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1 ARTICLE II

1.1 Text of Article II

Article II

Schedules of Concessions

1. (a) Each contracting party shall accord to the commerce of the other contracting parties 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 contracting party, which are the products of territories of other contracting parties, 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. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, 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 for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

- (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic

product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

(c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

1.2 Text of note *ad* Article II

Ad Article II

Paragraph 2 (a)

The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment

provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.¹

(footnote original) ¹ This Protocol entered into force on 14 December 1948.

Paragraph 2 (b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

1.3 Understanding on Interpretation of Article II.1(b) of the GATT 1994

Members hereby agree as follows:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".
2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.
3. "Other duties or charges" shall be recorded in respect of all tariff bindings.
4. Where a tariff item has previously been the subject of a concession, the level of "other duties or charges" recorded in the appropriate Schedule shall not be higher than the level obtaining at the time of the first incorporation of the concession in that Schedule. It will be open to any Member to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the time of the original binding of the item in question, as well as the consistency of the recorded level of any "other duty or charge" with the previously bound level, for a period of three years after the date of entry into force of the WTO Agreement or three years after the date of deposit with the Director-General of the WTO of the instrument incorporating the Schedule in question into GATT 1994, if that is a later date.
5. The recording of "other duties or charges" in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 other than those affected by paragraph 4. All Members retain the right to challenge, at any time, the consistency of any "other duty or charge" with such obligations.
6. For the purposes of this Understanding, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply.
7. "Other duties or charges" omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than

that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.

8. The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken on 26 March 1980 (BISD 27S/24).

1.4 Article II:1: Interpretation of tariff concessions

1.4.1 General

1. The Panel in *EC – Chicken Cuts* had to decide whether the tariff treatment of frozen boneless salted chicken cuts imported into the European Communities was inconsistent with Article II:1(a) and Article II:1(b), as had been alleged by Brazil and Thailand. The Panel set out a three-step test for their analysis of this issue:

"[W]e will need to ascertain: (a) the treatment accorded to the products at issue under the EC Schedule; (b) the treatment accorded to the products at issue under the measures at issue; and (c) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule and, more particularly, whether those measures result in the imposition of duties and conditions on the products at issue in excess of those provided for in the EC Schedule."¹

2. The Panel found that the EC measures at issue had the effect of classifying frozen boneless chicken cuts that had been impregnated with salt, with a salt content of 1.2% – 3% (the products at issue), under the concession contained in heading 02.07 of the EC Schedule, which relates *inter alia* to "frozen" chicken. The Panel concluded that those measures were in violation of Article II:1(a) and II:1(b) of the GATT 1994 because (based on its interpretation of the EC Schedule) the products at issue were covered by the concession in heading 02.10 of that Schedule, but the EC measures resulted in imposition of customs duties on the chicken cuts in question in excess of the bound duty rate for heading 02.10.

"The Panel recalls that ... we stated that, if we were to conclude that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule, there is no question that the treatment accorded to those products under the measures at issue is less favourable than that provided for in the EC Schedule because undisputed pricing data indicates that the duty levied on the products at issue can and has exceeded 15.4% *ad valorem*, being the bound duty rate for products covered by heading 02.10.

It is the Panel's view that the products at issue are covered by the concession contained in heading 02.10 of the EC Schedule. Therefore, such products are entitled to treatment provided for by that concession. Since the products at issue are not being accorded such treatment, the European Communities is in violation of Article II:1(a) and Article II:1(b) of the GATT 1994.

In reaching this conclusion, the Panel recalls that a fundamental object and purpose of the WTO Agreement and the GATT 1994 is that the security and predictability of reciprocal and mutually advantageous arrangements must be preserved. In the Panel's view, a Member's unilateral intention regarding the meaning to be ascribed to a concession that Member has made in the context of WTO multilateral trade negotiations cannot prevail over the common intentions of all WTO Members as determined through an analysis undertaken pursuant to Articles 31 and 32 of the *Vienna Convention*."²

¹ Panel Report, *EC – Chicken Cuts*, para. 7.65; followed by Panel Report, *EC – IT Products*, para. 7.100.

² Panel Report, *EC – Chicken Cuts*, paras. 7.425-7.427. The Panel arrived at this conclusion by interpreting tariff heading 02.10 of the EC Schedule using the customary rules of treaty interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The Appellate Body reversed the Panel's

3. In considering what is required to prove an "as such" breach of Article II:1, the Panel in *EC – IT Products* declined to accept the argument that particular product models or categories must always be identified in cases under Article II involving the product composition of tariff concessions:

"The key issue in this case under Article II is whether certain products that are entitled duty-free treatment under the EC Schedule indeed receive such treatment. If the complainants are able to establish that the measures operate in such a way as to necessarily deny duty-free treatment, then we consider that a breach of Article II has been established. More specifically, in the circumstances of this case, if we were to determine that some products fall within the scope of duty-free concessions in the EC Schedule, then if the challenged measures provide for the application of duties to those products covered by the concession, this would be sufficient to find a breach of Article II. ... findings generally focus on measures rather than products. While the obligation under Article II refers to the tariff treatment of products, such treatment results from the effect of certain measures. This means that, in the event that a violation is found, it is the measures at issue that must be brought into conformity."³

1.4.2 Applicable interpretative rules

4. In *EC – Computer Equipment*, the Appellate Body dealt with the complaint that the application of increased duties on certain computer equipment was in violation of the relevant tariff concessions of the European Communities, and therefore inconsistent with Article II. The Appellate Body set forth the interpretative rules on tariff concessions and, contrary to the Panel which had based its interpretation of the European Communities' tariff commitments on the "legitimate expectations" of the exporting Member,⁴ it emphasized the parties' common intentions as determined through treaty interpretation:

"The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*."⁵

5. The Appellate Body Report in *EC – Chicken Cuts* agreed with the Panel in that case that "in characterizing a product for purposes of tariff classification, it is necessary to look exclusively at the 'objective characteristics' of the product in question when presented for classification at the border."⁶

6. The Panel in *China – Auto Parts*, considering the scope of the term "as presented" in the General Rules of Interpretation (GIRs) of the Harmonized Commodity Description and Coding System (HS), decided that this term "is limited to the specific moment when goods are presented to the customs authority for classification".⁷

interpretation and application of the concept of "subsequent practice" under Article 31(3)(b) of the *Vienna Convention*, but did not alter the Panel's ultimate conclusion that the European Communities' measures were WTO-inconsistent.

³ Panel Report, *EC – IT Products*, para. 7.116.

⁴ Panel Report, *EC – Computer Equipment*, para. 8.60.

⁵ Appellate Body Report, *EC – Computer Equipment*, para. 84. The Appellate Body confirmed this finding in *Canada – Dairy*. See also Appellate Body Report, *Canada – Dairy*, para. 131.

⁶ Appellate Body Report, *EC – Chicken Cuts*, para. 246.

⁷ Panel Report, *China – Auto Parts*, para. 7.415.

1.4.3 Ordinary meaning and factual context

7. In *EC – Chicken Cuts*, the Appellate Body observed: "The Appellate Body has observed that dictionaries are a 'useful starting point' for the analysis of "ordinary meaning" of a treaty term, but they are not necessarily dispositive. The ordinary meaning of a treaty term must be ascertained according to the particular circumstances of each case. Importantly, the ordinary meaning of a treaty term must be seen in the light of the intention of the parties 'as expressed in the words used by them against the light of the surrounding circumstances'.⁸ The Appellate Body also considered that the use of elements such as the products falling under a HS heading, the physical properties of those products, and aspects of the description of those products was not incorrect; the Panel's considerations of these elements under "ordinary meaning" complemented its analysis of dictionary definitions, and even if these elements could not be considered under "ordinary meaning", they could be considered under "context".

"Interpretation pursuant to the customary rules codified in Article 31 of the *Vienna Convention* is ultimately a holistic exercise that should not be mechanically subdivided into rigid components. Considering particular surrounding circumstances under the rubric of "ordinary meaning" or "in the light of its context" would not, in our view, change the outcome of treaty interpretation."⁹

1.4.4 Context for tariff concessions including Harmonized System

8. The Appellate Body confirmed in *EC – Chicken Cuts* that the HS constitutes relevant "context" to interpret a Member's Schedule of concessions in the sense of Article 31(2)(a) of the Vienna Convention on the Law of Treaties:

"[P]rior to, during, as well as *after* the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the HS as the basis for their WTO Schedules, notably with respect to agricultural products. In our view, this consensus constitutes an 'agreement' between WTO Members 'relating to' the WTO Agreement that was 'made in connection with the conclusion of' that Agreement, within the meaning of Article 31(2)(a) of the Vienna Convention. As such, this agreement is 'context' under Article 31(2)(a) *for the purpose of interpreting the WTO agreements*, of which the EC Schedule is an integral part. In this light, we consider that the HS is relevant for purposes of interpreting tariff commitments in the WTO Members' Schedules."¹⁰

9. The Appellate Body also explained that, besides considering the headings and subheadings of the HS, a treaty interpreter may also resort to HS elements which are binding on the contracting parties of the HS (i.e. the Section, Chapter and Subheading Notes and the General Rules for Interpretation of the HS), as well as other elements which are *not* binding for the contracting parties of the HS, such as the HS Explanatory Notes.¹¹ The Panel in *China – Auto Parts* also found that parts of a HS Committee Decision that have not been codified into legal texts of the HS or Explanatory Notes to the HS, do not afford the same evidentiary weight as the GIR itself or the HS Committee Decisions that have been codified into legal texts or Explanatory Notes.¹²

10. The Panel in *China – Auto Parts* referred to other terms in tariff headings in China's Schedule as "context." However, the Appellate Body in *China – Auto Parts* cautioned that context

⁸(footnote original) Lord McNair, *The Law of Treaties* (Oxford Clarendon Press, 1961), p. 365.

⁹ Appellate Body Report, *EC – Chicken Cuts*, para. 176.

¹⁰ Appellate Body Report, *EC – Chicken Cuts*, para. 199.

¹¹ See Appellate Body Report, *EC – Chicken Cuts*, para. 224. While the Appellate Body agreed with the general proposition that "the Chapter Notes to the Harmonized System, which are binding, may have greater probative value than the Explanatory Notes to the Harmonized System, which are non-binding" it also recognized that the "probative value of a Note will, however, also depend on how relevant it is to the interpretative question at issue; as a result, it cannot be excluded that an Explanatory Note that directly addresses a given interpretative question will be more probative than a Chapter Note that does not relate specifically to that interpretative question." (See Appellate Body Report, *EC – Chicken Cuts*, para. 224, fn. 431).

¹² Panel Report, *China – Auto Parts*, para. 7.421.

provided by the HS was not relevant to the issue of whether the charges at issue were internal charges.¹³

11. The Panel in *EC – IT Products* opined on this subject:

"[W]hile the HS would always qualify as context for interpreting concessions in a Member's schedule that are based on that nomenclature, or that explicitly or implicitly make reference to it, the relevance of the HS will depend on the interpretative question at issue. Moreover, it does not follow from the Appellate Body jurisprudence that the HS will *necessarily* qualify as context or be relevant in interpreting *all* tariff concessions, including concessions which are not based on the HS."¹⁴

12. The *EC – IT Equipment* Panel determined that the HS and its associated interpretative materials were not relevant for interpreting the concessions based on narrative descriptions (relating to Attachment B of the Annex to the ITA).¹⁵

13. The Panel in *India – Tariffs on ICT Goods (Japan)* stated that "the relevance of the HS depends on the specific interpretative question at issue (including whether the relevant concessions were based on the HS)".¹⁶

1.4.5 Subsequent practice

14. In *EC – Chicken Cuts* the Appellate Body would not recognize a failure to protest a classification practice as agreement confirming that practice as "subsequent practice" in the sense of Article 31(3)(b) of the Vienna Convention.¹⁷

1.4.6 Circumstances of conclusion

15. Regarding the "circumstances of conclusion of a treaty" which may be taken into account as supplementary means of interpretation under Article 32 of the Vienna Convention, in *EC – Chicken Cuts* the Appellate Body agreed that relevant such circumstances for an Uruguay Round tariff concession "should be ascertained over a period of time ending on the date of the conclusion of the WTO Agreement¹⁸ that relevant customs classification practices would include those of the importing Member, and could also include those of other Members¹⁹; and that information or events subsequent to conclusion of the treaty can be probative of the common intentions of the parties at the time of the conclusion of the treaty."²⁰

1.4.7 Relevance of "legitimate expectations"

16. In *EC – Computer Equipment*, the Appellate Body rejected the Panel's findings that "the meaning of the term 'ADP machines' in this context [of Article II:1(b)] may be determined in light of the legitimate expectations of an exporting Member"²¹ and that during tariff negotiations, the United States "was not required to clarify the scope of the European Communities' tariff concessions".²² The Appellate Body stated:

"Tariff negotiations are a process of reciprocal demands and concessions, of 'give and take'. It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the

¹³ Appellate Body Report, *China – Auto Parts*, para. 151.

¹⁴ Panel Report, *EC – IT Products*, para. 7.443.

¹⁵ Panel Report, *EC – IT Products*, para. 7.444.

¹⁶ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.65.

¹⁷ Appellate Body Report, *EC – Chicken Cuts*, para. 272-273.

¹⁸ Appellate Body Report, *EC – Chicken Cuts*, para. 293.

¹⁹ Appellate Body Report, *EC – Chicken Cuts*, paras. 300-301.

²⁰ Appellate Body Report, *EC – Chicken Cuts*, para. 305.

²¹ Panel Report, *EC – Computer Equipment*, para. 8.31.

²² Panel Report, *EC – Computer Equipment*, para. 8.60.

Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions.²³ Indeed, the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.

For the reasons stated above, we conclude that the Panel erred in finding that 'the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment'. We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties."²⁴

1.4.8 Judicial economy

17. The Panel in *US – Safeguard Measures on Washers* noted that Korea's claim under Article II:1 was purely consequential and dependent on a finding of violation with respect to Korea's claims under Article XIX:1(a) and different provisions of the Agreement on Safeguards. Having upheld certain claims made by Korea under Article XIX:1(a) of the GATT 1994 as well as under the Agreement on Safeguards, the Panel exercised judicial economy in respect of the claim under Article II:1 of the GATT 1994.²⁵

1.4.9 Modification vs. replacement of tariffs

18. In *India – Tariffs on ICT Goods (Japan)*, the Panel rejected India's argument that its HS2007 Schedule had replaced its HS2002 Schedule. According to the Panel, the process embodied in the GATT Decision of 26 March 1980 on Procedures for Modification and Rectification of Schedules of Tariff Concessions through which India's changes were certified was about changing, not replacing, schedules:

"India's argument that its HS2002 Schedule is 'no longer in currency' implies that, in India's view, a newly transposed Schedule replaces the old Schedule. We have examined the relevant documents surrounding each transposition of India's WTO Schedule and we understand that following a transposition exercise it is not the case that a 'new' Schedule replaces an 'old' Schedule. Rather, the documents that are agreed upon by Members, adopted as binding, and certified as such by the Director-General, contain certain *changes* to the relevant Schedules. Indeed, the process through which these changes are certified is under the 1980 Decision. That Decision does not set forth procedures for *replacing* a Member's Schedule, but rather sets forth procedures for 'modification' and 'rectification', and the adoption of 'changes'. Thus, the files that are certified following each transposition process do not set forth *all* of India's tariff concessions, but rather only those tariff items that have changed as a result of the transposition exercise. India is therefore incorrect when it suggests that its HS2002 Schedule was replaced with its HS2007 Schedule. To the contrary, India only has one WTO Schedule concerning trade in goods, which is indeed a covered agreement, and which has been changed several times over the years through various recourses to the 1980 Decision. The fact that India's WTO Schedule is a covered agreement does not imply *ipso facto* that the ITA is a covered agreement. India's WTO Schedule is explicitly recognized as an integral part of the covered agreements. The ITA, which is a distinct legal instrument from India's WTO Schedule, is not."²⁶

²³ (footnote original) MTN.TNC/W/131, 21 January 1994. See also *Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994*, para. 3.

²⁴ Appellate Body Report, *EC – Computer Equipment*, paras. 109-110.

²⁵ Panel Report, *US – Safeguard Measure on Washers*, paras. 7.289 – 7.290.

²⁶ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.45.

1.5 Article II:1(a)

1.5.1 "treatment no less favourable"

19. In *Argentina – Textiles and Apparel*, the Appellate Body found that "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."²⁷ The Appellate Body stated 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)."²⁸ In this regard, the Appellate Body considered it "evident ... 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)".²⁹

20. The Panels on *EC - Chicken Cuts* and *EC – IT Products* also found that a violation of Article II:1(b) necessarily results in less favourable treatment which is inconsistent with the obligations in Article II:1(a).³⁰

21. In *India – Tariffs on ICT Goods (Japan)*, Japan argued that India's tariff treatment for certain products was in violation of Article II:1(a) because it lacked foreseeability or predictability. In this context, Japan argued that the term "less favourable treatment" in Article II:1(a) should be understood as referring to "conditions of competition".³¹ The Panel, while acknowledging that "treatment no less favourable" in this provision may be interpreted as referring to "conditions of competition", underlined that this assessment necessarily entailed a comparison:

"We do not disagree with Japan that the expression 'treatment no less favourable' in Article II:1(a) can be interpreted as referring to conditions of competition. We observe, however, that the phrase 'treatment no less favourable *than*' necessarily entails a comparison – in other words, for a measure to be inconsistent with Article II:1(a), there must be something against which the challenged treatment is *less* favourable. That comparator is explicitly identified in Article II:1(a) as the treatment 'provided for in ... the appropriate Schedule'. As the panels in *EC – IT Products* found, 'if a measure adversely affects the conditions of competition for a product *from that which it is entitled to enjoy under a Schedule*, this would be less favourable treatment under Article II:1(a)'.³²

22. The Panel in *India – Tariffs on ICT Goods (Japan)* noted that Japan, in presenting its claim based on the notion of "conditions of competition", had not made a comparison with India's Tariff Schedule:

"Thus, to succeed in its third claim under Article II:1(a), Japan would need to demonstrate that the lack of foreseeability or predictability allegedly attached to the use of customs notifications and exemptions by the Government of India results in treatment that is less favourable than the treatment set forth in India's WTO Schedule. In the context of this third claim, however, and in contrast to its other two claims under Article II:1(a), Japan has conducted no comparison of the tariff treatment at issue to India's WTO Schedule. While Japan makes a passing reference to India's WTO Schedule in the context of this claim, Japan does not attempt to explain how the challenged measures – certain customs notifications unconditionally exempting the products at issue from customs duties – would adversely affect the conditions of competition of the products of Japan at issue 'from that which [they are] entitled to enjoy under' India's WTO Schedule. Thus, Japan has not tried to show how such customs notifications have 'the potential of deleterious effects on competition' for those products, as compared to the conditions of competition such products are entitled to under India's WTO Schedule.

²⁷ Appellate Body Report, *Argentina – Textiles and Footwear*, para. 45.

²⁸ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

²⁹ Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47 (emphasis original).

³⁰ Panel Reports on *EC – Chicken Cuts*, para. 7.65, and *EC – IT Products*, para. 7.747.

³¹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.421, 7.424 and 7.426.

³² Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.427.

... Mere statements to the effect that India's system of duty exemptions through customs notifications 'lacks foreseeability or predictability' because the exemptions 'do not provide any explanation or refer to any objective criteria' and may be modified or repealed 'at any time', do not amount to a demonstration that the measures at issue accord treatment less favourable than that provided for in India's WTO Schedule. There is therefore no baseline identified by Japan by which we can assess whether any lack of foreseeability or predictability allegedly attached to the measures at issue in this dispute constitutes treatment less favourable than that set forth in India's WTO Schedule, inconsistent with Article II:1(a)."³³

23. In reaching its conclusion on this claim, the Panel in *India – Tariffs on ICT Goods (Japan)* underlined that Article II:1(a) does not prescribe how the obligations under that provision should be implemented:

"As a final observation on this issue, we note that Article II:1(a) does not, on its face, regulate the manner in which a Member implements the obligations under that provision. India has adopted a system whereby the executive may exempt certain products from ordinary customs duties through customs notifications and we see nothing in Article II:1(a) or in India's WTO Schedule that would prevent India from implementing its WTO obligations in that manner. In short, in the circumstances of this dispute, Japan has provided no argument or evidence demonstrating that India's use of customs notifications to apply the tariff treatment set forth in its WTO Schedule results in tariff treatment less favourable than that set forth in its WTO Schedule. There is therefore no basis for us to find that the manner in which India implements its WTO obligations under Article II:1(b) is inconsistent with Article II:1(a).

For these reasons we consider that Japan has failed to demonstrate that the measures at issue in this dispute impose treatment less favourable than that set forth in India's WTO Schedule, inconsistent with Article II:1(a) of the GATT 1994, on the ground that India's customs notifications lack foreseeability or predictability, thus affecting conditions of competition for traders."³⁴

1.5.2 "commerce"

24. In *Colombia – Textiles*, the respondent argued that the obligations in Article II do not extend to what may be termed "illicit trade". The Appellate Body rejected this argument, and in the course of its analysis stated that:

"Article II:1 of the GATT 1994 serves the important function of preventing Members from applying duties that exceed the bound rates agreed to in tariff negotiations and incorporated into their Schedules of Concessions.³⁵ Article II:1(a) provides that a Member shall accord to the 'commerce' of other Members treatment no less favourable than that provided for in its Schedule. The term 'commerce' is defined as referring broadly to the exchange of goods such that, in this provision, the 'commerce' of a Member should be understood to refer to all such exchanges of that Member. We do not see that the scope of this term, as it appears in Article II:1(a), is qualified in respect of the nature or type of 'commerce', or the reason or function of the transaction, in a manner that excludes what Colombia considers to be illicit trade."³⁶

1.5.3 Article XXVIII modifications prior to certification

25. See the summary of the Panel's finding in *EU – Poultry (China)* at paragraph 69 below.

³³ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.428-7.429.

³⁴ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.431-7.432.

³⁵ (footnote original) Appellate Body Report, *Argentina – Textiles and Apparel*, para. 47.

³⁶ Appellate Body Report, *Colombia – Textiles*, para. 5.34.

1.6 Article II:1(b)

1.6.1 "products of territories of other contracting parties"

26. The Panel in *India – Tariffs on ICT Goods (Japan)* found that India acted inconsistently with Articles II:1(a) and (b) of the GATT 1994 by imposing customs duties on certain products of Japanese origin, in excess of those found in India's WTO Schedule. India then argued that Notification No. 69/2011, adopted in the context of the India-Japan Comprehensive Economic Partnership Agreement (CEPA), provided for 0% duty rate on such products, and therefore negated Japan's claims under the mentioned two provisions.³⁷ The Panel noted that the Notification provided for 0% duty rate on the condition that the products complied with the CEPA origin requirements. In this regard, the Panel disagreed with India's argument that such origin requirements were inbuilt in the phrase "products of territories of other contracting parties" in Article II:1(b):

"We note that it is uncontested that the origin requirements set forth in CEPA Rules 2011 constitute preferential rules of origin, and that India has no non-preferential rules of origin in place for imports. Keeping in mind the MFN nature of the obligations contained in Articles II:1(a) and (b), we do not see how the phrase 'products of territories of other Members' in Article II:1(b) can encompass preferential rules of origin such as those applied by India pursuant to CEPA Rules 2011. In other words, even assuming that *non-preferential* rules of origin are 'inbuilt' in the phrase 'products of territories of other Members' in Article II:1(b) – an issue which is not before us in this dispute – nothing in the text of this provision indicates that *preferential* rules of origin, such as those contained in CEPA Rules 2011, are 'inbuilt' in that phrase. We consider, therefore, that the origin requirements set forth in CEPA Rules 2011 are not encompassed in the phrase 'products of territories of other Members' in Article II:1(b), first sentence. To the extent that, pursuant to Notification No. 69/2011, products of Japan are required to comply with origin requirements set forth in CEPA Rules 2011 to be exempted from customs duty, it follows that Notification No. 69/2011 does not accord unconditional duty-free treatment to products of Japan falling under the tariff items at issue in this dispute."³⁸

27. On this basis, the Panel in *India – Tariffs on ICT Goods (Japan)* concluded:

"We recall that, pursuant to Articles II:1(a) and (b), India has the obligation to grant unconditional duty-free treatment on an MFN basis to all products covered by the tariff items at issue, including all such products of Japan, as set forth in its WTO Schedule. We have found that the origin requirements set forth in CEPA Rules 2011 constitute preferential rules of origin and are not 'inbuilt' in the phrase 'products of territories of other Members' in Article II:1(b), first sentence, of the GATT 1994. To the extent that the products of Japan falling under the tariff items at issue are required to comply with such origin requirements to be exempted from customs duties, those products of Japan are not accorded unconditional duty-free treatment."³⁹

1.6.2 "upon their importation"

28. In *Colombia – Textiles*, the Appellate Body stated that:

"Article II:1(b) thus provides that the products described in a Member's Schedule may not, 'on their importation', be subject to ordinary customs duties, or other duties or charges, that exceed that Member's bound tariff rates. The term 'importation' refers generally to the action of bringing in goods from another country. Thus, as with the term 'commerce', we do not see that the scope of the term 'importation' is qualified in respect of the nature or type of imports, or the reason or function of the transaction, in a manner that excludes what Colombia considers to be illicit trade."⁴⁰

³⁷ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.433 and 7.440.

³⁸ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.449.

³⁹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.451.

⁴⁰ Appellate Body Report, *Colombia – Textiles*, para. 5.35.

1.6.3 Duties or charges under Article II:1(b)

29. In *India – Additional Import Duties*, the Appellate Body rejected the Panel's finding that duties or charges under Article II:1(b) are "inherently discriminatory":

"[I]nsofar as this may suggest that the mere application of a tariff by a Member on imports of another Member is somehow unfair or prejudicial. Such a connotation would, in our view, be at odds with negotiations by Members of tariff concessions that allow for the imposition of duties up to a bound level.³¹⁵ Tariffs are legitimate instruments to accomplish certain trade policy or other objectives such as to generate fiscal revenue. Indeed, under the GATT 1994, they are the preferred trade policy instrument, whereas quantitative restrictions are in principle prohibited. Irrespective of the underlying objective, tariffs are permissible under Article II:1(b) so long as they do not exceed a Member's bound rates."⁴¹

1.6.4 "subject to the terms, conditions or qualifications set forth in that Schedule"

30. In *EC – Bananas III*, addressing the question as to whether the allocation of tariff quotas as inscribed in a Schedule was inconsistent with GATT Article XIII, the Appellate Body addressed the legal status of tariff concessions. The Appellate Body held that "a Member may yield rights and grant benefits, but it cannot diminish its obligations":

"With respect to concessions contained in the Schedules annexed to the GATT 1947, the panel in *United States – Restrictions on Importation of Sugar* ("*United States – Sugar Headnote*") found that:

'... Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.'⁴²

This principle is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations. This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:

'The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement*. (emphasis added)'⁴³

31. In *EC – Poultry*, the Appellate Body rejected Brazil's argument that the MFN principle in Articles I and XIII of the GATT 1994 does not necessarily apply to tariff-rate quotas resulting from compensation negotiations under Article XXVIII of the GATT 1994. In so doing, the Appellate Body confirmed its finding in *EC – Bananas III*, cited in paragraph 30 above, and again referred to paragraph 3 of the *Marrakesh Protocol*. The Appellate Body stated:

"In *United States – Restrictions on Imports of Sugar* the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts *diminishing* obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In *EC – Bananas*, we confirmed the principle that a Member may yield rights but not diminish its obligations and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term 'concessions' suggests that a Member may yield or waive some

⁴¹ Appellate Body Report, *India – Additional Import Duties*, para. 159.

⁴² (footnote original) Panel Report, *US – Sugar*, para. 5.2.

⁴³ Appellate Body Report, *EC – Bananas III*, para. 154.

of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations. This interpretation is confirmed by paragraph 3 of the *Marrakesh Protocol*, which provides:

'The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement*. (emphasis added)'⁴⁴

32. In *Canada – Dairy*, Canada's Schedule established a quota of 64,500 tons, under which imports were subject to a certain duty, while out-of-quota imports were subject to a higher duty. Under the heading "Other terms and conditions", the Canadian Schedule stated: "This quantity [64,500] represents the estimated annual cross-border purchases imported by Canadian consumers." The United States argued that Canada violated Article II:1(b) in restricting access to tariff quotas for fluid milk to cross-border imports by Canadians of (i) consumer packaged milk for personal use, (ii) valued at less than Can\$20. The United States argued that with respect to those two conditions, Canada was granting imports of fluid milk treatment less favourable than that provided for in its Schedule. The Panel found the language contained in Canada's Schedule under the heading "Other terms and conditions" to be a *description* of the way the size of the quota was determined, rather than a statement of the *conditions* as to the kind of imports qualified to enter Canada under this quota. The Panel found that "the ordinary meaning of the word "represent" in this context does not, in our view, call to mind the setting out of specific restrictions or conditions".⁴⁵ The Panel added that "[e]ven if the phrase could be said to include restrictions on access to the tariff-rate quota, we do not see how the two conditions *at issue in this dispute* could be read into this phrase".⁴⁶ As a result, the Panel did not find any restriction to tariff quotas in Canada's relevant Schedule, and thus, agreed with the United States' argument.⁴⁷ The Appellate Body disagreed with the Panel's reading of the Schedule and presented the following interpretation of the term "subject to terms, conditions or qualifications" contained in Article II:1(b):

"Under Article II:1(b) of the GATT 1994, the market access concessions granted by a Member are '*subject to*' the 'terms, conditions or qualifications set forth in [its] Schedule'. (emphasis added) In our view, the ordinary meaning of the phrase 'subject to' is that such concessions are without prejudice to and are *subordinated to*, and are, therefore, *qualified by*, any 'terms, conditions or qualifications' inscribed in a Member's Schedule. We believe that the relationship between the 64,500 tonnes tariff-rate quota and the 'Other Terms and Conditions' set forth in Canada's Schedule is of this nature. The phrase 'terms and conditions' is a composite one which, in its ordinary meaning, denotes the imposition of qualifying restrictions or conditions. A strong presumption arises that the language which is inscribed in a Member's Schedule under the heading, 'Other Terms and Conditions', has some *qualifying or limiting* effect on the substantive content or scope of the concession or commitment."⁴⁸

In interpreting the language in Canada's Schedule, the Panel focused on the verb 'represents' and opined that, because of the use of this verb, the notation was no more than a '*description*' of the 'way the size of the quota was determined'.⁴⁹ The net consequence of the Panel's interpretation is a failure to give the notation in Canada's Schedule *any* legal effect as a 'term and condition'. If the language is *merely* a 'description' or a 'narration' of how the quantity was arrived at, we do not see what purpose it serves in being inscribed in the Schedule. The Panel, in other words, acted upon the assumption that Canada projected no identifiably necessary or

⁴⁴ Appellate Body Report, *EC – Poultry*, para. 98.

⁴⁵ Panel Report, *Canada – Dairy*, para. 7.151.

⁴⁶ Panel Report, *Canada – Dairy*, para. 7.152.

⁴⁷ Panel Report, *Canada – Dairy*, paras. 7.151-7.155.

⁴⁸ (*footnote original*) The United States contends, on the basis of the panel report in *United States – Restrictions on Imports of Sugar* (*supra*, footnote 52), that "terms and conditions" may encompass "additional concessions". We take no position as to whether "terms and conditions" may encompass "additional concessions"; but we do, however, note that, even assuming that the United States is correct on this point, an "additional concession" may well embody a qualification to a concession by expanding its scope or adding to it.

⁴⁹ (*footnote original*) Panel Report, para. 7.151.

useful qualifying or limiting purpose in inscribing the notation in its Schedule. The Panel thus disregarded the principle of effectiveness in its interpretive effort.

We note that the Panel also adopted an overly literal and narrow view of the words 'cross-border purchases imported by Canadian consumers' in the notation at issue. Moreover, the Panel erred in failing to give meaning to *all* of the words in that notation. On the basis of its ordinary meaning, the Panel stated that the language in the notation could *not* refer only to 'consumer packaged' milk 'for personal use'.⁵⁰ (emphasis in original) We do not agree that the ordinary meaning of that phrase in the notation is so unequivocal. We do not see anything in the text of the notation which necessarily *precludes* such an interpretation. The notation refers to 'cross-border purchases imported by Canadian consumers'. It seems, to us, that this language may well be taken to refer to imports of fluid milk made by Canadian consumers for personal use in the course of cross-border shopping."⁵¹

33. After making the findings referenced in paragraph 32 above, the Appellate Body in *Canada – Dairy* found that while the language contained in Canada's Schedule could be said to refer to the requirement of "consumer packaged milk for personal use", it could not refer to the Can\$ 50 value limitation. As a result, the Appellate Body found the latter requirement not to be contained in Canada's Schedule and its existence to be inconsistent with Article II:1(b).⁵²

34. In *Korea – Various Measures on Beef*, the Panel ruled, in a finding not appealed, that pursuant to Article II of the GATT 1994 any other "terms, conditions or qualifications" that are added to import concessions, must be included in the schedules. The Panel went on to find that "[g]iven that Korea made no such qualification, and that imports of grass-fed beef by the LPMO are thus restricted, the Panel finds that imports of grass-fed beef are accorded less favourable treatment than that is provided for in Korea's Schedule, contrary to Article II:1(a)."⁵³

35. In *India – Tariffs on ICT Goods (Japan)*, the Panel distinguished general conditions for importation from the concept of "terms, conditions or qualifications" in Article II:1(b), and stated that the former do not need to be inscribed in a member's schedule:

"We further note that, in response to a question from the Panel, both parties agree that the reference in Article II:1(b), first sentence, to 'terms, conditions or qualifications' does not extend to general conditions for importation. Indeed, in our view, to the extent that a Member imposes a general condition on importation (i.e. a condition that must be satisfied in order for the product to enter the market), this would not necessarily mean that such condition constitutes a term, condition, or qualification that must be met in order to receive certain tariff treatment. Such a general condition, where it is not tied to tariff treatment, does not appear to be a term, condition, or qualification, that must be inscribed in a Member's Schedule, pursuant to Article II:1(b), first sentence. Where, however, a condition *is* tied to certain tariff treatment, such that a relevant product must satisfy the condition in order to be eligible for the tariff treatment provided for in a Member's Schedule, Article II:1(b), first sentence, requires such condition to be inscribed in the Member's Schedule."⁵⁴

1.6.5 "ordinary customs duties"

36. The Panel in *Chile – Price Band System*, discussing the use of the phrase "ordinary customs duties" in both Article II:1(b) and Article 4.2 of the Agreement on Agriculture, suggested that the phrase should be interpreted consistently in both agreements.⁵⁵ In the context of deciding the order of analysis in a case with claims under both Article 4.2 of the Agreement on Agriculture

⁵⁰ (footnote original) *Ibid.*, para. 7.152.

⁵¹ Appellate Body Report, *Canada – Dairy*, paras. 134-136.

⁵² Appellate Body Report, *Canada – Dairy*, para. 143.

⁵³ Panel Report, *Korea – Various Measures on Beef*, para. 779.

⁵⁴ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.8.

⁵⁵ Panel Report, *Chile – Price Band System*, para. 7.49 (with citations to the negotiating history).

and Article II:1(b) of the GATT 1994, the Appellate Body stated that "the term 'ordinary customs duties' should be interpreted in the same way in both of these provisions."⁵⁶

37. In *Peru – Agricultural Products*, the Appellate Body further elaborated on the relationship between the concept of "ordinary customs duties" in the context of Article II:1(b) of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. See paragraph 71 below.

38. The Panel Report on *China – Auto Parts*, examining the nature of a particular charge, held as follows:

"[T]he ordinary meaning of 'on their importation' in Article II:1(b), first sentence, of the GATT 1994, considered in its context and in light of the object and purpose of the GATT 1994, contains a *strict and precise temporal element* which cannot be ignored. This means that the obligation to pay ordinary customs duties is linked to the product at the moment it enters the territory of another Member. If the right to impose ordinary customs duties – and the importer's obligation to pay it – accrues because of the importation of the product at the very moment it enters the territory of another Member, ordinary customs duties should necessarily be related to the status of the product at that single moment. It is at this moment, and this moment only, that the obligation to pay such charge accrues. As stated by the Appellate Body in *EC – Poultry*, 'it is *upon entry* of a product into the customs territory, but *before* the product enters the domestic market, that the obligation to pay customs duties ... accrues.' And it is based on the condition of the good at this moment that any contemporaneous or subsequent act by the importing country to enforce, assess or reassess, impose or collect ordinary custom duties should be carried out."⁵⁷

39. As the Appellate Body remarked in *China – Auto Parts*,

"[T]he moment at which a charge is *collected* or *paid* is not determinative of whether it is an ordinary customs duty or an internal charge. Ordinary customs duties may be collected *after* the moment of importation, and internal charges may be collected at the moment of importation.²²¹ For a charge to constitute an ordinary customs duty, however, the *obligation* to pay it must accrue at the moment and by virtue of or, in the words of Article II:1(b), "on", importation."⁵⁸

40. The Panel in *Turkey – Additional Duties (US)* concluded that the contested measures, additional duties charged by Türkiye on imports of certain goods from the United States, constituted ordinary customs duties:

"The Panel notes that the Implementation Decree is formally titled 'Decree on Additional Duties on the Importation of Certain Products Originated from the United States of America'. The Panel also notes that Article 1(1) provides that '[t]he purpose of this Decree is to impose additional duties on the importation of certain products originated from the United States of America', and Article 1(2) provides that '[a]dditional duties are collected on the importation of certain products originated from the [United States] at the rates shown in the table attached to this Decree'. These provisions therefore explicitly establish that the additional duties measure imposes duties that accrue at the moment and by virtue of the importation of goods from the United States into Türkiye.

...

The Panel has already found that Türkiye's additional duties measure imposes duties that accrue at the moment and by virtue of the importation of goods from the United States into Türkiye. Accordingly, the Panel considers that these duties can

⁵⁶ Appellate Body Report, *Chile – Price Band System*, para. 188.

⁵⁷ Panel Report, *China – Autos*, para. 7.184 (citing para. 145 of the Appellate Body Report, *EC – Poultry*).

⁵⁸ Appellate Body Report, *China – Auto Parts*, para. 158.

properly be characterized as ordinary customs duties within the meaning of Article II:1(b) of the GATT 1994."⁵⁹

1.6.6 "in excess of"

41. In *Argentina – Textiles and Apparel*, the products at issue were subject to the higher of either (i) a 35 per cent *ad valorem* duty or (ii) a minimum specific duty (the so-called "DIEM"); the relevant tariff concession was a 35 per cent *ad valorem* duty rate. The Panel found that Argentina violated Article II by applying a different *type* of import duty than set out in its Schedule, and because the minimum specific duty exceeded 35 per cent when levied on low-value products. The Appellate Body reversed the Panel in part, as follows:

"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.

...

... 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.

... 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 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."⁶⁰

42. The Panel in *EC – IT Products* found that certain EU regulations resulted in imposition of duties in excess of those provided for in the EU Schedule, and were therefore inconsistent with Article II:1(b); but a separate duty suspension eliminated the inconsistency with Article II:1(b) to the extent that it covered items within the scope of the concession.⁶¹

43. The Panel in *Russia – Tariff Treatment* rejected an interpretation of "in excess of" that would allow for a *de minimis* exception, taking into account prior jurisprudence under Article III:2 of the GATT 1994:

⁵⁹ Panel Report, *Turkey – Additional Duties (US)*, paras. 7.105 and 7.128. See also Panel Report, *China – Additional Duties (US)*, para. 7.155.

⁶⁰ Appellate Body Report, *Argentina – Textiles and Apparel*, paras. 46, 53-54 and 55.

⁶¹ Panel Report, *EC – IT Products*, paras. 7.743-7.744.

"The dictionary definition of the noun 'excess' is '[t]he amount by which one number or quantity exceeds another'. More specifically, 'in excess of' means 'more than'. Thus, as a textual matter, a particular number or quantity is 'in excess of' another number or quantity if it is greater, regardless of the extent to which it is greater.

Looking at the context of Article II:1(b), first sentence, we note that Article III:2, first sentence, of the GATT 1994 is cast in very similar terms and in fact uses the phrase 'in excess of':

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject ... to internal taxes or other internal charges of any kind *in excess* of those applied ... to like domestic products (emphasis added).

The Appellate Body has interpreted this provision to mean that:

Even the smallest amount of 'excess' is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard.

Russia effectively asks us to take no notice of this statement concerning Article III:2, first sentence, in our interpretative analysis under Article II:1(b), first sentence. Indisputably, these are two different provisions with different scopes of application. Article III:2, first sentence, concerns internal taxes applied to imported goods, whereas Article II:1(b), first sentence, relates to customs duties applied to imports at the border. However, both Articles II:1(b) and III:2 concern the imposition of charges on products, and both provisions require an assessment of whether an imposed charge 'exceeds' another charge (the customs duty set forth in a Member's schedule or the internal tax applied to like domestic products). Moreover, both customs duties and internal taxes can, from an economic perspective, be used as instruments to afford protection to domestic production. Taking into account the Appellate Body's interpretation of Article III:2, first sentence, it would be incongruous if an internal tax could *not* be used to provide even the slightest degree of protection to domestic 'like' products under Article III:2, first sentence, but additional protection *could* be provided to such products through the application of a duty rate that slightly exceeds the bound duty rate.

In view of the aforementioned substantial similarities between Articles II:1(b), first sentence, and III:2, first sentence, it appears to us that the Appellate Body's interpretation of the identical phrase 'in excess of' in Article III:2, first sentence, is relevant to the interpretation of Article II:1(b), first sentence, and that these two provisions should be interpreted harmoniously. We observe in addition that this being an interpretative issue, we do not agree with Russia that it was for the European Union to prove the legal correctness of its reliance on jurisprudence concerning Article III:2, first sentence."⁶²

1.6.7 "other duties or charges" (ODCs)

1.6.7.1 General

44. In *Dominican Republic – Import and Sale of Cigarettes*, the Panel analysed the definition of an "other duty or charge":

"Although there is no definition of what constitutes an 'other duty or charge' in the GATT 1994 and in the 'Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994', the ordinary meanings of Article II:1(b) and Article II:2 make it clear that any fee or charge that is in connection with importation and that is not an ordinary customs duty, nor a tax or duty as listed under Article II:2 (internal tax, anti-dumping duty, countervailing duty, fees or charges

⁶² Panel Report, *Russia – Tariff Treatment*, paras. 7.22-7.26.

commensurate with the cost of services rendered) would qualify for a measure as an 'other duties or charges' under Article II:1(b).

The *travaux préparatoires* concerning the Understanding confirm such interpretation. The Secretariat note on 'Article II:1(b) :OF THE GENERAL AGREEMENT' stated:

'4 The definition of ODCs falling under the purview of Article II:1(b) can only be done by exclusion –i.e. by reference to those categories of ODC not covered by it. It would be impossible, and logically fallacious, to draw up an exhaustive list of ODCs which do fall under the purview of Article II:1(b), since it is always possible for governments to invent new charges. Indeed, an attempt to provide an exhaustive list would create the false impression that charges omitted from it, or newly invented, were exempt from the II:1(b) obligation.'⁶³⁶⁴

45. The Appellate Body Report on *India – Additional Import Duties* remarked that "the duties and charges covered by the second sentence of Article II:1(b) are 'defined in relation to' duties covered by the first sentence of Article II:1(b), such that ODCs encompass only duties and charges that are not [ordinary customs duties]."⁶⁵

46. The Panel in *Dominican Republic – Safeguards* interpreted the terms "other duties or charges" by reference to the meaning of "ordinary customs duties", and recalling prior jurisprudence:

"The use of the expression '*all other* duties or charges of any kind imposed on or in connection with the importation' in Article II:1(b), second sentence, suggests that the prohibition covers any duty or charge of any kind on or in connection with the importation that is not an ordinary customs duty.⁶⁶ In other words, the category of *other duties or charges* under Article II:1(b), second sentence, is a residual one covering all duties or charges on or in connection with the importation that are not ordinary customs duties and which are not expressly provided for in Article II:2 of the GATT 1994.

...

In its report in *Chile – Price Band System*, the Appellate Body made it clear that what determines whether 'a duty imposed on an import at the border' constitutes an ordinary customs duty is not the form which that duty takes. Nor is the fact that the duty is calculated on the basis of exogenous factors, such as the interests of consumers or of domestic producers. The Appellate Body also explained that a Member may periodically change the rate at which it applies an 'ordinary customs duty', provided it remains below the rate bound in the Member's schedule. This change in the applied rate of duty could be made, for example, through an act of the Member's legislature or executive at any time. However, one essential feature of 'ordinary customs duties' is that any change in them is discontinuous and unrelated to an underlying scheme or formula. The Appellate Body noted that the price band system impugned in that case contained an inherent variability and had the effect of impeding the transmission of international price developments to Chile's market in the way in which *ordinary customs duties* normally would, also generating in its application a lack of transparency and predictability with respect to market access conditions.

All in all, using a meaning that seeks to reconcile the texts of the GATT 1994 in the various official languages, we could conclude that the expression 'ordinary customs duties' in Article II:1(b) of the GATT 1994 refers to duties collected at the border

⁶³ The footnote in the original cites document MTN.GNG/NG7/W/53.

⁶⁴ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.113-114.

⁶⁵ Appellate Body Report, *India – Additional Import Duties*, para. 151.

⁶⁶ (*footnote original*) Save for certain exceptions, such as duties or charges applied or mandatorily required to be applied on the date of the agreement. See in this connection the provisions of the Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994.

which constitute 'customs duties' in the strict sense of the term (*stricto sensu*) and that this expression does not cover possible extraordinary or exceptional duties collected in customs. This would be compatible with the object and purpose of the GATT 1994 which, as the Appellate Body said in *Chile – Price Band System*, seeks to ensure that the application of customs duties gives rise to transparent and predictable market access conditions and does not impede the transmission of international price developments to the domestic market of the importing country. To reach a conclusion in this respect, the Panel must consider the design and structure of the measures concerned."⁶⁷

47. In *US – Steel and Aluminium Products (Turkey)*, the Panel noted that the additional duties at issue bore certain features of ordinary customs duties and certain other features resembling other duties or charges. The Panel proceeded to an assessment of the consistency of the additional duties as ordinary customs duties and as other duties or charges, and concluded that they would be inconsistent with Article II:1(b) in either case:

"Accordingly, the Panel considers that the additional duties are inconsistent with the first sentence of Article II:1(b) as 'ordinary customs duties' exceeding the United States' bound rates for the relevant products. Even if the additional duties were considered 'other duties or charges', the Panel considers that these duties would also be inconsistent with the second sentence of Article II:1(b). On either basis, the additional duties on steel and aluminium products would therefore be inconsistent with Article II:1(b) of the GATT 1994. As the additional duties are inconsistent with Article II:1(b) by exceeding the levels in the United States' Schedule, the United States has necessarily accorded treatment less favourable than that provided for in its Schedule. The Panel therefore concludes that the additional duties are also inconsistent with Article II:1(a) of the GATT 1994."⁶⁸

1.6.7.2 Import surcharges

48. In *Dominican Republic – Import and Sale of Cigarettes*, Honduras challenged *inter alia* a 2 per cent transitional surcharge for economic stabilization on all imports.

"The Panel agrees with the parties that the surcharge as it is applied in Law 2-04 is imposed on, or in connection with, the importation of all goods with a few exceptions prescribed in paragraph I to Article 1 of Law 2-04. It is imposed on these imported products in addition to tariff duties on these products. It is clearly a border measure.

The surcharge is based on the value of the imported products, rather than any service rendered by the custom authorities. Therefore, it is not a fee or charge that falls under Article VIII of the GATT 1994. It is not an internal tax either since it does not apply to domestic products. To summarize, the surcharge is neither an ordinary customs duty, nor a charge or duty that falls under Article II:2 of the GATT 1994. The Panel agrees with the parties that as a border measure, the surcharge as prescribed in Law 2-04 is an "other duty or charge" within the meaning of Article II:1(b) of the GATT 1994."⁶⁹

1.6.7.3 Foreign exchange fees

49. In *Dominican Republic – Import and Sale of Cigarettes*, Honduras also challenged a 10 per cent foreign exchange fee on all imports. The Panel found that "[t]he foreign exchange fee is imposed on imported products only and it is not an ordinary customs duty. It is computed on the value of imports, not on the cost of the services rendered by the customs authorities. Consequently, it is not a fee or charge that falls under Article VIII of the GATT. It is obviously not

⁶⁷ Panel Report, *Dominican Republic – Safeguards*, paras. 7.79, 7.84-7.85.

⁶⁸ Panel Report, *US – Steel and Aluminium Products (Turkey)*, para. 7.44. See also *ibid.* paras. 7.48 and 7.51.

⁶⁹ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras 7.24-7.25.

an anti-dumping or countervailing duty. Therefore, it is a border measure in the nature of an ODC within the meaning of Article II:1(b)."⁷⁰

1.6.7.4 Recording of "other duties and charges" pursuant to the Understanding on Article II.1(b)

50. In *Dominican Republic – Import and Sale of Cigarettes*, the Panel found that the Dominican Republic did record ODCs for its Schedule in 1994, pursuant to paragraph 7 of the Understanding on Article II:1(b), that there was no objection within the specified period of time, and therefore the notification was deemed as approved. However, the Panel determined that the transitional surcharge referred to in paragraph 48 above was not in effect as of 1994, and the Dominican Republic's notification pertained to a different measure which was not in fact an ODC.⁷¹ The Dominican Republic then contended that even if the recording was not properly made, it was not challengeable after expiry of the three-year period specified in paragraphs 4 and 5 of the Understanding. The Panel held that the Understanding would permit a challenge on the basis that the recorded ODC did not exist as of 15 April 1994, and therefore the recording was not legally valid; also, a challenge on the basis that the nature of the recorded measure is not an ODC within the meaning of Article II:1(b). The Panel noted the statement in paragraph 1 of the Understanding that "recording does not change the legal character of 'other duties or charges'", and found:

"[T]he recording of the nature of the measure is a necessary part of the recorded content and it also constitutes an element that is bound in the Schedule. Therefore, in case what was recorded is not in the nature or legal character of an ODC, the recording can not be invoked to justify a current ODC measure due to the difference in nature of the two measures."⁷²

"Reading Article II:1(b) together with paragraphs 1, 2, 7 and 4 of the Understanding as context, the Panel considers that the obligation under Article II:1(b), second sentence is for Members to record in their Schedules, within six months of the date of deposit of the instrument, all ODCs as applied on 15 April 1994 unless those levels breach previous bound levels of ODCs. In case any Member did not record the ODCs in the Schedule within six months of the date of deposit of the said instrument, the right to record it in the Schedule and to invoke it expired after six months....

There is no legally valid recording of 'other duties or charges' as required by the Understanding in the Schedule of Concessions of the Dominican Republic. For all legal and practical purposes, what was notified by the Dominican Republic in document G/SP/3 is equivalent to 'zero' in the Schedule. The Panel finds that the surcharge as an 'other duty or charge' measure is applied in excess of the level 'zero' pursuant to the Schedule. Therefore, the surcharge measure is inconsistent with Article II:1(b) of the GATT 1994."⁷³

1.6.8 Relationship between paragraphs 1(b) and 2(a)

51. In *India – Additional Import Duties* the Appellate Body considered whether certain border charges were inconsistent with Article II:1(b) or whether they correlated with internal taxes and were sheltered by Article II:2(a). The Appellate Body observed that "Article II:2(a), subject to the conditions stated therein, exempts a charge from the coverage of Article II:1(b). The participants agree that, if a charge satisfies the conditions of Article II:2(a), it would not result in a violation of Article II:1(b)."⁷⁴

⁷⁰ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.115.

⁷¹ Panel on *Dominican Republic – Import and Sale of Cigarettes*, paras 7.34-7.40.

⁷² Panel on *Dominican Republic – Import and Sale of Cigarettes*, para 7.72.

⁷³ Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.88-7.89.

⁷⁴ Appellate Body Report, *India – Additional Import Duties*, para. 153.

1.6.9 Relationship between paragraphs 1(b) and 1(a)

52. The Panel in *India – Tariffs on ICT Goods (Japan)* rejected the argument that a finding of inconsistency with paragraph 1(a) of Article II is dependent on a finding of inconsistency with its paragraph 1(b):

"As a general matter, we see nothing in the text of Article II:1(a) suggesting that a finding of inconsistency with this provision is necessarily dependent on a finding of inconsistency with Article II:1(b). While Article II:1(b) refers specifically to the application of ordinary customs duties and other duties or charges, Article II:1(a) refers more broadly to the treatment of the commerce of the other Members provided for in the Schedule. Thus, Article II:1(a) may encapsulate obligations, as set forth in Members' Schedules, notwithstanding that such obligations are not implicated by Article II:1(b)."⁷⁵

53. The Panel in *Turkey – Additional Duties (US)* found that:

"A measure that is inconsistent with Article II:1(b) of the GATT 1994 will necessarily be inconsistent with Article II:1(a) as well. This is because the imposition by a Member of duties in excess of the relevant bound rates constitutes 'less favourable treatment' within the meaning of Article II:1(a)."⁷⁶

1.6.10 Demonstration of trade effects

54. The Panel in *Russia – Tariff Treatment* concluded that Article II:1(b), first sentence, does not require a complaining party to demonstrate adverse trade effects concerning products falling within the relevant tariff lines. In the course of its consideration of this issue, the Panel stated that:

"In respect of adverse trade effects, the Appellate Body has explained that trade effects are 'irrelevant' to findings under Article III of the GATT 1994 because 'Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.' The panel in *EC – IT Products* explained that, similarly, Article II generally, without reference to any particular paragraph, protects expectations of a competitive relationship (or conditions of competition) and not expectations of any particular trade volume. This is in accord with the statement of the panel in *Argentina – Hides and Leather* that 'Article XI:1, like Articles I, II and III ... protects competitive opportunities of imported products, not trade flows.' Further support for the view that evidence of actual trade effects is not essential can be found in the Appellate Body's observation that 'the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade'. As Article II:1(b), first sentence, is concerned with tariff bindings and thus market access conditions, it is difficult to think of another discipline of the GATT 1994 for which it would be more true to say that it is intended to protect not only existing trade, but also the security and predictability needed to conduct future trade. Thus, in accordance with the jurisprudence cited above, we consider that Article II:1(b), first sentence, protects conditions of competition, and not trade volumes.

This view is consistent with the approach followed by the Appellate Body in *Argentina – Textiles and Apparel*. As mentioned above, there the Appellate Body indicated that a finding of inconsistency with Article II:1(b), first sentence, can be made on the basis of the structure and design of an impugned duty. The Appellate Body did not rely on any evidence of adverse trade effects in making its findings of inconsistency. Similarly, and as discussed above, the panel in *Colombia – Textiles* made findings of inconsistency based solely on the 'text' of the relevant measures."⁷⁷

⁷⁵ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.425.

⁷⁶ Panel Report, *Turkey – Additional Duties (US)*, para. 7.125.

⁷⁷ Panel Report, *Russia – Tariff Treatment*, paras. 7.18-7.19.

1.6.11 Balancing/offsetting

55. The Panel in *Russia – Tariff Treatment* concluded that "Article II:1(b), first sentence, prohibits duties imposed in excess of a bound duty, even if these duties are balanced or offset (at the same time or later) by duties imposed on identical products that are below the bound duty".⁷⁸

1.7 Article II:2

1.7.1 Closed list

56. In *Colombia – Textiles*, the respondent argued that the obligations in Article II do not extend to what may be termed "illicit trade". The Appellate Body disagreed, and in the course of its analysis stated that "Article II:2 sets out a closed list of instances in which bound tariff rates may be exceeded".⁷⁹

1.7.2 Article II:2(a)

57. As the Appellate Body observed in *India – Additional Import Duties*, "charges that are justified under Article II:2(a) are not in breach of Article II:1(b)".⁸⁰ Examining the text of Article II:2(a), the Appellate Body found:

"In our view, these two concepts—'equivalence' and 'consistency with Article III:2'—cannot be interpreted in isolation from each other; they impart meaning to each other and need to be interpreted harmoniously. ... Determining whether a charge is imposed consistently with Article III:2 necessarily involves a comparison of a border charge with an internal tax in order to determine whether one is 'in excess of' the other. ...

... as we see it, the reference in Article II:2(a) to consistency with Article III:2 suggests that the concept of equivalence includes elements of 'effect' and 'amount' that necessarily imply a quantitative comparison.

...

We therefore consider that whether a charge is imposed "in excess of" a corresponding internal tax is an integral part of the analysis in determining whether the charge is justified under Article II:2(a). Contrary to what the Panel suggests, a complaining party is not required to file an independent claim of violation of Article III:2 if it wishes to challenge the consistency of a border charge with Article III:2."⁸¹

58. Regarding the burden of proof under Article II:2(a), the Appellate Body found in *India – Additional Import Duties*:

"Not every challenge under Article II:1(b) will require a showing with respect to Article II:2(a). In the circumstances of this dispute, however, where the potential for application of Article II:2(a) is clear from the face of the challenged measures, and in the light of our conclusions above concerning the need to read Articles II:1(b) and II:2(a) together as closely inter-related provisions, we consider that, in order to establish a *prima facie* case of a violation of Article II:1(b), the United States was also required to present arguments and evidence that the Additional Duty and the Extra-Additional Duty are not justified under Article II:2(a).

...We do not consider that a complaining party alleging a violation of Article II:1(b) must also disprove in all cases that the challenged charge is justified under Article II:2, much less some other hypothetical category of charges. We do consider, however, that if, due to the characteristics of the measures at issue or the arguments presented by the responding party, there is a reasonable basis to understand that the

⁷⁸ Panel Report, *Russia – Tariff Treatment*, para. 7.33.

⁷⁹ Appellate Body Report, *Colombia – Textiles*, para. 5.36.

⁸⁰ Appellate Body Report, *India – Additional Import Duties*, fn. 320.

⁸¹ Appellate Body Report, *India – Additional Import Duties*, paras. 170, 172 and 180.

challenged measure may not result in a violation of Article II:1(b) because it satisfies the requirements of Article II:2(a), then the complaining party bears some burden in establishing that the conditions of Article II:2(a) are not met."⁸²

1.7.3 Article II:2(b)

59. In *US – Zeroing (Japan – Article 21.5 – Japan)*, the Appellate Body upheld the Panel's approach to Article II:2(b) as "providing a 'safe harbour' to Article II:1 to the extent that the anti-dumping duties are applied consistently with Article VI of the GATT 1994 and the *Anti-Dumping Agreement*", and upheld the Panel's findings that certain US Department of Commerce liquidation instructions and US Customs liquidation notices violated Article II:1(a) and (b).⁸³ The Panel had found:

"[T]he safe harbour provided for in Article II:2(b) does not apply to the liquidation actions at issue in this proceeding, since those actions were taken pursuant to administrative reviews, and importer-specific assessment rates determined therein, that had been found to be WTO-inconsistent in the original proceeding. ... Since the underlying basis of the liquidation actions challenged by Japan was WTO-inconsistent, we conclude that anti-dumping duties collected pursuant to those liquidation actions were not 'applied consistently with the provisions of Article VI' of the GATT 1994, as implemented by the *AD Agreement*."⁸⁴

1.8 Article II:5

60. In *EC – Computer Equipment*, the Panel held that Article II:5 confirms that legitimate expectations are a vital element in the interpretation of Article II:1 and of Members' Schedules. The Appellate Body reversed this finding:

"It is clear from the wording of Article II:5 that it does not support the Panel's view. This paragraph recognizes the possibility that the treatment *contemplated* in a concession, provided for in a Member's Schedule, on a particular product, may differ from the treatment *accorded* to that product and provides for a compensatory mechanism to rebalance the concessions between the two Members concerned in such a situation. However, nothing in Article II:5 suggests that the expectations of *only* the exporting Member can be the basis for interpreting a concession in a Member's Schedule for the purposes of determining whether that Member has acted consistently with its obligations under Article II:1. In discussing Article II:5, the Panel overlooked the second sentence of that provision, which clarifies that the 'contemplated treatment' referred to in that provision is the treatment contemplated by *both* Members."⁸⁵

1.9 Article II:7

61. In *EC – Computer Equipment*, the Appellate Body considered that "[a] Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994". The Appellate Body thus concluded that "the concessions provided for in that Schedule are part of the terms of the treaty".⁸⁶ See the discussion above of interpretation of Schedules.

1.10 Relationship with other GATT provisions

1.10.1 General

62. In *EC – Bananas III*, the Appellate Body, discussing whether tariff concessions for agricultural products can deviate from Article XIII of GATT 1994, emphasized that in their Schedules, Members may yield their rights, but may not diminish their obligations under GATT 1994. See paragraph 30 above.

⁸² Appellate Body Report, *India – Additional Import Duties*, para. 190 and 192.

⁸³ Appellate Body Report, *US – Zeroing (Japan – Article 21.5 – Japan)*, para. 209.

⁸⁴ Panel Report, *US – Zeroing (Japan – Article 21.5 – Japan)*, para. 7.207.

⁸⁵ Appellate Body Report, *EC – Computer Equipment*, para. 81.

⁸⁶ Appellate Body Report, *EC – Computer Equipment*, para. 84.

1.10.2 Article III

63. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef's practice of treating grass-fed beef and grain-fed beef differently was inconsistent with GATT Articles XI and II:1(a), the Panel, in a finding not reviewed by the Appellate Body, did not "find it necessary to address Australia's claims that the same measures also violate Articles III:4 and XVII of GATT."⁸⁷

64. In *China – Auto Parts*, the Appellate Body upheld the Panel's finding that the charge in question was an internal charge under Article III:2, not an ordinary customs duty under Article II:1(b). The Appellate Body remarked:

"[I]n examining the scope of application of Article III:2, in relation to Article II:1(b), first sentence, the time at which a charge is collected or paid is not decisive. In the case of Article III:2, this is explicitly stated in the GATT 1994 itself, where the Ad Note to Article III specifies that when an internal charge is 'collected or enforced in the case of the imported product at the time or point of importation', such a charge 'is nevertheless to be regarded' as an internal charge. What is important, however, is that the obligation to pay a charge must accrue due to an internal event, such as the distribution, sale, use or transportation of the imported product."⁸⁸

1.10.3 Article XIII

65. Following the finding referenced in paragraph 62 above, the Appellate Body in *EC – Bananas III* addressed whether the Agreement on Agriculture shelters market access concessions on agricultural products that are inconsistent with GATT Article XIII (such as discriminatory tariff rate quotas resulting from tariffication of discriminatory import quotas). The Appellate Body addressed the relationship between the Agreement on Agriculture and GATT 1994 and found that Article XIII of GATT 1994 was applicable to such concessions:

"The question remains whether the provisions of the *Agreement on Agriculture* allow market access concessions on agricultural products to deviate from Article XIII of the GATT 1994. The preamble of the *Agreement on Agriculture* states that it establishes 'a basis for initiating a process of reform of trade in agriculture' and that this reform process 'should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'. The relationship between the provisions of the GATT 1994 and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*:

'The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.'

Therefore, the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter."⁸⁹

66. In *EC – Bananas III*, the Panel also found that the European Communities' import regime for bananas was inconsistent with Article XIII of GATT 1994 in that the European Communities allocated tariff quota shares to some Members without allocating such shares to other Members. In doing so, with respect to the relationship between Articles II and XIII, the Panel stated as follows:

"The panel in the *Sugar Headnote* case found that qualifications on tariff bindings do not override other GATT provisions after an analysis of the wording of Article II, its

⁸⁷ Panel Report, *Korea – Various Measures on Beef*, para. 780.

⁸⁸ Appellate Body Report, *China – Auto Parts*, para. 162.

⁸⁹ Appellate Body Report, *EC – Bananas III*, para. 155.

object, purpose and context, and the drafting history of the provision. Although it made no mention of the Vienna Convention, it seems to have followed closely Articles 31 and 32 thereof. ...⁹⁰

...

We agree with the analysis of the *Sugar Headnote* panel report and note that Article II was not changed in any relevant way as a result of the Uruguay Round. Thus, based on the *Sugar Headnote* case, we conclude that the EC's inclusion of allocations inconsistent with the requirements of Article XIII in its Schedule does not prevent them from being challenged by other Members. We note in this regard that the Uruguay Round tariff schedules were prepared with full knowledge of the *Sugar Headnote* panel report, which was adopted by the GATT CONTRACTING PARTIES in the middle of the Round (June 1989)."⁹¹

1.10.4 Article XVII

67. In *Korea – Various Measures on Beef*, after finding that the practice of the Korean state trading agency for beef of treating grass-fed beef and grain-fed beef differently was inconsistent with GATT Articles XI and II:1(a), the Panel, in a finding not reviewed by the Appellate Body, did not "find it necessary to address Australia's claims that the same measures also violate Article XVII of GATT".⁹²

1.10.5 Article XX

68. In *Colombia – Textiles*, the respondent argued that the obligations in Article II do not extend to what may be termed "illicit trade". In the course of its analysis, the Appellate Body referred to the general exceptions under Article XX:

"Colombia further contends that the object and purpose of the GATT 1994, as reflected in the preamble, supports its interpretation of Article II:1(a) and (b).⁹³ Specifically, Colombia points out that the criminal activities associated with illicit trade reduce standards of living, generate economic distortions that hurt employment, and reduce real income. We recall that the Appellate Body has previously stated that the GATT 1994 strikes a balance between Members' obligations, on the one hand, and their rights to adopt measures seeking to achieve legitimate policy objectives, on the other hand. To effectuate such a balance, Article XX of the GATT 1994 contains a number of exceptions that reflect important societal objectives other than trade liberalization, which may be relied upon in seeking to justify an otherwise GATT-inconsistent measure. The GATT 1994 thus preserves the right of Members to pursue legitimate policy objectives, including addressing concerns relating to, *in casu*, money laundering, through the general exceptions set out in Article XX.

...

... [W]e wish to remark that our analysis set out above should not be understood to suggest that Members cannot adopt measures seeking to combat money laundering. This aim, however, cannot be achieved through interpreting Article II:1 of the GATT 1994 in a manner that excludes from the scope of that provision what a Member considers to be illicit trade. A Member's right to adopt and pursue measures seeking

⁹⁰ Following this paragraph, the Panel cited Panel Report, *US – Sugar*, paras. 5.1-5.7.

⁹¹ Panel Report, *EC – Bananas III*, paras. 7.113-7.114. In support of its finding, the Panel cited Appellate Body Report, *Japan – Alcoholic Beverages II*, p.15, as stating that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often taken into account by subsequent panels. They create legitimate expectations among Members, and, therefore should be taken into account where they are relevant to any dispute".

⁹² Panel Report, *Korea – Various Measures on Beef*, para. 780.

⁹³ (*footnote original*) The preamble of the GATT 1994 provides that the relations of Members "in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods".

to address concerns relating to money laundering can be appropriately preserved when justified, for example, in accordance with the general exceptions contained in Article XX of the GATT 1994."⁹⁴

1.10.6 Article XXVIII

69. In *EU – Poultry (China)*, the Panel found that certification of changes to a Schedule is not a legal prerequisite that must be completed before a Member modifying its concessions can proceed to implement the changes agreed upon in Article XXVIII negotiations at the national level. On this basis the Panel therefore rejected China's claims that the European Union violated Article II by giving effect to the modifications arising from the Article XXVIII negotiations prior to the changes being reflected in the authentic text of its Schedule through certification.⁹⁵

1.11 Relationship with other WTO agreements

1.11.1 Agreement on Agriculture

70. The Appellate Body in *Chile – Price Band System*, in examining the concept of ordinary customs duties under Article 4.2 of the Agreement on Agriculture, referred to GATT Article II:1(b). The Appellate Body also indicated that if it were to find that Chile's price band system was inconsistent with Article 4.2 of the Agreement on Agriculture, it would not need to make a separate finding on whether Chile's price band system also results in a violation of Article II:1(b) to resolve this dispute.⁹⁶

71. In *Peru – Agricultural Products*, the Panel found that the additional duties resulting from the price range system (PRS) constituted "variable import levies" or a border measure "similar" to a "variable import levy" within the meaning of footnote 1 of the Agreement on Agriculture. On this basis, the Panel concluded, when examining Guatemala's claim under Article 4.2 of the Agreement on Agriculture, that the additional duties could not at the same time constitute an "ordinary customs duty", and stated that "it [was] not necessary to undertake further analysis in this regard". In the context of its analysis under Article II:1(b) of the GATT 1994, the Panel recalled the Appellate Body's statement in *Chile – Price Band System* that "the term 'ordinary customs duties' must have the same meaning" in both Article 4.2 of the Agreement on Agriculture and the first sentence of Article II:1(b) of the GATT 1994. The Panel also recalled its earlier conclusion that the additional duties are not "ordinary customs duties" in the context of Article 4.2 of the Agreement on Agriculture. On the basis of the above considerations, the Panel concluded that the additional duties at issue were "other duties or charges" within the meaning of Article II:1(b) of the GATT 1994. On appeal, the Appellate Body saw no error in the Panel's approach:

"Given the Panel's finding that the additional duties resulting from the PRS fall within footnote 1 of the Agreement on Agriculture and that 'variable import levies' cannot be 'ordinary customs duties' within the meaning of Article 4.2, we consider that the Panel was correct in finding that such additional duties are also not 'ordinary customs duties' within the meaning of the first sentence of Article II:1(b) of the GATT 1994.

Contrary to Peru's argument, the Panel's approach and reasoning do not suggest that the Panel found an inconsistency with Article II:1(b) of the GATT 1994 'by implication' from a finding of inconsistency with Article 4.2 of the Agreement on Agriculture. Article 4.2 prohibits 'measures of the kind which have been required to be converted into ordinary customs duties'. In turn, the first sentence of Article II:1(b) of the GATT 1994 provides that certain products shall 'be exempt from ordinary customs duties in excess of those set forth and provided' in the relevant Schedule of Concessions. The second sentence of Article II:1(b), read together with the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, prohibits the imposition of 'other duties or charges' in excess of those recorded in the relevant Member's Schedule of Concessions. In line with the understanding that Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 contain 'distinct legal obligations arising under ... two different legal provisions', the Panel examined

⁹⁴ Appellate Body Report, *Colombia – Textiles*, paras. 5.40 and 5.47.

⁹⁵ Panel Report, *EU – Poultry (China)*, paras. 7.496-7.552.

⁹⁶ Appellate Body Report, *Chile – Price Band System*, para. 190.

both provisions separately in different sections of its Report, and did not make a consequential finding of inconsistency with the second sentence of Article II:1(b) based on its earlier finding under Article 4.2."⁹⁷

1.11.2 Licensing Agreement

72. In *Canada – Dairy*, the Panel decided not to examine a claim that Canada violated Article 3 of the Licensing Agreement in that it restricted access to tariff-rate quotas for imports of fluid milk to Canadians of consumer packaged milk for personal use, valued less than Can\$20, after having found the Canadian measure inconsistent with GATT Article II:1(b) (see paragraph 32 above).⁹⁸ See the Section on the Licensing Agreement.

1.12 Tariff Initiatives in the WTO

1.12.1 Ministerial Declaration on Trade in Information Technology Products

73. The Panel Report in *EC – IT Products*, which interprets the ITA at length, sums up its interpretation of the product coverage of Attachment B to the Annex as follows:

"Taking into account our analysis of the provisions in the ITA so far, and looking at them in a holistic manner, the Panel is of the view that the drafters of the ITA considered that the traditional approach of listing HS codes was inadequate to address the full scope of the product coverage that was intended by participants to the ITA, in particular given the then prevailing divergences in the classification of products in and for Attachment B. Consequently, ITA participants agreed to implement their commitments through a 'dual' approach that included binding and eliminating duties for both: (i) products classified or classifiable in HS codes listed in Attachment A, and (ii) products specified in Attachment B. While the approach under Attachment A is straightforward and 'traditional' in WTO terms, ITA participants were directed under Attachment B to eliminate duties on all products 'specified' in that Attachment. This approach was taken because ITA participants could not agree on precise headings for the products identified through the narrative descriptions in Attachment B. Since the narrative descriptions must determine the scope of coverage of those products, duty-free treatment must be extended to products specified in Attachment B 'wherever they are classified'. Otherwise, ITA participants would have ended up with diverging product coverage, which runs contrary to the intent to provide duty-free coverage for specified 'products' in Attachment B, and not headings of tariff lines under which products are classified. We explained that, if the 'exhaustion' interpretation were correct, the potentially significant differentiation in the scope of commitments undertaken by ITA participants would be a significant feature of ITA-related concessions. An intention to create such a differentiated approach to commitments should be clearly evident from the language in the ITA. However, it is not. We also do not see a basis to conclude that a unique or elevated burden of proof would be required to demonstrate that a product fell within the scope of a particular concession that is defined by the narrative description."⁹⁹

74. In *India – Tariffs on ICT Goods (Japan)*, the Panel noted that Japan, the complainant in the dispute, had referred to the ITA in its first written submission as relevant factual background explaining the history of India's tariff commitments at issue, but that Japan had not made any claim of violation of the ITA.¹⁰⁰ The Panel then explained the relationship between the ITA and Article II of the GATT as follows:

"[T]he legal standard under Articles II:1(a) and (b) entails comparing the treatment that India is obligated to provide in its WTO Schedule with the tariff treatment that India accords to the products at issue. This provision does not refer to the ITA, nor does any other provision in the GATT 1994. We therefore see no textual link in the

⁹⁷ Appellate Body Report, *Peru – Agricultural Products*, paras. 5.74-5.75.

⁹⁸ Panel Report, *Canada – Dairy*, para. 7.157.

⁹⁹ Panel Report, *EC – IT Products*, para. 7.409.

¹⁰⁰ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.37.

GATT 1994 indicating that Members' legal obligations, for the purposes of applying Articles II:1(a) and (b), could be contained in the ITA.

...

Thus, the ITA specifically requires WTO Members who are participants in the ITA to incorporate their ITA undertakings into their WTO Schedules annexed to the GATT 1994. It appears to us, therefore, that any undertakings made under the ITA only become binding WTO obligations under Articles II:1(a) and (b) of the GATT 1994 if they are incorporated into Members' WTO Schedules. Once incorporated into a Member's WTO Schedule, such concessions shall be treated no differently to any other concession contained in that Schedule. Consequently, it is the WTO Schedule of each ITA participant that sets forth those legal obligations within the broader WTO legal structure – not the ITA."¹⁰¹

75. The Panel in *India – Tariffs on ICT Goods (Japan)* further noted that the ITA is not a covered agreement within the meaning of the DSU.¹⁰² While recognizing that the ITA formed part of the factual and historical background to this dispute, the Panel rejected the argument that the ITA is the source of a member's obligation under Article II of the GATT 1994.¹⁰³

76. In *India – Tariffs on ICT Goods (Japan)*, India argued that its commitments under the ITA were static and that therefore its WTO tariff commitments excluded new products resulting from technological innovations that occurred after the conclusion of the ITA.¹⁰⁴ The Panel disagreed with this view. In its reasoning, the Panel stated that a tariff concession covers all products falling under its terms, including new products resulting from technological innovation:

"We start by recalling that Members' WTO Schedules, as an integral part of the GATT 1994 and the WTO Agreement, are to be interpreted in accordance with customary rules of interpretation of public international law, pursuant to Article 3.2 of the DSU. We also understand that a tariff concession in a Member's WTO Schedule applies to all products, falling under the terms of the concession, as interpreted based on its ordinary meaning when read in context, and in light of the object and purpose of the agreement. This includes new products that come into existence as a result of technological innovation, and which did not exist at the time that the concession in the Schedule was agreed upon. In this respect, we agree with prior interpretations of the scope of Members' obligations under their WTO Schedules."¹⁰⁵

77. The Panel found support for this view in HS as context for the interpretation of WTO tariff concessions:

"[T]he relevance of the HS depends on the specific interpretative question at issue (including whether the relevant concessions were based on the HS). It is also uncontested by the parties that, pursuant to the rules of interpretation of the HS, any product at any moment in time must fall within the product scope of a tariff item in the HS nomenclature. This necessarily includes new products that come into existence, for instance as a consequence of technological innovations, subsequent to a given HS nomenclature having been concluded. We agree with the parties on this point.

Thus, for those Members whose WTO Schedules are based on the HS, such as India, where a product is classified under a particular HS heading or subheading of a Member's Schedule, that product would also fall within the scope of a WTO Member's obligations unless the Schedule specifies otherwise. This includes new products that only come into existence following the binding of a Member's commitments with respect to the relevant heading or subheading.

¹⁰¹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.38 and 7.41.

¹⁰² Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.42.

¹⁰³ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.43.

¹⁰⁴ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.61.

¹⁰⁵ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.64.

From the foregoing, it is clear that as a general rule the product scope of Members' tariff concessions evolves over time to capture products that may come into existence as a result of technological developments..."¹⁰⁶

78. In *India – Tariffs on ICT Goods (Japan)*, India argued that "because the product scope of the ITA is static, so is the scope of its tariff commitments in its WTO Schedule with respect to undertakings made pursuant to the ITA".¹⁰⁷ The Panel disagreed with this view because it would lead to a situation where the scope of a tariff concession for an ITA participant member would be different from that of a non-ITA member:

"We therefore turn to address whether, assuming that the product scope of the ITA is static, it limits the scope of certain Members' WTO tariff commitments. We recall the general rule that if, at any given point in time, a product falls within the scope of a Member's WTO tariff commitments pursuant to the general rules of interpretation under Article 31 of the Vienna Convention, then a Member's obligations extend to that product. We understand that, under India's interpretation of the relationship between the ITA and its WTO Schedule, while the general rule described above would continue to apply to WTO Members who are *not* participants in the ITA, WTO Members who *are* participants in the ITA would be subject to a different rule. In other words, under India's approach, a tariff concession set forth in an ITA participant's WTO Schedule would have a different product scope to *the same tariff concession* set forth in a non-ITA participant's Schedule.

In our view, India's interpretation is at odds with the multilateral principles of reciprocity and mutual advantageous arrangements underpinning the multilateral trading system. To interpret the product scope of ITA participants' WTO Schedules differently from the Schedules of Members that are *not* participants in the ITA, when the product scope of those commitments is on its face identical, would also substantially undermine the security and predictability of Members' tariff commitments."¹⁰⁸

79. The Panel in *India – Tariffs on ICT Goods (Japan)* also pointed out that India had not demonstrated that the ITA excluded from its scope products resulting from technological developments:

"We note that India has not pointed to any provision in the ITA indicating that the ITA excluded from the scope of participants' WTO tariff commitments new products resulting from technological developments, if such new products were to fall within the scope of the relevant tariff commitments in Members' Schedules as interpreted pursuant to the general rules of treaty interpretation. We are aware of India's argument that the ITA specifically requires ITA participants to 'meet periodically' and modify the product scope of the ITA 'in light of technological developments'. In our view, the requirement that parties should meet periodically to review the product scope of the ITA suggests that the ITA participants anticipated expanding the scope of the ITA to include additional tariff items that were not initially included. We fail to see how this requirement could imply that products coming into existence after the conclusion of the ITA and otherwise falling within the scope of Members' tariff commitments as set forth in their WTO Schedules would be excluded from the coverage of Members' existing WTO commitments."¹⁰⁹

80. The Panel in *India – Tariffs on ICT Goods (Japan)* rejected India's argument that "its WTO Schedule should be given a 'special meaning', pursuant to Article 31(4) of the Vienna Convention, because the participants to the ITA 'intended to limit the scope of Attachment A to the HS1996 Nomenclature'". The Panel based its reasoning on the fact that the ITA had not been signed by all WTO members:

¹⁰⁶ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.65-7.67.

¹⁰⁷ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.67.

¹⁰⁸ Panel Report, *India – Tariffs on ICT Goods (Japan)*, paras. 7.69-7.70. See also *ibid.* para. 7.76.

¹⁰⁹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.71.

"In our view, the reference in this provision to 'the parties' includes *all* parties to a treaty, and not *some* of those parties.¹¹⁰ We note that India's WTO Schedule forms part of the GATT 1994 and the WTO Agreement. The 'parties' to the GATT 1994 and the WTO Agreement include all Members of the WTO. Moreover, India's WTO Schedule governs its tariff obligations with respect to all imports from *all* WTO Members, and not solely the participants in the ITA. We understand that the ITA was not signed by all WTO Members. Since the ITA was agreed to by only some of the Members of the WTO, we do not see how the ITA could signal the intentions of the parties to the WTO Agreement with respect to any of its treaty terms (including the terms set forth in India's WTO Schedule). We therefore consider that the present circumstances do not satisfy the requirements of Article 31(4), since the ITA does not express the intentions of the parties to the WTO Agreement."¹¹¹

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¹¹⁰ (*footnote original*) The plain language of Article 31(4) refers to "the parties" and not "some" or "certain" of the parties to the treaty. We also note that Article 41 of the Vienna Convention concerns "[a]greements to modify multilateral treaties between certain of the parties only". We find it meaningful that this provision uses the language in its title of "certain of the parties". The drafters of the Vienna Convention could have used similar language in Article 31(4), but chose not to do so. Furthermore, regarding the content of Article 41, the drafters of the Vienna Convention specifically accounted for a situation where *certain parties* to a treaty wish to modify the treaty as between themselves. This situation is treated distinctly under the Vienna Convention from a situation where the parties to a treaty wish to give a "special meaning" to a term in that treaty. These two provisions should not be conflated. Moreover, the existence of Article 41 suggests that Article 31(4) is not a mechanism through which *some* parties to a treaty can modify the treaty for *all* parties to the treaty.

¹¹¹ Panel Report, *India – Tariffs on ICT Goods (Japan)*, para. 7.73.