to seek to justify the 3 per cent statistical tax/import surcharge as a balance of payments measure, it would need to invoke Articles XII and XVIII of the GATT 1994 and notify the Committee on Balance-of-Payments Restrictions under Articles XII:4 or XVIII:12 of the GATT 1994. There is no indication that any of this has been done and there is, therefore, no basis to review the Panel's finding that the measure is inconsistent with Article VIII of the GATT 1994.

37. With regard to Article 11 of the DSU, the European Communities contends that it was not necessary for the Panel to have evidence based on invoices that duties exceeding the bound levels were imposed. The European Communities stresses the importance of respecting the principles of due process in panel proceedings, but does not consider it necessary or appropriate to comment on the submission and use of the evidence submitted by the United States prior to the second meeting of the Panel. Article 13 of the DSU entitles a panel to seek information from any body, including the IMF, if it considers this necessary. There was no need for the Panel to seek the opinion of the IMF on the existence of an obligation toward it by Argentina to maintain the 3 per cent statistical duty since that would not have been relevant for deciding whether or not there was a violation of Article VIII of the GATT 1994.

III. Issues Raised in this Appeal

38. The appellant, Argentina, raises the following issues in this appeal:

(a) Whether the application by a Member of a type of duty other than the type provided for in that Member's Schedule is, in itself, inconsistent with Article II of the GATT 1994;

(b) Whether the Panel erred in concluding that Argentina had acted inconsistently with its obligations under Article II of the GATT 1994 "in all cases" in which Argentina applied the DIEM;

(c) Whether the Panel erred in its application of Article VIII of the GATT 1994 to the 3 per cent *ad valorem* statistical tax by not taking into account commitments that Argentina states it made to the IMF; and

(d) Whether the Panel acted inconsistently with Article 11 of the DSU in: (i) admitting certain evidence submitted by the United States two days prior to the second substantive meeting of the Panel with the parties, and granting Argentina only two weeks to respond; and (ii) not seeking information from, and consulting with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax imposed by Argentina.

IV. Interpretation of Article II of the GATT 1994

A. *The Type of Duty*

39. Article II:1 of the GATT 1994 states, in pertinent part:

> (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.

40. With respect to Article II, the Panel found, *inter alia*:

> 6.31 We note that the past GATT practice is clear: a situation whereby a contracting party applies one type of duties while its Schedule refers to bindings of another type of duties constitutes a violation of Article II of GATT, without any obligation for the complaining party to submit further evidence that such variance leads to an effective breach of bindings. … As a guarantee for predictability and to ensure the full respect of the negotiations under Article II, GATT practice has generally required that once a Member has indicated the type(s) of duties in specifying its bound rate, it must apply such type(s) of duties. Accordingly, faced with such a variance in the type [of] duties applied by Argentina from that reflected in its Schedule, we consider that we do not have to examine the effects of that variance on possible future imports. Indeed, such a variance undermines the stability and predictability of Members' Schedules.
>
> 6.32 We, therefore, find that Argentina, in using a system of specific minimum tariffs although it has bound its tariffs at *ad valorem* rates only, is violating the provisions of Article II of GATT and that the United States does not have to provide further evidence that the resultant duties exceed the bound tariff rate. Such a variance between Argentina's Schedule and its applied tariffs constitutes a less favourable treatment to the commerce of the other Members than that provided for in Argentina's Schedule, contrary to the provisions of Article II of GATT.[21]

[21]Panel Report, paras. 6.31-6.32.

41. Argentina appeals from paragraphs 6.31 and 6.32 of the Panel Report, arguing that the Panel erred in its interpretation that Article II of the GATT 1994 does not permit a Member to apply a type of duty other than that provided for in that Member's Schedule. Argentina maintains that the Panel should have taken into account whether the level of protection to domestic products ensuing from the application of the actual duty imposed is, or is not, higher than the level of protection resulting from the duty bound in the Member's Schedule. In Argentina's view, a Member is free to choose the type of duty applied, provided that the maximum level of protection specified in that Member's Schedule is not exceeded.

42. In paragraphs 6.31 and 6.32 of the Panel Report, the Panel holds that any variance between the type of duty provided for in a Member's Schedule and the type of duty actually applied by that Member "constitutes a less favourable treatment to the commerce of the other Members"[22] than that provided for in the Member's Schedule, and therefore is inconsistent with Article II of the GATT 1994. Furthermore, the Panel asserts that the complaining party "does not have to provide further evidence that the resultant duties exceed the bound tariff rate."[23] We note that the Panel did not base its finding on a textual analysis of either paragraph (a) or (b) of Article II:1 of the GATT 1994. It observes that "[t]he wording of Article II does not seem to address explicitly whether WTO Members have an obligation to use a particular type of duty"[24], and then asserts that "the wording of Article II must be interpreted in the light of past GATT practice …".[25] The Panel relies heavily on what it characterizes as "past GATT practice", without undertaking any analysis of the ordinary meaning of the terms of Article II in their context and in the light of the object and purpose of the GATT 1994, in accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*. After citing three working party reports[26], the adopted report of the *Panel on Newsprint*[27] and the unadopted panel report in *EEC - Import Regime for Bananas*[28] ("*Bananas II*"), the Panel declared that "… the past GATT practice is clear: a situation whereby a contracting party applies one type of duties while its Schedule refers to bindings of another type of duties constitutes a violation of Article II of GATT …".[29]

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[22]Panel Report, para. 6.32.

[23]*Ibid*.

[24]Panel Report, para. 6.24.

[25]*Ibid*.

[26]Working Party Report, *Rectifications and Modifications of Schedules*, adopted 24 October 1953, BISD 2S/63, para. 8; Working Party Report, *Transposition of the Schedule XXXVII - Turkey*, adopted 20 December 1954, BISD 3S/127; and Working Party Report, *Fourth Protocol on Rectifications and Modifications*, adopted 3 March 1955, BISD 3S/130.

[27]Adopted 20 November 1984, BISD 31S/114.

[28]DS38/R, 11 February 1994, unadopted.

[29]Panel Report, para. 6.31.

43. We are not persuaded that "the past GATT practice is clear". The three working party reports cited by the Panel did not arise in the context of dispute settlement cases brought pursuant to Article XXIII of the GATT 1947, unlike some working party reports in GATT history that resulted from complaints made under Article XXIII.[30] We also note that these three working party reports did not result in the CONTRACTING PARTIES giving a ruling or making recommendations, pursuant to Article XXIII:2 of the GATT 1994, on whether a variance in the type of duty applied by a contracting party from the type of duty provided for in its Schedule constituted an infringement of Article II:1 of the GATT 1947.[31] The Panel also referred to the report of the *Panel on Newsprint* that did not, on its facts, deal with the application by a contracting party of a specific duty rather than an *ad valorem* duty provided for in its Schedule.[32] Finally, the Panel relied extensively on the *unadopted* panel report in *Bananas II*. In our Report in *Japan - Taxes on Alcoholic Beverages*[33], we agreed with that panel that "*unadopted* panel reports 'have no legal status in the GATT or WTO system …'", although we believe that "'a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'". In the case before us, the Panel's use of the *Bananas II* panel report appears to have gone beyond deriving "useful guidance" from the reasoning employed in that unadopted panel report. The Panel, in fact, *relies* upon the *Bananas II* panel report.

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[30]See, for example, *Australian Subsidy on Ammonium Sulphate*, adopted 3 April 1950, BISD II/188.

[31]As the Panel observed in paragraph 6.26 of the Panel Report, we note that the working party report in *Transposition of Schedule XXXVII - Turkey*, adopted 20 December 1954, BISD 3S/127, stated in paragraph 4:

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

This working party report, which examined a proposal by Turkey to change into *ad valorem* duties the specific duties provided for in its Schedule, did not address whether or not such a modification would be inconsistent with Article II of the GATT 1947.

[32]We note that the *Panel on Newsprint*, adopted 20 November 1984, BISD 31S/114, stated in paragraph 50:

> … under long-standing GATT practice, even purely formal changes in the tariff schedule of a contracting party, which may not affect the GATT rights of other countries, such as the conversion of a specific to an *ad valorem* duty without an increase in the protective effect of the tariff rate in question, have been considered to require renegotiations.

It should be noted that the issue before the *Panel on Newsprint* was *not* whether a change in the type of customs duty applied by a contracting party from a specific duty to an *ad valorem* duty was consistent with Article II of the GATT 1947, but whether a reduction in a tariff-rate quota from 1.5 million tonnes to 0.5 million tonnes was consistent with Article II of the GATT 1947. For this reason, we consider the above statement to be *obiter*.

[33]Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 14-15.

44. The legal issue before us here is whether the application by a Member of a type of duty other than that provided for in its Schedule is, in itself, inconsistent with Article II of the GATT 1994. We now turn to an examination of this question, first, in the light of the terms of Article II:1 of the GATT 1994 and, second, in the context of Argentina's DIEM system at issue in this case.

45. The terms of Article II:1(a) require that a Member "accord to the commerce of the other Members treatment no less favourable than that provided for" in that Member's Schedule. Article II:1(b), first sentence, states, in part: "The products described in Part I of the Schedule … shall, on their importation into the territory to which the Schedule relates, … be exempt from ordinary customs duties in excess of those set forth and provided therein." Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule. Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision.

46. A tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule. The principal obligation in the first sentence of Article II:1(b), as we have noted above, requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member's Schedule. However, the text of Article II:1(b), first sentence, does not address whether applying a *type* of duty different from the *type* provided for in a Member's Schedule is inconsistent, in itself, with that provision.

47. In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members "treatment no less favourable than that provided for" in its Schedule. It is evident to us that the application of customs duties *in excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes "less favourable" treatment under the provisions of Article II:1(a). A basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession

is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members.

48. We turn next to examine whether, by applying the DIEM instead of the *ad valorem* duties provided for in its Schedule, Argentina has acted inconsistently with Article II:1(b), first sentence, of the GATT 1994.

49. As we understand it, the Argentine methodology of determining the DIEM is, first, to identify a representative international price for each relevant tariff category of textile and apparel products. Once this representative international price has been established, Argentina then multiplies that price by the bound rate of 35 per cent, or by the actually applied rate of less than 35 per cent[34], to arrive at the DIEM for the products in that category. Customs officials are directed, in a specific transaction, to collect the higher of the two values: the applied *ad valorem* rate or the DIEM.[35]

50. To grasp the meaning and implications of the Argentine system, it is important to keep in mind that for any specific duty, there is an *ad valorem* equivalent deduced from the ratio of the absolute amount collected to the price of the imported product. Thus, the *ad valorem* equivalent of a specific duty varies with the variation in the price of imports. It is higher for low-priced products than for high-priced products. To illustrate, a specific duty of $10 collected on all imported products in a certain tariff category, is equivalent to 10 per cent *ad valorem* if the price of the imported product is $100; however, it is equivalent to 20 per cent *ad valorem* if the price is only $50.

51. Thus, under the Argentine system, whenever the amount of the specific duty is determined by applying the bound rate of 35 per cent to the representative international price in a certain tariff category, the *ad valorem* equivalent of the specific duty is greater than 35 per cent for all imports at prices below the representative international price; it is less than 35 per cent for all imports at prices above the representative international price. Therefore, collecting the higher of the two values means applying the bound tariff rate of 35 per cent *ad valorem* to the range of prices above the representative international price, and applying the minimum specific import duty with an *ad valorem* equivalent of more than 35 per cent to the range of prices below the representative international price.

[34]Argentina's response to questioning at the oral hearing.

[35]As the Panel observed, Resolution No. 811/93 of 29 July 1993, expressly stated in Article 3 that "the specific import duties established by Article 1 of this decision shall operate as a minimum of the corresponding *ad valorem* import duty". See Panel Report, para. 6.19 and footnote 171.

52. In cases where the amount of the DIEM is determined by applying a rate of *less than* 35 per cent -- for example, 20 per cent -- to the representative international price in a certain tariff category, the result would be as follows. For the range of prices *above* the representative international price, the *ad valorem* equivalent of the specific duty would be less than 20 per cent. With respect to the range of prices *below* the representative international price, a distinction should be made between two zones. As to a certain zone of prices immediately below the representative international price, the *ad valorem* equivalent of the specific duty would be greater than 20 per cent but less than 35 per cent. However, for products at prices below that zone, the *ad valorem* equivalent of the specific duty would be greater than 35 per cent.[36]

53. In the light of this analysis, we may generalize that under the Argentine system, whether the amount of the DIEM is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, there will remain the possibility of a price that is sufficiently low to produce an *ad valorem* equivalent of the DIEM that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any DIEM, no matter what *ad valorem* rate is used as the multiplier of the representative international price, the possibility remains that there is a "break-even" price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent.

54. We note that it is possible, under certain circumstances, for a Member to design a legislative "ceiling" or "cap" on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided for in the Member's Schedule. However, no such "ceiling" exists in this case. The measures at issue here, as we have already noted, specifically and expressly require Argentine customs officials to collect the *greater* of the *ad valorem* or the specific duties applicable, with no upper limit on the level of the *ad valorem* equivalent of the specific duty that may be imposed. Before the Panel, Argentina argued that its domestic challenge procedure (*recurso de impugnación*), in combination with the precedence and direct effect of international treaty obligations in the Argentine national legal system, operated as an effective legislative "ceiling" to ensure that a duty in excess of the bound rate of 35 per cent *ad valorem* could never actually be

[36]See Panel Report, para. 3.125.

imposed. The Panel did not accept this argument[37], and Argentina has not appealed from that finding of the Panel. In this case, therefore, there is no effective legislative "ceiling" in the Argentine system which ensures that duties in excess of the bound rate of 35 per cent *ad valorem* will not be applied.

55. We conclude that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule. In this case, we find that Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent *ad valorem* in Argentina's Schedule.

56. We modify the Panel's findings in paragraphs 6.31 and 6.32 of the Panel Report accordingly.

B. *Violation of Article II "In All Cases"*

57. Argentina claims that the Panel erred in finding that it had infringed its obligations under Article II of the GATT 1994 "in all cases" in which it applied the DIEM. Argentina argues that the United States submitted evidence with respect to only 118 out of the approximately 940 relevant tariff categories in the *Nomenclatura Común MERCOSUR* ("N.C.M.").[38] Argentina further asserts that, had evidence in respect of the remaining tariff categories been examined, it would have shown that the application of the DIEM, on average over all tariff categories, had not exceeded the maximum level of binding in Argentina's Schedule.[39] On another ground, Argentina appeals the Panel's late admission into evidence of certain invoices and customs documents submitted by the United States relating to specific import transactions in six additional tariff categories.[40] We examine this separate ground of appeal in Part VI of this Report.

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[37]Panel Report, para. 6.69.

[38]We note that the Panel appears to use the terms "category", "HS category", "line-item" and "tariff line" interchangeably. (See e.g. Panel Report, paras. 6.48, 6.52 and 6.54.) We also note that the parties, in their submissions to the Panel, sometimes used these terms interchangeably. (See e.g. pp. 8-10 of the United States' second written submission to the Panel.) In this Report, we use the term "tariff category" to refer to the relevant 6 or 8-digit subheading in the *Nomenclatura Común MERCOSUR* ("N.C.M.") applied by Argentina through Decree No. 2275/94 of 23 December 1994, as subsequently modified.

[39]Argentina's appellant's submission, paras. 70-72.

[40]Argentina's appellant's submission, paras. 106-110.

58. The Panel concluded that:

> In the light of the foregoing, we find that the United States has provided sufficient evidence that Argentina has effectively imposed duties on imports of textiles and apparel above 35 per cent *ad valorem*, that indeed the total amount of duties collected annually on these items leads to the conclusion that duties above 35 per cent *ad valorem* on the average transaction value have been imposed on the same items, and that in any case, as we found in paragraph 6.47 above, the very nature of the minimum specific duty system imposed in Argentina on the items at issue will inevitably lead, in certain instances, to the imposition of duties above 35 per cent *ad valorem*.[41]

59. We note that the Panel did *not* make a finding that Argentina had infringed its obligations under Article II of the GATT 1994 "in all cases" in which it applied the DIEM. In fact, the Panel stated that:

> As Argentina did not provide any affirmative evidence to the contrary, we consider that this US evidence provides reliable information that, on a tariff line basis, duties above the bound rate of 35 per cent *ad valorem* have been imposed. We agree that, if an average calculation shows duties above 35 per cent, this is evidence of a sufficient number of transactions which were subject to duties imposed above the 35 per cent *ad valorem*. The United States was able to demonstrate that Argentina had imposed and collected duties on the effective price of the import transactions at levels well above the bound rate of 35 per cent *ad valorem*.[42]

60. It is our understanding that Argentina is objecting to the Panel's conclusion that the application of the DIEM is inconsistent with Argentina's obligations under Article II of the GATT 1994 to the extent that this conclusion was based on the Panel's examination of evidence relating to only 118, or at most 124, tariff categories out of approximately 940 relevant tariff categories for textile and apparel products. We note that Argentina did not challenge the methodology employed by the Panel in examining the evidence submitted by the United States identifying 118 tariff categories which led it to conclude, on the basis of statistical data relating to the average value of transactions, that the *ad valorem* equivalents of Argentina's specific duties exceeded 35 per cent *ad valorem* in a "sufficient number of transactions".[43]

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[41]Panel Report, para. 6.65.

[42]Panel Report, para. 6.51.

[43]*Ibid*.

61. The real issue posed here by Argentina is whether the United States had adduced sufficient evidence to establish a *prima facie* case of inconsistency with Article II:1 of the GATT 1994 for all tariff categories covered by Chapters 51 to 63 of the N.C.M.. As we have noted above, the Panel stated that the statistical data submitted by the United States on the average import price of certain products in relation to the total amount of duties collected, "… provides *reliable information* that, on a tariff line basis, duties above the bound rate of 35 per cent *ad valorem* have been imposed."[44] (emphasis added) Furthermore, the Panel agreed with the United States that, "… if an average calculation shows duties above 35 per cent, this is *evidence of a sufficient number of transactions* which were subject to duties imposed above the 35 per cent *ad valorem*."[45] (emphasis added) The Panel also noted that Argentina had not submitted "any affirmative evidence to the contrary".[46] Argentina, in other words, did not successfully overcome the *prima facie* case established by the United States. We cannot find any error of law in the findings of the Panel based on the evidence submitted by the United States on average calculations relating to 118 tariff categories out of approximately 940 tariff categories for textile and apparel products.

62. As noted above, the Panel stated that "… the very nature of the minimum specific duty system imposed in Argentina on the items at issue will inevitably lead, *in certain instances*, to the imposition of duties above 35 per cent *ad valorem*."[47] (emphasis added) This reference to "in certain instances" indicates that the Panel did not conclude that there was infringement "in all cases". We recall our finding that the DIEM regime, by its structure and design, results in the application of specific duties with *ad valorem* equivalents exceeding 35 per cent for all textile and apparel products imported at prices below the relevant "break-even" prices in the relevant tariff categories.[48] At the same time, products imported at prices above such "break-even" prices will be subject to a duty equivalent to 35 per cent or less *ad valorem*. This proposition holds for all relevant tariff categories relating to textile and apparel products to which the DIEM are applied. It is the result of Argentina requiring its customs officials to collect the higher of two values: the applicable *ad valorem* duty or the DIEM. It follows that, under such a system, the rate of duty applicable to any import transaction depends on the position of the imported product within the prevailing price range in any relevant tariff category. Thus, some

[44]*Ibid*.

[45]*Ibid*.

[46]*Ibid*.

[47]Panel Report, para. 6.65.

[48]See paras. 51-53 of this Report. We note that this "break-even" price will be the representative international price when the DIEM are calculated on the basis of the 35 per cent bound *ad valorem* rate. However, when the DIEM are calculated on the basis of a lower, applied rate, the "break-even" price will be lower than the representative international price.

transactions will fall within a price range where the application of the DIEM results in *ad valorem* equivalents exceeding 35 per cent. Other transactions, on the other hand, will fall within a price range where the application of the DIEM results in *ad valorem* equivalents less than, or equal to, 35 per cent. We agree with Argentina, therefore, that the application of the DIEM does not result in a breach of Article II for *each and every* import transaction in a given tariff category. At the same time, however, we agree with the Panel that there are sufficient reasons to conclude that the structure and design of the DIEM will result, with respect to a certain range of import prices within a relevant tariff category, in an infringement of Argentina's obligations under Article II:1 for all tariff categories in Chapters 51 to 63 of the N.C.M..

63. For these reasons, we find no legal basis on which to reverse the Panel's findings in paragraph 6.65 of the Panel Report.

V. The Statistical Tax and Argentina's Stated Commitments to the IMF

64. At the time the Panel proceeding commenced, there was in effect in Argentina an *ad valorem* tax of 3 per cent on imports, without a minimum or a maximum charge, which was called a "statistical tax" and was described as designed to cover the cost of providing a statistical service intended to provide a reliable data base for foreign trade operators.[49] In respect of this statistical tax, the Panel found as follows:

> Consequently, following the GATT practice on the subject matter, we conclude that Argentina's statistical tax of three per cent *ad valorem*, in its present form, is in violation of Article VIII:1(a) of GATT to the extent it results in charges being levied in excess of the approximate costs of the services rendered as well as being a measure designated for fiscal purposes.[50]

65. Argentina does not appeal the Panel's finding that the statistical tax is inconsistent with the substantive requirements of Article VIII of the GATT 1994. Rather, Argentina submits that the Panel erred in law in failing to take into account Argentina's obligations to the IMF in the Panel's interpretation of Article VIII. Argentina refers to the Memorandum on Economic Policy[51], that forms part of the

[49]According to Argentina's statement at the oral hearing on 23 February 1998, this *ad valorem* statistical tax was modified to 0.5 per cent in December 1997.

[50]Panel Report, para. 6.80

[51]Exhibit S to the United States' first written submission to the Panel.

panel record in this case, as a "Memorandum of Understanding" between Argentina and the IMF. Argentina states that this "Memorandum of Understanding" is a "simplified agreement" which includes an "undertaking" or an "obligation" on its part to collect a specified amount in the form of a statistical tax.[52] This obligation is said to be set out or reflected in the statement on page 7 of the Memorandum on Economic Policy that the fiscal measures to be adopted by Argentina include "… increases in import duties, including a temporary 3 per cent surcharge on imports".[53]

66. Argentina argues that in failing to consider its arguments about its obligations to the IMF and in failing to provide any reasons for not taking these arguments into account, the Panel disregarded its duty to make "an objective assessment of the matter" under Article 11 of the DSU. It is furthermore contended that the Panel, in ruling that the statistical tax is not consistent with Article VIII of the GATT 1994, failed to comply with the requirement in Article 12.7 of the DSU that "a panel shall set out … the basic rationale behind any findings and recommendations that it makes."[54] Argentina argues still further that the Panel erred in law in failing to consider certain "subsequent legislative developments" -- namely, the *Agreement Between the IMF and the WTO* and the *Declaration on Coherence*.[55] Paragraph 10 of the *Agreement Between the IMF and the WTO* and paragraph 5 of the *Declaration on Coherence* require, in the view of Argentina, that "the imposition on governments of cross-conditionality or additional conditions"[56] must be avoided.[57]

67. In the "Findings" section of the Panel Report, the Panel said:

> We find no exception in the WTO Agreement that would excuse Argentina's compliance with the requirements of Article VIII of GATT. Moreover, we see nothing in the Agreement Between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking that suggests that we should interpret Article VIII as argued by Argentina.[58]

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[52]Argentina's appellant's submission, para. 76.

[53]Argentina's appellant's submission, para. 82, and response of Argentina to questioning at the oral hearing.

[54]Argentina's appellant's submission, paras. 80-87.

[55]Argentina's appellant's submission, para. 91.

[56]*Declaration on Coherence*, para. 5.

[57]Argentina's appellant's submission, paras. 95-96.

[58]Panel Report, para. 6.79.

68. In Part V of its Report, under the heading "Interim Review", although not in its "Findings" section, the Panel offers some explanation as to why it did not address Argentina's arguments concerning cross-conditionalities or conflicts between Argentina's commitments to the IMF and its obligations under the *WTO Agreement*. The Panel stated:

> We see no reason to address this wider issue since, in the situation before the Panel, *there is no evidence that Argentina was requested by the International Monetary Fund* ("IMF") to impose an import tax that would violate the provisions of the WTO Agreement. Moreover, we see nothing in the Agreement Between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking that suggests that we should change our approach.[59] (emphasis added)

69. Implicit in the above statement is the Panel's belief that Argentina had not successfully shown that it was required under an agreement with the IMF to impose the statistical tax.[60] Indeed, the Panel does not appear to have been convinced that Argentina had a legally binding agreement with the IMF at all. From the panel record in this case, it does not appear possible to determine the precise legal nature of this Memorandum on Economic Policy, nor the extent to which commitments undertaken by Argentina in this Memorandum constitute legally binding obligations. We note that page 7 of the Memorandum on Economic Policy refers to "a temporary 3 percent surcharge on imports", which is not necessarily the same thing as the 3 per cent statistical tax levied on imports. Argentina did not show an irreconcilable conflict between the provisions of its "Memorandum of Understanding" with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel's implicit finding that Argentina failed to demonstrate that it had a legally binding commitment to the IMF that would somehow supersede Argentina's obligations under Article VIII of the GATT 1994.

70. We also agree with the Panel that there is nothing in the *Agreement Between the IMF and the WTO*, the *Declaration on the Relationship of the WTO with the IMF* or the *Declaration on Coherence* which justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994. The 1994 *Declaration on Coherence* is a Ministerial decision that articulates the objective of promoting increased cooperation between the WTO and the IMF in

[59]Panel Report, para. 5.3.

[60]We note that the Panel's statement in paragraph 6.79 of the Panel Report that Argentina "… does not argue that it is required to impose this specific tax in order to meet its commitments to the IMF" is not, strictly speaking, accurate, as it does not reflect Argentina's arguments before the Panel or before the Appellate Body in this appeal. See Panel Report, para. 3.276, and Argentina's appellant's submission, paras. 73-105.

order to encourage greater coherence in global economic policy-making. This objective is more explicitly recognized in the treaty language of the *WTO Agreement* in Article III:5, which states:

> With a view to achieving greater coherence in global economic policy-making, *the WTO shall cooperate, as appropriate*, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies. (emphasis added)

71. In furtherance of the WTO's mandate to "cooperate, as appropriate" with the IMF, the *Agreement Between the IMF and the WTO* was concluded in 1996.[61] This Agreement provides for specific means of administrative cooperation between the two organizations. It provides for consultations and the exchange of information between the WTO Secretariat and the staff of the IMF in certain specified circumstances, and grants to each organization observer status in certain of the other's meetings.[62]

72. The *Agreement Between the IMF and the WTO*, however, does *not* modify, add to or diminish the rights and obligations of Members under the *WTO Agreement*, nor does it modify individual States' commitments to the IMF. It does not provide any substantive rules concerning the resolution of possible conflicts between obligations of a Member under the *WTO Agreement* and obligations under the Articles of Agreement of the IMF or any agreement with the IMF. However, paragraph 10 of the *Agreement Between the IMF and the WTO* contains a direction to the staff of the IMF and the WTO Secretariat to *consult* on "issues of *possible inconsistency* between *measures under discussion*".

73. In the 1994 *Declaration on the Relationship of the WTO with the IMF*, Ministers reaffirmed that, unless otherwise provided for in the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, "the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund." We note that certain provisions of the GATT 1994, such as Articles XII, XIV, XV and XVIII, permit a WTO Member, in certain specified circumstances relating to exchange matters and/or balance of payments, to be excused from

[61]Done at Singapore, 9 December 1996.

[62]Excluding the DSB and dispute settlement panels, except where "matters of jurisdictional relevance to the Fund are to be considered". The WTO may invite a member of the staff of the Fund to attend a meeting of DSB "when the WTO, after consultation between the WTO Secretariat and the staff of the Fund, finds that such a presence would be of particular common interest to both organizations." *Agreement Between the IMF and the WTO*, para. 6.

certain of its obligations under the GATT 1994. However, Article VIII contains no such exception or permission.

74. We agree, therefore, with the Panel that there is "nothing in the Agreement Between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking"[63] that modifies Argentina's obligations under Article VIII of the GATT 1994. We also agree with the Panel that there is "… no exception in the WTO Agreement that would excuse Argentina's compliance with the requirements of Article VIII of GATT."[64] There does not appear to be anything in the *WTO Agreement* or in the other legal instruments cited by Argentina that would relieve a Member from its obligations under Article VIII of the GATT 1994. For these reasons, we uphold the Panel's findings in paragraphs 6.79 and 6.80 of the Panel Report.

VI. Objective Assessment of the Matter under Article 11 of the DSU

75. Argentina makes two claims under Article 11 of the DSU. It submits that the Panel acted inconsistently with Article 11 in: (i) admitting certain evidence submitted by the United States two days before the second substantive meeting of the Panel with the parties, and granting Argentina only two weeks to respond; and (ii) not seeking information from, and consulting with, the IMF to obtain its opinion on specific aspects of the matter relating to the statistical tax imposed by Argentina.[65] We examine each of these arguments in turn.

76. Article 11 of the DSU states in part:

> The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. …

[63]Panel Report, para. 6.79.

[64]*Ibid*.

[65]Argentina's appellant's submission, paras. 106-114.

A. *Admission of Certain Evidence*

77. Argentina submits that the Panel acted inconsistently with Article 11 of the DSU by admitting certain evidence offered by the United States two days before the second substantive meeting of the Panel with the parties. This evidence consisted of approximately 90 invoices and customs documents purporting to show specific cases in which Argentina had applied duties in excess of its 35 per cent *ad valorem* tariff binding.[66] At the second substantive meeting of the Panel with the parties, Argentina requested the Panel to reject this evidence on the grounds that it had been submitted too late in the panel process and that, because of the blacking-out of certain information from these documents, it would be impossible for Argentina to respond to this evidence. These documents related to customs operations or transactions carried out using the manual customs clearance system rather than the MARIA computerized system which, Argentina states, made it impossible to verify the information within the time period granted by the Panel.[67] The Panel ruled that it would admit this evidence, but allowed Argentina two weeks to respond to it.

78. Paragraph 6.55 of the Panel Report reads, in part, as follows:

> We note that the rules of procedures of panels do not prohibit the practice of submitting additional evidence after the first hearing of the Panel. Until the WTO Members agree on different and more specific rules on this regard, our main concern is to ensure that "due process" is respected and that all parties to a dispute are given all the opportunities to defend their position to the fullest extent possible. In light of the difficulties faced by Argentina in responding to this evidence on such a short notice, we decided to accept this additional evidence on the understanding that Argentina would have a period of two weeks to provide further comments on these additional invoices and customs documents. Argentina informed the Panel that it would not be submitting any further comment.

79. Article 11 of the DSU does not establish time limits for the submission of evidence to a panel. Article 12.1 of the DSU directs a panel to follow the Working Procedures set out in Appendix 3 of the DSU, but at the same time authorizes a panel to do otherwise after consulting the parties to the dispute. The Working Procedures in Appendix 3 also do not establish precise deadlines for the

[66]See Panel Report, paras. 3.179 and 6.55.

[67]Argentina's appellant's submission, paras. 107-108.

presentation of evidence by a party to the dispute.[68] It is true that the Working Procedures "do not prohibit" submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. Paragraphs 4 and 5 of the Working Procedures address the first stage in the following terms:

> 4. Before the first substantive meeting of the panel with the parties, the parties to the dispute shall transmit to the panel written submissions in which they present the facts of the case and their arguments.
>
> 5. At its first substantive meeting with the parties, the panel shall ask the party which has brought the complaint to present its case. Subsequently, and still at the same meeting, the party against which the complaint has been brought shall be asked to present its point of view.

The second stage of a panel proceeding is dealt with in paragraph 7 which states:

> 7. Formal rebuttals shall be made at a second substantive meeting of the panel. The party complained against shall have the right to take the floor first to be followed by the complaining party. The parties shall submit, prior to that meeting, written rebuttals to the panel.

Under the Working Procedures in Appendix 3, the complaining party should set out its case in chief, including a full presentation of the facts on the basis of submission of supporting evidence, during the first stage. The second stage is generally designed to permit "rebuttals" by each party of the arguments and evidence submitted by the other parties.

80. As noted above, however, the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence. The Panel could have refused to admit the additional documentary evidence of the United States as unseasonably submitted. The Panel chose, instead, to admit that evidence, at the same time allowing Argentina two weeks to respond to it. Argentina drew attention to the difficulties it would face in tracing and verifying the manually processed customs documents and in responding to them, since identifying names, customs identification numbers

[68]As we have observed in two previous Appellate Body Reports, we believe that detailed, standard working procedures for panels would help to ensure due process and fairness in panel proceedings. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, adopted 25 September 1997, WT/DS27/AB/R, para. 144; *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, para. 95.

and, in some cases, descriptions of the products had been blacked out. The Panel could well have granted Argentina more than two weeks to respond to the additional evidence. However, there is no indication in the panel record that Argentina explicitly requested from the Panel, at that time or at any later time, a longer period within which to respond to the additional documentary evidence of the United States. Argentina also did not submit any countering documents or comments in respect of any of the additional documents of the United States.

81. Accordingly, while another panel could well have exercised its discretion differently, we do not believe that the Panel here committed an abuse of discretion amounting to a failure to render an objective assessment of the matter as mandated by Article 11 of the DSU.

B. *Consultation with the IMF*

82. Argentina also argues that the Panel failed to make "an objective assessment of the matter", as required by Article 11 of the DSU, by not acceding to the request of the parties to seek information from, and consult with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax.[69] The DSU gives panels different means or instruments for complying with Article 11; among these is the right to "seek information and technical advice" provided in Article 13 of the DSU. Argentina maintains that the Panel did not make use of this right, which would have allowed it to verify the information provided by the parties, and which might have altered the Panel's findings regarding the statistical tax.[70]

83. During the panel proceedings, the United States argued that Argentina had not demonstrated that the imposition of a 3 per cent statistical tax was required, or even requested, by the IMF, and invited the Panel to consult with the IMF to ascertain whether it had asked Argentina to impose the tax.[71] In its appellant's submission, Argentina states that it too requested "consultations" with the IMF by the Panel.[72]

84. The only provision of the *WTO Agreement* that *requires* consultations with the IMF is Article XV:2 of the GATT 1994. This provision *requires* the WTO to consult with the IMF when

[69]Argentina's appellant's submission, para. 111.

[70]Argentina's appellant's submission, paras. 111-112.

[71]Opening statement of the United States at the first meeting of the Panel with the parties, p. 8 and second submission of the United States to the Panel, pp. 25-26. Also see Panel Report, para. 3.281.

[72]Argentina's appellant's submission, para. 90, referring to Panel Report, para. 3.294.

dealing with "problems concerning monetary reserves, balances of payments or foreign exchange arrangements".[73] However, this case does not relate to these matters. Article 13.1 of the DSU gives a panel "… the right to seek information and technical advice from any individual or body which *it deems appropriate.*" (emphasis added) Pursuant to Article 13.2 of the DSU, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. This is a grant of discretionary authority: a panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the DSU enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate."[74] Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.

85. As in the *WTO Agreement*, there are no provisions in the *Agreement Between the IMF and the WTO* that *require* a panel to consult with the IMF in a case such as this. Under paragraph 8 of this latter Agreement, in a case involving "exchange measures within the Fund's jurisdiction", the IMF "shall inform in writing the relevant WTO body (including dispute settlement panels) … whether such measures are consistent with the Articles of Agreement of the Fund." This case does not, however, involve "exchange measures within the Fund's jurisdiction". Paragraph 8 also provides that the IMF "may communicate its views in writing on matters of mutual interest to the [WTO] or any of its organs or bodies (*excluding the WTO's dispute settlement panels*) …" (emphasis added). Evidently, the IMF has not been authorized to provide its views to a WTO dispute settlement panel on matters *not* relating to exchange measures within its jurisdiction, unless it is requested to do so by a panel under Article 13 of the DSU.

86. In this case, we find that the Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF. While it might perhaps have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF in this case, we believe that the Panel did not abuse its discretion by not seeking information or an opinion from the IMF.

[73]Furthermore, Article XV:2 states that, in such consultations, the WTO "… shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether action by a Member in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund …".

[74]Adopted 13 February 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 147.

For these reasons, we find that the Panel did not violate Article 11 of the DSU by not seeking information from, and consulting with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax imposed by Argentina.

VII. Findings and Conclusions

87. For the reasons set out in this Report, the Appellate Body:

(a) modifies the Panel's findings in paragraphs 6.31 and 6.32 of the Panel Report by concluding that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule. In this case, Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent *ad valorem* in Argentina's Schedule;

(b) concludes that the Panel did not err in finding that Argentina had acted inconsistently with its obligations under Article II of the GATT 1994 "in all cases" in which Argentina applied the DIEM, and, therefore, upholds the findings of the Panel in paragraph 6.65 of the Panel Report;

(c) upholds the findings of the Panel in paragraphs 6.79 and 6.80 of the Panel Report; and

(d) concludes that the Panel did not violate Article 11 of the DSU in: (i) admitting certain evidence submitted by the United States two days prior to the second substantive meeting of the Panel with the parties, and granting Argentina two weeks to respond; and (ii) not seeking information from, and consulting with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax imposed by Argentina.

Signed in the original at Geneva this 11th day of March 1998 by:

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Said El-Naggar
Presiding Member

_____ _____

Florentino Feliciano
Member

Mitsuo Matsushita
Member

WORLD TRADE ORGANIZATION

WT/DS56/AB/R/Corr.1
20 April 1998

(98-1593)

ARGENTINA - MEASURES AFFECTING IMPORTS OF FOOTWEAR, TEXTILES, APPAREL AND OTHER ITEMS

Corrigendum

The following paragraph should be added as paragraph 88 to the Appellate Body Report in *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, circulated on 27 March 1998.

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88. The Appellate Body *recommends* that the Dispute Settlement Body request Argentina to bring its measures found in this Report and in the Panel Report, as modified by this Report, to be inconsistent with the GATT 1994 into conformity with the obligations of Argentina under the GATT 1994.
