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

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

( ) 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. ( ) 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; that the CONTRACTING PARTIES (., the

provided for

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

11. The Panel in 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 qualify as context or be relevant in interpreting tariff concessions, including concessions which are not based on the HS."[14]

12. The 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 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 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 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 Agreement[18] that relevant customs classification practices would include those of the importing Member, and could also include those of other Members[19]; 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 , 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, , para. 151.
[14] Panel Report, , para. 7.443.
[15] Panel Report, , para. 7.444.
[16] Panel Report, para. 7.65.
[17] Appellate Body Report, para. 272-273.
[18] Appellate Body Report, , para. 293.
[19] Appellate Body Report, , paras. 300-301.
[20] Appellate Body Report, , para. 305.
[21] Panel Report, , para. 8.31.
[22] Panel Report, , para. 8.60.

1.5 Article II:1(a)

1.5.1 "treatment no less favourable"

19. In 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] I

… 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'

1.6 Article II:1(b)

1.6.1 "products of territories of other contracting parties"

26. The Panel in 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 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 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

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

29. In 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 t

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 , 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
>
> . (emphasis added)'"[44]

32. In , 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 of the way the size of the quota was determined, rather than a statement of the 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 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 gran 0 0 1 340.51 4721m6327.17 4

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 , 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 , 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 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 , 'it is of a product into the customs territory, but 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]

As the Appellate Body remarked in

> "[T]he moment at which a charge is or is not determinative of whether it is an ordinary customs duty or an internal charge. Ordinary customs duties may be collected 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 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 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.
>
> ...
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> 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,

1.6.11 Balancing/offsetting

55. The Panel in 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 , the res

> 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 , 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 , 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 , the Panel found that the additional duties resulting from the price range system (PRS) constituted "variable import levi

> 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 , 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 , 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 asure

ons in the

> 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 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 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.

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[101] Panel Report, paras. 7.38 and 7.41.
[102] Panel Report, para. 7.42.
[103] Panel Report, para. 7.43.
[104] Panel Report, para. 7.61.
[105] Panel Report, 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 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

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