

**DOMINICAN REPUBLIC – MEASURES AFFECTING THE IMPORTATION
AND INTERNAL SALE OF CIGARETTES**

AB-2005-3

Report of the Appellate Body

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TABLE OF CASES CITED IN THIS REPORT

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<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Periodicals</i>	Appellate Body Report, <i>Canada – Certain Measures Concerning Periodicals</i> , WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449
<i>Canada – Pharmaceutical Patents</i>	Panel Report, <i>Canada – Patent Protection of Pharmaceutical Products</i> , WT/DS114/R, adopted 7 April DSR

Short Title	Full Case Title and Citation
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i>

WORLD TRADE ORGANIZATION

APPELLATE BODY TD 0 . Tc 0.1875 Tw () Tj -109.5 -12.75 TD 0.1275V75 TD

Honduras each filed an appellee's submission.¹³ On the same day, China, the European Communities, and the United States each filed a third participant's submission.¹⁴ Also on 18 February 2005, Guatemala notified its intention to appear at the oral hearing as a third participant.¹⁵ El Salvador notified its intention to appear at the oral hearing on 7 March 2005.¹⁶

6. The oral hearing in this appeal was held on 9 March 2005. The participants and third participants presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants²⁷⁶ Tces,

that each factor will "indicate the same degree of necessity".¹⁸ Therefore, a panel must ascertain the collective strength of the factors. This requires a panel to consider the weight of each factor and to balance their relative weights, so as to determine whether, collectively, they render the measure necessary.

9. According to the Dominican Republic, a proper weighing and balancing of the relevant factors leads to the conclusion that the tax stamp requirement is "necessary" within the meaning of Article XX(d) of the GATT 1994. As regards the first factor, namely the trade impact of the measure, the Dominican Republic underlines that the Panel acknowledged that the trade impact of the tax stamp requirement is minimal. The Dominican Republic asserts that the Appellate Body has indicated that a measure with "a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects."¹⁹ For the Dominican Republic,

11. The third factor addressed by the Dominican Republic is the contribution of the measure to the ends pursued. The Dominican Republic contends that affixation of tax stamps in the presence of a tax inspector contributes more to the prevention of tax evasion than affixation abroad, without the presence of a tax inspector. The Dominican Republic underlines that affixing the stamp abroad would make it possible for cigarettes smuggled into the Dominican Republic to be sold as stamped, while evading import taxes. Such a situation is prevented by the requirement to affix stamps in the Dominican Republic in the presence of a tax inspector, except if the stamp is forged. Thus, for the Dominican Republic, the tax stamp requirement not only seeks to ensure the authenticity of tax stamps, but also "contributes importantly to reducing the volume of smuggled cigarettes and increasing the volume of cigarettes bearing 'authentic tax stamps' ".²²

12. As regards the question of the existence of alternative measures that a Member could reasonably be expected to employ in place of the GATT-inconsistent measure, the Dominican Republic submits that the Panel wrongly concluded that an alternative measure is reasonably available in this case. According to the Dominican Republic, the measure to which the Panel alluded—providing secure tax stamps to foreign exporters and affixing the stamps abroad, possibly under the supervision of a reputable company that would conduct pre-shipment inspection and certification—is not an alternative that is reasonably available because it would increase the risk of smuggling and tax evasion, as compared with the tax stamp requirement, and, therefore, would be less likely to secure the goals pursued by the tax stamp requirement. The Dominican Republic points to evidence that cigarette producers actively collaborate in the smuggling of cigarettes. It also points to evidence of a higher prevalence of smuggling of alcoholic beverages, which it argues results from allowing the affixation of tax stamps outside of the territory of the Dominican Republic.

13. On this basis, the Dominican Republic submits that the Panel erred in finding that the Dominican Republic's tax stamp requirement is not "necessary" in the sense of Article XX(d) of the GATT 1994. It requests the Appellate Body to reverse the Panel's finding in this regard.

²²Dominican Republic's appellant's submission, para. 45.

14. In response to information concerning the recent modification of the tax stamp measure referred to by Honduras in its opening statement at the oral hearing²³, the Dominican Republic confirmed that a new decree had been passed that altered the application of the tax stamp requirement and allowed tax stamps to be affixed abroad.²⁴ The Dominican Republic, however, considers that the new measure reflects a change in the level of enforcement that it seeks to achieve. It therefore continues to maintain that only the affixation of stamps in the territory of the Dominican Republic,

in a manner that discriminates between different foreign supplying countries or between domestic and foreign suppliers of cigarettes. Indeed, Honduras has not made allegations to the contrary. Moreover, even if the Appellate Body were to find that the measure is applied in a discriminatory manner, there is nothing to suggest that any such discrimination is arbitrary or unjustifiable. Nor is there anything to suggest that the tax stamp requirement is applied in a manner that constitutes a disguised restriction on international trade.

3. The Conformity of the Panel's Examination of Exhibits DR-8 and DR-29 with Article 11 of the DSU

18. The Dominican Republic contends that the Panel failed to make an objective assessment of the facts of the case, contrary to Article 11 of the DSU, by misinterpreting evidence submitted in Exhibits DR-8 and DR-29 and by misunderstanding the proposition in support of which these exhibits were introduced. Although it recognizes that panels enjoy a margin of discretion in their appreciation of the evidence before them, according to the Dominican Republic, the Panel in this case exceeded the bounds of this discretion because an objective trier

18. ~~18. The Dominican Republic contends that the Panel failed to make an objective assessment of the facts of the case, contrary to Article 11 of the DSU, by misinterpreting evidence submitted in Exhibits DR-8 and DR-29 and by misunderstanding the proposition in support of which these exhibits were introduced. Although it recognizes that panels enjoy a margin of discretion in their appreciation of the evidence before them, according to the Dominican Republic, the Panel in this case exceeded the bounds of this discretion because an objective trier~~

In Honduras' view, the Panel properly examined the relative importance of the interest served by the measure at issue. Honduras contests the Dominican Republic's assertion, which was not put forward before the Panel, that the measure aims to protect human life or health. The thrust of the tax stamp requirement is fiscal in nature, which, although important, is not on a par with the protection of human life or health. According to Honduras, the Panel also examined the extent to which the tax stamp requirement contributes to securing compliance with the Dominican Republic'

C. *Claims of Error by Honduras – Appellant*

1. Article III:4 of the GATT 1994 and the Bond Requirement

30. Honduras challenges the Panel's finding that the Bond Requirement is inconsistent with Article III:4 of the GATT 1994. Honduras claims that the Panel's finding is based on an incorrect interpretation of Article III:4 of the GATT 1994. Honduras claims that the Panel's finding is based on an incorrect interpretation of Article III:4 of the GATT 1994. Honduras claims that the Panel's finding is based on an incorrect interpretation of Article III:4 of the GATT 1994.

not compare the per-unit costs between imported products and domestic like products. Accordingly, Honduras argues, the Panel did not have any basis upon which to conclude that there was no less favourable treatment being accorded to imports. Finally, Honduras submits that the Panel erred because it stated that the fact that a fixed expense (that is, an expense not related to volume of production) may lead to different per-unit costs among supplier firms is not in itself enough to conclude that the expense creates less favourable treatment for imported products.

2. Article XX(d) of the GATT 1994 and the Bond Requirement

33. At the oral hearing, Honduras responded to the claim raised by the Dominican Republic that, even if the Appellate Body accepts Honduras' appeal under Article III:4 of the GATT 1994 against the bond requirement, the measure is nevertheless justified under Article XX(d) of the GATT 1994. Honduras submits that the Dominican Republic must have in place alternative measures for products, other than cigarettes and alcohol, that are also subject to the Selective Consumption Tax. These alternative measures would be reasonably available to secure compliance with tax laws in the case of cigarettes as well. In Honduras' view, the Appellate Body should find that the Dominican Republic has not proven that its bond requirement is necessary to secure compliance with its tax laws.

3. Article 11 of the DSU and the Panel's Consideration of the Bond Requirement "As Such"

34. Honduras claims that the Panel failed to make an objective assessment of the matter before it, contrary to Article 11 of the DSU, in finding that the bond requirement secured obligations other than the Selective Consumption Tax. Honduras emphasizes that its claims relate to the bond requirement as such, independently from the application of that legislation in specific circumstances. According to Honduras, the Panel did not, however, consider the legislative basis of the bond requirement as such, but instead relied upon a letter from the Dominican Republic Director-General of Internal Taxes (referred to as Exhibit DR-12) that contradicted the terms of the underlying legislation. Honduras argues that, in analyzing its claim against the bond requirement as such, the Panel "should have properly examined only ... the terms of the legislation and [should] not have relied on the unsubstantiated views of one officer of an agency of the Dominican Republic".³⁵ Honduras finds support for its view in the Report of the Appellate Body in *ellanttaort of t110Dominican Republic*

4. The Timing of Payment of the Selective Consumption Tax and the Panel's Terms of Reference

35. Honduras submits that the Panel erred in treating certain contentions regarding the timing of payment of the Selective Consumption Tax as a separate claim outside of the Panel's terms of reference. Honduras submits that these contentions were simply arguments in support of its claim that the bond requirement violated Article III:4 of the GATT 1994. Honduras asks the Appellate Body to reverse the Panel's finding that these contentions were outside the Panel's terms of reference.

D. *Arguments of the Dominican Republic – Appellee*

1. Article III:4 of the GATT 1994 and the Bond Requirement

36. The Dominican Republic submits that the Panel correctly interpreted the term "treatment no less favourable" in Article III:4 of the GATT 1994 and requests the Appellate Body to reject Honduras' appeal against this finding. The Dominican Republic submits that Honduras advocates an erroneous interpretation of Article III:4.

37. According to the Dominican Republic, the Panel reached its conclusion with respect to the

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38. According to the Dominican Republic, Honduras' objection to the Panel's approach is based on the untenable proposition that, in a case where a Member challenges a measure "as such", alleging *de facto* less favourable treatment, a panel cannot look beyond the text of the measure itself to consider the factual evidence that would prove *de facto* discrimination. The Dominican Republic notes that, although Honduras recognizes that the bond requirement imposes formally equal treatment, Honduras would preclude examination of evidence other than the text of the legislation in examining whether the formally equal treatment under the law nevertheless establishes *de facto* discrimination.

39. The Dominican Republic argues that Honduras' position is contrary to WTO jurisprudence on national treatment, in which panels and the Appellate Body have consistently looked to the application of the measure in question fitself to

42. The Dominican Republic submits that Article XX(d) requires a two-step analysis. First, the measure must be provisionally justified under Article XX(d). Secondly, it must comply with the requirements of the chapeau to Article XX. The Dominican Republic says that its measure secures compliance with its tax laws and regulations, and that these tax laws and regulations are consistent with the GATT 1994. The Dominican Republic refers to certain findings by the Panel, which, it claims, substantiate these assertions. The Dominican Republic also argues that the bond requirement is "necessary"

nothing precludes a panel from considering statements made by representatives of the responding Member regarding that law; indeed, such statements have been relied upon by panels (such as in *US – Section 301 Trade Act*) and the Appellate Body (for example, in *US – Hot-Rolled Steel*) in the past.

E. *Arguments of the Third Participants*

1. China

- (a) The necessity analysis under Article XX(d) of the GATT 1994 in relation to the tax stamp requirement

49. China notes that a party invoking Article XX(d) of the GATT 1994 must demonstrate that its measure is "necessary" to secure compliance with GATT-consistent laws or regulations. China synthesizes the jurisprudence of the Appellate Body on this issue as suggesting that "necessary" in this context should mean "almost indispensable".³⁸ China also observes that the Appellate Body has set out a number of factors that need to be considered in assessing whether a measure is "necessary". These include three factors identified in *Korea – Various Measures on Beef*: the contribution of the measure to the ends pursued; the importance of the interests protected; and the trade impact of the measure. There is also another factor from earlier jurisprudence, which the Appellate Body des Tw (that the po0947

2. European Communities

- (a) The necessity analysis under Article XX(d) of the GATT 1994 in relation to the tax stamp requirement

51. The European Communities considers that the Panel was correct to find that the tax stamp requirement was not justified by the provisions of Article XX(d) of the GATT 1994. The European Communities submits that the Panel properly applied the test outlined by the Appellate Body in *Korea – Various Measures on Beef* for determining whether a measure is "necessary" in terms of Article XX(d). The European Communities argues that the Panel correctly took into account the importance of the common interest served by the tax stamp requirement and the contribution of the tax stamp requirement to the objective pursued. The European Communities questions the Panel's assumption that the measure in question had no "intense restrictive effects on trade"³⁹; however,

not be applied so as to afford protection to domestic production. A measure with formally equal treatment and minimal or negligible practical consequences is unlikely to be applied so as to afford protection.

- (c) Article 11 of the DSU and the Panel's consideration of the bond requirement "as such"

53. The European Communities submits that the Panel made an objective assessment of Honduras' claims regarding the bond requirement, consistent with the requirements of Article 11 of the DSU. According to the European Communities, the matter before the Panel was defined, in the first place, by Honduras' request for the establishment of the Panel. Honduras' panel request referred not only to the legislation establishing the bond requirement, but also to "practices" under the bond requirement. Accordingly, it was appropriate for the Panel to consider such practices in addressing Honduras' claims against the bond requirement. The European Communities thus disagrees with the position of Honduras regarding the import of *India – Patents (US)*. Contrary to the position of Honduras, *India – Patents (US)*, in which the panel reviewed practices as well as the underlying legislation, would tend to confirm the approach of the Panel in this case. Indeed, it is consistent with the object and purpose of the DSU for a panel to take into account all relevant elements for its determinations regarding the matter before it.

3. United States

- (a) The necessity analysis under Article XX(d) of the GATT 1994 in relation to the tax stamp requirement

54. The United States argues that the Panel's interpretation of the term "necessary" in Article XX(d) adds to and diminishes WTO Members' rights and obligations under the GATT 1994. The United States raises three concerns with the Panel's interpretation. First, the United States considers incorrect the notion that Article XX(d) requires a Member to select a less GATT-inconsistent alternative where no GATT-consistent alternative is available. There is nothing to justify use of a concept of degrees of inconsistency in the application of Article XX(d). Moreover, such a concept would be difficult to administer and is logically incoherent. In this case, the Panel characterizes as "less GATT-inconsistent" possible alternative measures that are "less trade-restrictive".⁴⁰ In so doing, the Panel impermissibly imports into Article XX(d) a requirement that a Member use a less-trade restrictive measure, if one is available. There is no basis in the GATT 1994 for doing so. Secondly, the United States submits that the Panel has dis TD -0.09 Tc (") Tj 0.0-261 -18.75

succeed in securing compliance with a Member's desired level of protection is not "necessary". Thirdly, the United States argues that a measure that would involve continuation of a risk that a Member seeks to avoid cannot be a reasonably available alternative to an impugned measure. The United States emphasizes the right of Members to determine their own desired level of protection.

(b) Article III:4 of the GATT 1994 and the bond requirement

55. The United States also suggests that, in its appeal regarding the application of Article III:4 of the GATT 1994 to the bond requirement, Honduras mischaracterizes the standard for finding "treatment no less favourable" under Article III:4. The United States submits that the Panel properly articulated the relevant test as one based on the conditions of competition prevailing in the market, and correctly found that the differences in the per-unit costs of the bond were not in themselves sufficient to demonstrate that importers received less favourable treatment. In addition, according to the United States, throughout its appeal, Honduras alleges that the Panel improperly applied Article III:4 because it took into account the market performance of importers in the past years as the decisive element, rather than the bond itself. However, although Honduras criticizes the Panel for examining the market performance of importers, according to the United States, it is Honduras that improperly seeks a finding of less favourable treatment on this basis.

III. Issues Raised in this Appeal

56. The following issues are raised in this appeal:

- (a) whether the Panel erred in finding that the tax stamp requirement is not justified under Article XX(d) of the GATT 1994, based on its interpretation and application of the term "necessary" in that provision;
- (b) whether the Panel failed to make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in its examination of Exhibits DR-8 and DR-29;
- (c) whether the Panel erred in finding that Honduras failed to establish that the bond requirement accords less favourable treatment to imported cigarettes than that accorded to like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994;
- (d) whether the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, in its consideration of Honduras' claim against the bond requirement "as such"; and,

- (e) whether the Panel erred in finding that Honduras' contentions regarding the timing of payment of the Selective Consumption Tax represented a separate claim outside the Panel's terms of reference.

IV. The Necessity Analysis under Article XX(d) of the GATT 1994 in relation to the Tax Stamp Requirement

57. The Dominican Republic requires that tax stamps be affixed to cigarette packets in the territory of the Dominican Republic

said that "the measure has not had any intense restrictive effects on trade".⁴⁴ The Panel found, however, no supporting evidence "that there is a causal link between allowing stamps to be affixed abroad and the forgery of tax stamps."⁴⁵ According to the Panel, the requirement of affixing tax stamps in the Dominican Republic and under the supervision of the Dominican Republic authorities "would only serve to guarantee that those tobacco products that enter legally into the country and go through the proper customs procedures will carry authentic tax stamps as a proof that the appropriate tax has been paid."⁴⁶ The Panel added that the tax stamp requirement, "in and of itself, would not prevent the forgery of tax stamps, nor smuggling and tax evasion."⁴⁷ In the opinion of the Panel, the Dominican Republic did not discharge its duty to prove why other reasonably available GATT-consistent or less GATT-inconsistent measures would not be able to achieve the level of enforcement with regard to tax collection and cigarette smuggling that the Dominican Republic sought to attain with the tax stamp requirement.⁴⁸ For the Panel, a reasonably available alternative to the tax stamp requirement would be to provide secure tax stamps to foreign exporters.⁴⁹ In this light, the Panel concluded that the tax stamp requirement is not "necessary" to secure compliance with the Dominican Republic's tax laws and regulations. Accordingly, the Panel found that the tax stamp requirement is not justified under Article XX(d) of the GATT 1994.⁵⁰

60. The Dominican Republic claims that the Panel erred in interpreting and applying the term "necessary" in Article XX(d) of the GATT 1994. The Dominican Republic relies mainly on the Appellate Body Report in *Korea – Various Measures on Beef*, contending that, determining whether a measure is "necessary" under Article XX(d), involves in every case a process of weighing and balancing a series of factors.⁵¹ According to the Dominican Republic, a panel must weigh and balance the following four factors as part of the necessity analysis: (1) the trade impact of the measure; (2) the importance of the interests protected by the measure; (3) the contribution of the measure to the end pursued; and (4) the existence of alternative measures that a Member could reasonably be expected to employ.⁵² Thus, "the Panel improperly interpreted and applied the term

⁴⁴Panel Report, para. 7.215.

⁴⁵*Ibid.*, para. 7.226.

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸*Ibid.*, para. 7.228.

⁴⁹Thus, tax stamps would be affixed on cigarette packets in the course of the foreign manufacturer's production process and prior to importation into the Dominican Republic.

⁵⁰Given its conclusion that the tax stamp requirement is not "necessary" under Article XX(d), the Panel considered that it did not need to analyze consistency of the measure with the chapeau of Article XX.

⁵¹Dominican Republic's appellant's submission, para. 30 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 164).

⁵²*Ibid.*, para. 31.

'necessary' because it failed to examine fully all the factors relevant to determining whether a measure is 'necessary' under Article XX(d), including weighing and balancing them, as required by Article XX(d)."⁵³ The Dominican Republic adds that a proper weighing and balancing of the relevant factors leads to the conclusion that the tax stamp requirement is "necessary" within the meaning of Article XX(d) of the GATT 1994. In particular, the Dominican Republic contends that affixation of tax stamps in the presence of a tax inspector contributes more to the prevention of tax evasion than affixation abroad, without the presence of a tax inspector. The Dominican Republic underlines that affixing the stamp abroad would make it possible for cigarettes smuggled into the Dominican Republic to be sold as stamped, while evading import taxes. This would be prevented by the requirement to affix stamps in the Dominican Republic in the presence of a tax inspector, unless the stamp is forged. Thus, for the Dominican Republic, the tax stamp requirement not only seeks to ensure the authenticity of tax stamps, but also "contributes importantly to reducing the volume of smuggled cigarettes and increasing the volume of cigarettes bearing 'authentic tax stamps'."⁵⁴

61. Regarding the question of the existence of alternative measures that a Member could reasonably be expected to employ in place of the GATT-inconsistent measure, the Dominican Republic submits that the Panel erred in concluding that an alternative measure is reasonably available. According to the Dominican Republic, the alternative identified by the Panel—providing secure tax stamps to foreign exporters—is not a reasonably available alternative because it would increase the risk of smuggling and tax evasion, as compared with the tax stamp requirement, and, therefore, would be less likely to secure the goals pursued by the tax stamp requirement.

62. For Honduras, the Dominican Republic's contention that the Panel did not properly weigh and balance the relevant factors in its analysis under Article XX(d) should be rejected. Honduras maintains that "the Panel properly set out and applied the appropriate factors in its assessment of the measure under Article XX(d)."⁵⁵ Honduras adds that "the Panel did examine the relevant factors in its assessment of whether there were less trade restrictive alternative measures that the Dominican Republic could have employed."⁵⁶

⁵³Dominican Republic's appellant's submission, para. 30.

⁵⁴*Ibid.*, para. 45.

⁵⁵Honduras' appellee's submission, para. 37.

⁵⁶*Ibid.*, para. 65.

63. At the oral hearing, Honduras drew attention to the fact that, on 25 October 2004, the Dominican Republic enacted a new decree modifying the tax stamp requirement to allow tax stamps to be affixed abroad at the time of production.⁵⁷ The Dominican Republic confirmed that it had enacted the new decree. Honduras stated that, pursuant to this new measure, it had recently exported to the Dominican Republic a shipment of cigarettes with stamps attached at the factory. Honduras expressed surprise that, in these circumstances, the Dominican Republic continues to maintain that the only measure reasonably available to it is affixation of tax stamps within the Dominican Republic, under the supervision of the tax authorities. Both participants nevertheless requested the Appellate Body to rule on whether the original measure is justified under Article XX(d) of the GATT 1994.

64. We begin our consideration of Article XX(d) by noting that the analysis of a measure under Article XX is two-tiered:

... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.⁶⁰

67. The Appellate Body also referred to the GATT panel report in *US – Section 337*

[and] the restrictive impact of the measure on international commerce."⁶⁵ The Appellate Body went on to explain that:

A comparison between the challenged measure and possible alternatives should then be undertaken, and the results of such comparison should be considered in the light of the importance of the interests at issue. It is on the basis of this "weighing and balancing"

most important interest for any country and particularly for a developing country such as the Dominican Republic."⁶⁹ With respect to the trade impact of the measure, the Panel noted that the ta

secure tax stamps to foreign exporters, so that those tax stamps could be affixed on cigarette packets in the course of their own production process, prior to importation, would be equivalent to the tax stamp requirement in terms of allowing the Dominican Republic to secure the high level of enforcement it pursues with regard to tax collection and the prevention of cigarette smuggling.⁷⁵ The Panel gave substantial weight to its finding that the tax stamp requirement is of limited effectiveness in preventing tax evasion and cigarette smuggling; in particular, it found "no evidence to conclude that the tax stamp requirement secures a zero tolerance level of enforcement with regard to tax collection and the prevention of cigarette smuggling."⁷⁶ We consider that the Panel conducted an appropriate analysis, following the approach set out in *Korea – Various Measures on Beef* and in *EC – Asbestos*, and affirmed in *Asbest* appropriate4-w 0 TD 0.375 Tc 0 0013 Tw (riate4-D /F3 0.375 Tc 0) Tj 3 c

proposition for which Exhibit DR-8 was offered"⁹¹; (3) the Panel "disregarded"⁹² the evidence in Exhibit DR-29⁹³; and (4) the Panel erred in concluding "that Exhibits DR-8 and DR-29 do not establish a causal link between allowing stamps to be affixed abroad and forgery of tax stamps."⁹⁴

81. As regards the first allegation of the Dominican Republic (misreading Memo DAT-No. 46), we do not see in the Panel's treatment of Memo DAT-No. 46 any error that would amount to a violation of Article 11 of the DSU. The Panel did not give "conclusive"⁹⁵ weight to Memo DAT-No. 46 in considering whether forgery of tax stamps is possible, justifying its position on two bases: first, Memo DAT-No. 46 does not definitely establish that the tax stamps referred to therein were forged, as, in that letter, "the Department of Alcohol and Tobacco of the DGII explicitly states that only the National Treasury would be in a position to confirm whether a set of stamps were forged"⁹⁶; secondly, the seizure documented in Exhibit DR-8 occurred in the year 2001, whereas, in Memo DAT-No. 46, "the doubts expressed about the stamps refer to the format of stamps since 2002."⁹⁷ In our view, the approach followed by the Panel and its decision not to give "conclusive" weight to Memo DAT-No. 46 fall within its margin of discretion as the trier of facts and are, therefore, consistent with the obligations of panels set out in Article 11 of the DSU. We acknowledge that the Panel, in its description of Memo DAT-No. 46, appears to have confused the stamps of half a cent (discontinued) and the current stamps of RD\$0.50, in attributing to the half cent stamps details suggesting forgery of the RD\$0.50 stamps. However, this did not play a role in the reasoning that led the Panel not to give conclusive weight to Memo DAT-No. 46. Accordingly, we are of the view that the Panel did not commit an error in the appreciation of the evidence that "may be characterized as a failure to make an objective assessment of the facts."⁹⁸

82. The Dominican Republic also submits that the Panel "misunderstood the proposition for which Exhibit DR-8 was offered"⁹⁹, because "[t]he Panel ... incorrectly focused on the relationship between smuggling and forgery"¹⁰⁰, whereas "Exhibit DR-8 was offered as evidence of (a) smuggling

⁹¹Dominican Republic's appellant's submission, para. 87.

⁹²*Ibid.*, para. 89.

⁹³Exhibit DR-29 submitted by the Dominican Republic to the Panel contains information on a batch of garlic and alcoholic beverages seized in March 2002.

⁹⁴Dominican Republic's appellant's submission, para. 91.

⁹⁵Panel Report, para. 7.223.

⁹⁶*Ibid.*

⁹⁷*Ibid.*

⁹⁸Appellate Body Report, *EC – Hormones*, para. 133.

⁹⁹Dominican Republic's appellant's submission, para. 87.

¹⁰⁰*Ibid.*, para. 88.

and, separately, (b) forgery of tax stamps of a product in respect of which the Dominican Republic allows stamps to be affixed outside its territory."¹⁰¹ In our view, the Panel did not act in a manner inconsistent with Article 11 of the DSU in not finding that Memo DAT-No. 46 "adds any conclusive elements as relate to the relationship between the seizure of alcoholic beverages and the possible forgery of tax stamps".¹⁰² A panel does not act in a manner inconsistent with Article 11 of the DSU simply because it draws inferences from some of the evidence that do not coincide with the reason for which a party adduced it.¹⁰³

83. Thirdly, the Dominican Republic contends that, "[w]ith respect to Exhibit DR-29, the Panel simply disregarded the evidence therein"¹⁰⁴, but offers no reason in support of this assertion. We have no reason to conclude that the Panel did not examine Exhibit DR-29. On the contrary, the Panel noted that Exhibit DR-29 "contain[s] information on a batch of garlic and alcoholic beverages seized in March 2002"¹⁰⁵, which suggests that the Panel did consider the evidence therein. The Dominican Republic may object to the fact that the Panel did not ascribe as much weight to Exhibit DR-29 as the Dominican Republic would have wished, but this cannot be characterized as a failure to make an objective assessment of the facts as required by Article 11 of the DSU. As to the Dominican Republic's assertion that the Panel referred to Exhibit DR-29 in the context of a statement it made on the forgery of tax stamps, whereas Exhibit DR-29 was to serve the purpose of demonstrating that alcoholic beverages are being smuggled, we observe that a panel does not act in a manner inconsistent with Article 11 of the DSU if it draws inferences from some of the evidence that do not coincide with the reason for which a party adduced it.

84. The Dominican Republic disagrees with the Panel's position that Exhibits DR-8 and DR-29 do not establish a causal link between allowing stamps to be affixed abroad and forgery of tax stamps. It contends that such a causal link exists, basing its contention on an inference it draws from evidence of smuggling and forgery of tax stamps with respect to alcohol products.¹⁰⁶ However, a mere divergence of views between a party and a panel on the inferences to be drawn from pieces of evidence is not a sufficient ground to conclude that the Panel failed to "make ... an objective assessment of the facts of the case". The Dominican Republic has not explained why the divergence

¹⁰¹Dominican Republic's appellant's submission, para. 88.

¹⁰²Panel Report, para. 7.223.

¹⁰³Appellate Body Report, *Australia – Salmon*, para. 267.

¹⁰⁴Dominican Republic's appellant's submission, para. 89.

¹⁰⁵Panel Report, para. 7.224.

¹⁰⁶The Dominican Republic made this clarification in response to our questioning at the oral hearing. According to the Dominican Republic, Exhibits DR-8 and DR-29 relate to "tax evasion, smuggling, and forgery of tax stamps with respect to alcohol products". (Dominican Republic's appellant's submission, para. 79)

of views between it and the Panel on the inferences to be drawn from Exhibits DR-8 and DR-29 would amount to a failure to "make ... an objective assessment of the facts of the case". Therefore, we are of the opinion that the Panel did not act in a manner inconsistent with Article 11 of the DSU in stating that it "finds no supporting evidence in Exhibits DR-8 and DR-29 to the Dominican Republic's assertion that there is a causal link between allowing stamps to be affixed abroad and the forgery of tax stamps."¹⁰⁷

85. In sum, we conclude that the Panel did not fail to comply with the obligations set out in Article 11 of the DSU in respect of Exhibits DR-8 and DR-29. Accordingly, we *find* that the Panel did not fail to make an objective assessment of the facts of the case, as required by Article 11 of the DSU, in its appreciation of the evidence in Exhibits DR-8 and DR-29.

VI. Article III:4 of the GATT 1994 and the Bond Requirement

86. We now move to consider Honduras' appeal regarding the application of Article III:4 of the GATT 1994 to the requirement, imposed by the Dominican Republic, that importers and domestic producers of cigarettes post a bond to ensure payment of taxes (the "bond requirement"). The Panel found that "the bond requirement is applied in an equal manner, both formally and in practice, to domestic and imported cigarettes"¹⁰⁸, and that "Honduras has failed to establish that the bond requirement ... accords less favourable treatment to imported cigarettes than that accorded to the like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994."¹⁰⁹

87. In reaching this conclusion, the Panel noted that the Dominican Republic's tax law imposes the requirement to post a bond on both importers and domestic producers of cigarettes.¹¹⁰ The Panel rejected the argument of Honduras that the bond requirement creates a disincentive against importing cigarettes. The Panel reasoned that a local company that intends to sell cigarettes in the Dominican Republic has two options: either to buy from a domestic producer or to buy from an importer. In neither case would the local company need to post a bond, because the posting of a bond is requested only from manufacturers and importers.¹¹¹ Honduras also argued that the bond requirement results in

¹⁰⁷Panel Report, para. 7.226.

¹⁰⁸*Ibid.*, para. 7.310.

¹⁰⁹*Ibid.*, para. 7.311.

¹¹⁰*Ibid.*, para. 7.234; the amount of the bond is RD\$5 million for both importers and domestic producers: Article 14 of Decree 79-03, Exhibit HOND-4 submitted by Honduras to the Panel. The Panel noted that "[a]ccording to the evidence provided by Honduras, in the specific case of the importer of cigarettes from that country, the annual fee charged by the insurance company that issued the bond was RD\$84,000 (approximately US\$1,873)". (*Ibid.*, para. 7.299)

¹¹¹*Ibid.*, para. 7.282.

less favourable treatment for imported cigarettes because it serves to guarantee the payment of a tax (the "Selective Consumption Tax") that is fully collected upon importation. This is in contrast to domestic cigarettes, where payment of the Selective Consumption Tax does not fall due until the twentieth day of the month following that in which the cigarettes are sold. The Panel discarded this argument, finding that "the evidence available does not support Honduras' assertion that there is no liability that the bond requirement would serve to secure."¹¹² For the Panel, "the Dominican Republic ... demonstrated that its tax authorities have the legal powers to reassess and eventually readjust the applicable tax liabilities for a period of up to three years."¹¹³ Thus, the importer may be asked to make a new payment as a result of the readjustment, and the bond would serve to guarantee this payment.¹¹⁴ Furthermore, the Panel relied on a written declaration from the Director-General of Internal Taxes¹¹⁵ to find that, in the exercise of its enforcement powers, the Dominican Republic tax authorities regard the bond as a guarantee of compliance with internal tax obligations other than the

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contends that "this lack of symmetry between the liabilities that bond secures ... constitutes an 'extra hurdle' or 'extra burden' for imported products."¹²⁰

89. Honduras also submits that the Panel erred because it evaluated the current per-unit cost of the bond fee for a specific importer in the light of its volume of imports for 2001-2003.¹²¹ According to Honduras, the Panel should have examined the conditions of competition established by the legislation, rather than the market situation in which the bond requirement was applied.¹²² In any event, Honduras notes that the bond requirement was introduced in March 2003 and argues that the per-unit cost determined by the Panel was incorrect, because it was based on the volume of imports in the years 2000-2002, and on the cost charged by financial institutions for a bond fee in 2004.¹²³ Honduras adds that, as the Panel did not determine the per-unit cost for domestic producers, it could not compare the per-unit costs between imported products and domestic like products. Accordingly, Honduras argues, the Panel "did not have any basis upon which to conclude that there was no less favourable treatment being accorded to imports."¹²⁴ Finally, Honduras submits that the Panel erred because it stated that the fact that a fixed expense (i.e., an expense not related to volume of production) may lead to different per-unit costs among supplier firms is not "in itself ... enough to conclude that the expense creates a less favourable treatment for imported products."¹²⁵

90. The Dominican Republic contests Honduras' appeal of the Panel's findings regarding the bond requirement under Article III:4 of the GATT 1994. The Dominican Republic contends that the Panel correctly concluded that the bond requirement does not modify the conditions of competition to the detriment of the imported cigarettes, and that it should not be presumed that any difference in the per-unit cost of the bond requirement is inconsistent with Article III:4. The Dominican Republic also submits that, in the event the Appellate Body reverses the Panel's finding regarding the bond requirement under Article III:4, the Appellate Body should nevertheless find that the bond requirement is justified under Article XX(d) of the GATT 1994.

91. In *Korea* –

... imported products are treated "less favourably" than like domestic products should be assessed ... by examining whether a measure modifies the *conditions of competition* in the relevant market to the detriment of imported products.¹²⁶

92. In *EC – Asbestos*, the Appellate Body said the following about "less favourable treatment" as embodied in Article III:4 of the GATT 1994:

The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production". If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products.¹²⁷

93. Therefore, the question that a panel must answer in an analysis under Article III:4 is whether the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products. In other words, a measure accords less favourable treatment to imported products if it gives domestic like products a competitive advantage in the market over imported like products. In this respect, we note that the bond requirement applies equally to importers and domestic producers, and is fixed at RD\$5 million (indexed for inflation)¹²⁸ for both importers and domestic producers.¹²⁹

94. Honduras acknowledges that the bond requirement is imposed equally on importers and domestic producers, but nevertheless claims that it accords less favourable treatment to imported cigarettes. Honduras argues that the bond requirement imposes an "extra burden" on imported products compared with domestic products because, as far as importers are concerned, the secured tax liability is non-existent or smaller than that of domestic producers. We recognize that a measure that applies equally to importers and domestic producers might, in some circumstances, nevertheless be inconsistent with Article III:4 of the GATT 1994.¹³⁰ In this case, however, the Panel did not rely in its reasoning exclusively on the equal application of the bond requirement to importers and domestic producers. The Panel rejected Honduras' argument "that the bond requirement results in a less

¹²⁶Appellate Body Report, *Korea – Various Measures on Beef*, para. 137. (original emphasis)

¹²⁷Appellate Body Report, *EC – Asbestos*, para. 100.

¹²⁸The bond of RD\$5 million represents approximately US\$110,000.

¹²⁹Article 14 of Decree 79-03, Exhibit HOND-4 submitted by Honduras to the Panel.

¹³⁰We note that in *Korea – Various Measures on Beef*, the Appellate Body stated:

A formal difference in treatment between imported and like domestic products is ... neither necessary, nor sufficient, to show a violation of Article III:4.

(Appellate Body Report, *Korea – Various Measures on Beef*, para. 137)

favourable treatment for imported cigarettes, because for those cigarettes there is no liability that the

per-unit costs of the bond requirement alleged by Honduras is explained by the fact that the importer of Honduran cigarettes has a smaller market share than two domestic producers¹³⁷ (the per-unit cost of the bond requirement being the result of dividing the cost of the bond by the number of cigarettes sold on the Dominican Republic market). In this case, the difference between the per-unit costs of the bond requirement alleged by Honduras does not depend on the foreign origin of the imported cigarettes. Therefore, in our view, the Panel was correct in dismissing the argument that the bond requirement accords less favourable treatment to imported cigarettes because the per-unit cost of the bond was higher for the importer of Honduran cigarettes than for two domestic producers.

97. Honduras also submits that the Panel erred because it evaluated the current per-unit cost of the bond fee for the importer of Honduran cigarettes in the light of the volume of imports for 2001-2003.¹³⁸ Honduras considers that the Panel's calculation is incorrect and that, in any event, it should also have calculated the per-unit cost for domestic producers. In our view, the Panel committed no error in seeking to make an illustrative evaluation of the per-unit cost of the bond fee with respect to the importer of Honduran cigarettes. First, we note that the Panel performed this exercise in response to Honduras' argument that the per-unit cost of the bond would be higher for the importer of Honduran cigarettes than for two

98. In any event, the calculation on which Honduras focuses is not the thrust of the Panel's reasoning. For the Panel, a fixed expense, such as the annual fee for the bond, leads necessarily to different per-unit costs among supplier firms, to the extent that these firms have different volumes of production or volumes of sales. The Panel was of the view that "[a]s long as the difference in costs does not alter the conditions of competition in the relevant market to the detriment of imported products, that fact in itself should not be enough to conclude that the expense creates a less favourable treatment for imported products."¹⁴¹ We agree with the Panel, for the reasons explained above.¹⁴²

99. Accordingly, Honduras has not shown that the Panel erred in finding that the bond requirement does not accord less favourable treatment to imported cigarettes within the meaning of Article III:4 of the GATT 1994. Therefore, we *uphold* the Panel's finding, in paragraphs 7.311, 7.316, and 8.1(f) of the Panel Report, that Honduras failed to establish that the bond requirement accords less favourable treatment to imported cigarettes than that accorded to like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994.

100. Finally, we observe that the Dominican Republic has argued that, in the event we reverse the Panel's finding regarding the bond requirement under Article III:4 of the GATT 1994, we should nevertheless find that the bond requirement is justified as necessary to ensure compliance with GATT-consistent laws and regulations under Article XX(d) of the GATT 1994. As we are of the view that the Panel committed no error in reaching its finding under Article III:4, there is no need for us to undertake an analysis of the Dominican Republic's defence under Article XX(d).

VII. Article 11 of the DSU and the Panel's Consideration of the Bond Requirement "As Such"

101. We next consider Honduras' appeal, under Article 11 of the DSU, regarding the Panel's assessment of Honduras' claim against the bond requirement. As discussed in the preceding section of this Report, a key argument by Honduras regarding the inconsistency of the bond requirement with Article III:4 of the GATT 1994 was that the bond requirement served to guarantee liability only for the Selective Consumption Tax and that such liability did not exist for importers, who must pay that tax in full at the time of importation.¹⁴³ The Dominican Republic responded that, notwithstanding payment of the Selective Consumption Tax at the time of importation, the bond nevertheless served to secure payment of that tax in the event of an adjustment of the taxpayers' total liability at some point in the future. The Dominican Republic also argued that:

¹⁴¹Panel Report, para. 7.300.

¹⁴²*Supra*, para. 96 of this Report.

¹⁴³See Panel Report, para. 7.284.

... although Article 376 of the Tax Code appears to refer only to the Selective Consumption Tax, in practice [the Dominican Republic] tax authority treats the bond as a guarantee of compliance with other internal tax obligations incumbent on the domestic producer and the importer of cigarettes, including the tax on the transfer of goods and services ("ITBIS") (Articles 335 through 360 of the Dominican Republic Tax Code), and the income tax (Articles 267 through 334 of the Dominican Republic Tax Code).¹⁴⁴

In support of this second argument, the Dominican Republic "presented a copy of a written declaration to that effect from its Director General of Internal Taxes."¹⁴⁵

102. The Panel accepted the arguments of the Dominican Republic and found "that the evidence available does not support Honduras's assertion that there is no liability that the bond requirement would serve to secure."¹⁴⁶ With respect to the Dominican Republic's assertion that the bond served to guarantee liabilities other than the Selective Consumption Tax, the Panel stated:

While the Dominican Republic has admitted that there is no explicit legal provision that authorizes the use of the bond as a guarantee of compliance for internal tax obligations other than the Selective Consumption Tax, the Panel finds that there is no reason to question its assertion that, in practice and in the exercise of its enforcement powers, the Dominican Republic tax authorities regard the bond as a guarantee of compliance for internal tax obligations such as the tax on the transfer of goods and services ("ITBIS") and the income tax.¹⁴⁷

103. On this basis the Panel concluded:

For the reasons expressed above, the Panel is not convinced by Honduras's argument that the bond requirement results in a less favourable treatment for imported cigarettes, because for those cigarettes there is no liability that the bond requirement would serve to secure.¹⁴⁸

104. On appeal, Honduras claims that the Panel failed to make an objective assessment of the matter before it, contrary to Article 11 of the DSU, in finding that the bond requirement secured obligations other than the Selective Consumption Tax. Honduras emphasizes that its claims relate to the bond requirement *as such*, independently from the application of that legislation in specific

¹⁴⁴Panel Report, para. 7.285.

¹⁴⁵*Ibid.*, para. 7.291.

¹⁴⁶*Ibid.*, para. 7.292.

¹⁴⁷*Ibid.*, para. 7.293.

¹⁴⁸*Ibid.*, para. 7.294.

circumstances.¹⁴⁹

emphasizes on appeal, the bond requirement had not been applied to its cigarette exporter at the time the Panel was established.¹⁵⁵ Having acknowledged this, however, we find no indication in the Panel Report to support the view that the Panel failed to consider the bond requirement as such, and instead undertook an analysis of a particular application or applications of the law.

108. We observe in this regard that the Panel said it would:

... consider the argument presented by Honduras in the sense that there is no liability that the bond requirement would serve to secure, as well as the two responses from the Dominican Republic: (i) that the bond serves as a guarantee of tax liabilities in the event of latter reassessments and adjustments of the tax liability of taxpayers; and, (ii) that it serves as a guarantee of compliance with internal tax obligations other than the Selective Consumption Tax.¹⁵⁶

This statement indicates that the Panel intended to undertake a general examination of the bond requirement, and, in particular, the types of tax liabilities that it serves to guarantee. In this statement, the Panel foreshadows an analysis of the characteristics of the measure as such. There is no indication in this statement that the Panel intended to consider particular applications of the measure at all.

109. After considering the issue, the Panel found that the bond requirement "would serve to guarantee" payment of Selective Consumption Tax not paid by an importer at the time of importation, in the event that the tax was reassessed and adjusted subsequent to importation.¹⁵⁷ In addition, the Panel found no reason to question the assertion of the Dominican Republic authorities that they "regard the bond as a guarantee of compliance for internal tax obligations such as the tax on the transfer of goods and services ('ITBIS') and the income tax."¹⁵⁸ Neither of these findings refers to a particular application of the bond requirement; rather, each is in the nature of a general finding regarding the obligations that the bond requirement, as such, secures. We therefore reject the argument of Honduras insofar as it asserts that the Panel failed to examine the bond requirement as such, as opposed to particular applications of the bond requirement.

110. We turn to the second dimension raised in the Article 11 appeal by Honduras and observe that much of Honduras' argument focuses not on the distinction between "as such" claims and "as applied" claims, but rather on the nature of the *evidence* that will be relevant to an "objective assessment" of an "as such" claim. Honduras thus contends that, because the "bond requirement stated unambiguously that the tax obligation secured by the bond was the Selective Consumption Tax, and

¹⁵⁵See Honduras' other appellant's submission, paras. 3 and 14.

¹⁵⁶Panel Report, para. 7.286.

¹⁵⁷*Ibid.*, para. 7.292.

¹⁵⁸*Ibid.*, para. 7.293.

nothing more", the "Panel should have ... examined only ... the terms of the legislation and [should] not have relied on the unsubstantiated views of one officer of an agency of the Dominican Republic."¹⁵⁹ In this way, a key basis for Honduras' assertion that the Panel failed to undertake the objective assessment required by Article 11 of the DSU is that "the Panel did not undertake an analysis of the legislation *alone*".¹⁶⁰

111. Honduras' argument in this regard takes issue with the Panel's treatment of the evidence before it. The Appellate Body has emphasized repeatedly that it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings and that the Appellate Body "will not interfere lightly with the panel's exercise of its discretion".¹⁶¹ We note also that, in *US – Carbon Steel*, the Appellate Body indicated that the analysis of a Member's municipal law (such as the bond requirement at issue in this dispute) requires a panel to consider and weigh the evidence put forward by the parties:

The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of affidavits, transcripts, and other documents.

113. In this case, the Panel took into account the legal provision establishing the bond requirement as well as supplementary evidence, put forward by the Dominican Republic, in the form of a letter from the Dominican Republic Director-General of Internal Taxes.¹⁶³ The letter from the Director-General of Internal Taxes indicates that, in the exercise of their broad powers to enforce the tax laws, the Dominican Republic tax authorities may apply the proceeds of the bond toward payment of taxes other than the Selective Consumption Tax.¹⁶⁴ The position taken by the Director-General of Internal Taxes in the letter relates to the scope of its enforcement powers with respect to the uses to which the bond may be put; it is not an interpretative statement of Article 376 of the Tax Code. Honduras does not appear to have put forward evidence that would call into question or otherwise rebut the statements made in the letter of the Director-General of Internal Taxes concerning the scope of the enforcement powers of the Dominican Republic tax authorities. As the question of the possible uses to which the bond might be put was a contentious issue before the Panel, and because Exhibit DR-12 provided information relevant to this issue, we do not think that the Panel exceeded its margin of discretion in considering and giving some weight to that letter. Accordingly, we reject Honduras' claim that the Panel failed to meet its obligations under Article 11 of the DSU in its consideration of this issue.

114. Finally, we *Accordi/F312*

appears to us that the Panel in this case also considered all of the evidence that was before it. Accordingly, although the facts of this case differ from *India – Patents (US)*, the panels in each case followed the same—correct—approach in taking into account relevant factual information presented by the parties.

115. For all these reasons, we *find* that the Panel conducted an objective assessment of Honduras' claims regarding the bond requirement as such, consistent with Article 11 of the DSU.

VIII. The Panel's Treatment of Honduras' Contentions Regarding the Timing of Payment of the Selective Consumption Tax

116. We turn, finally, to address Honduras' appeal in respect of the Panel's treatment of its contentions regarding the timing of payment of the Selective Consumption Tax.

117. Before the Panel, Honduras claimed that the bond requirement accorded treatment less favourable to imported cigarettes than to domestic cigarettes contrary to Article III:4 of the GATT 1994. This was because, according to Honduras, the bond served to guarantee payment only of the Selective Consumption Tax. In the case of domestic producers, the Selective Consumption Tax is due on the twentieth day of the month following the taxable transaction. By contrast, in the case of imports, the Selective Consumption Tax is payable immediately upon importation. Accordingly, in the case of an importer, following importation there is simply no tax liability for the bond to secure.¹⁶⁵ Honduras submitted that this accorded less favourable treatment to imported cigarettes, compared to domestic production because:

[t]his accords domestic producers the opportunity to earn interest income on the Selective Consumption Tax for a period of 20-50 days. On the other hand, importers have to pay the Selective Consumption Tax in advance. This entails either financing costs or opportunity costs on the part of the importers.¹⁶⁶

118. Ultimately, the Panel rejected Honduras' claim under Article III:4 of the GATT 1994 in respect of the bond requirement on several grounds. It dealt with Honduras' contentions regarding the absence of tax liabilities for importers secured by the bond in two ways. First, it accepted the submissions of the Dominican Republic that, notwithstanding the payment of Selective Consumption Tax at the time of importation, the bond nevertheless served to secure tax obligations; these included payment of the Selective Consumption Tax in the case of reassessment and adjustment. The Panel also accepted that the tax authorities of the Dominican Republic regard the bond as security for

¹⁶⁵See Panel Report, paras. 7.268 and 7.284.

¹⁶⁶*Ibid.*, para. 7.268.

payment of taxes other than the Selective Consumption Tax.¹⁶⁷ Secondly, with respect to the possibility that domestic producers could earn interest on the value of the tax liability during the period between a taxable transaction and the moment when payment of the tax became due, while importers were forced to bear financing costs in respect of the tax paid at the time of importation, the Panel found this matter to be distinct from Honduras' claims in respect of the bond requirement.¹⁶⁸ It reasoned that, although the "claim on the bond requirement is part of the terms of reference of the Panel", there was "nothing in the request for establishment of the Panel that would lead to the conclusion that the Panel would be asked to make any finding regarding the difference in timing of the payment of the Selective Consumption Tax between domestic producers and importers."¹⁶⁹ The Panel concluded, therefore:

... that Honduras's claim regarding the different costs for domestic producers and importers arising from the time of payment of the

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the conditions of competition between imported and domestic cigarettes. In addressing this issue, the Panel noted, in paragraph 7.284 of the Panel Report, Honduras' argument that, with respect to imported cigarettes, the Selective Consumption Tax is collected upon importation, whereas for domestic cigarettes, the tax may be paid up to the twentieth day of the month following that in which the sale is made. The Panel then indicated it would:

... consider the argument presented by Honduras in the sense that there is no liability that the bond requirement would serve to secure, as well as the two responses from the Dominican Republic: (i) that the bond serves as a guarantee of tax liabilities in the event of latter reassessments and adjustments of the tax liability of taxpayers; and, (ii) that it serves as a guarantee of compliance with internal tax obligations other than the Selective Consumption Tax.¹⁷⁶

124. In this way, the Panel Report shows that the Panel addressed Honduras' argument regarding the timing of payment for the Selective Consumption Tax and the two responses from the Dominican Republic as a whole. Ultimately, the Panel found that importers do bear liabilities that are secured by the bond. Thus, although the Panel did not consider specifically and in detail Honduras' contentions regarding the timing of payment of the Selective Consumption Tax in its analysis of the bond requirement, it reached a view on the facts that was sufficient for it to reject Honduras' theory that the bond secured no liabilities for importers. In that light, we do not believe that the Panel committed any error in the manner in which it dealt with the timing of payment of the Selective Consumption Tax, insofar as this was relevant to the question of whether the bond secures tax liability for importers. The Panel did not overlook or ignore the contentions advanced by Honduras on this point. Rather, the Panel Report reveals that the Panel bore these considerations in mind in the context of a global analysis of the question whether the bond secures tax liability for importers.

125. In any event, we note that there is no obligation upon a panel to consider each and every argument put forward by the parties in support of their respective cases, so long as it completes an objective assessment of the matter before it, in accordance with Article 11 of the DSU.¹⁷⁷

126. Nor do we see error in the Panel's finding that, insofar as Honduras' contentions represented a separate allegation of inconsistency with Article III:4 of the GATT 1994, those contentions were *claims* in respect of a measure not specified in the request for the establishment of the Panel. We also note, as pointed out by the Dominican Republic¹⁷⁸, that the issue of the timing of payment of the

¹⁷⁶Panel Report, para. 7.286.

¹⁷⁷Appellate Body Report, *EC – Poultry*, para. 135.

¹⁷⁸Dominican Republic's appellee's submission, para. 79.

Selective Consumption Tax is not dealt with in the legislative provisions identified by Honduras in connection with its claims against the bond requirement. In this light, we agree with the Panel that:

[w]hether imported cigarettes may be accorded less favourable treatment than the like domestic products due to the difference in the time of payment of the Selective Consumption Tax is ... a different issue from the bond requirement, although the two may be tangentially related. Although the bond would serve as a guarantee for the payment of the Selective Consumption Tax and other liabilities, if there was any challenge against the conditions for payment of the tax, that challenge would not have to do with the bond requirement, but with the rules on the tax itself. The time of payment of the Selective Consumption Tax is not part of the bond requirement.¹⁷⁹

127. Accordingly, because such a challenge was not included in the panel request, we see no error in the Panel's finding that such a matter was outside its terms of reference. For these reasons, we *find no error* in the Panel's treatment of Honduras' contentions regarding the timing of payment of the Selective Consumption Tax.

IX. Findings and Conclusions

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

- (a) *finds no error* in the Panel's interpretation and application of the term "necessary" in Article XX(d) of the GATT 1994; *finds it unnecessary* to complete the analysis of the Dominican Republic's defence under Article XX(d) of the GATT 1994; and, consequently, *upholds* the Panel's finding, in paragraphs 7.232, 7.233 and 8.1(e) of the Panel Report, that the tax stamp requirement is not justified under Article XX(d) of the GATT 1994;
- (b) *finds* that the Panel made an objective assessment of the facts of the case, as required by Article 11 of the DSU, in its examination of Exhibits DR-8 and DR-29;
- (c) *upholds* the Panel's finding, in paragraphs 7.311, 7.316, and 8.1(f) of the Panel Report, that Honduras failed to establish that the bond requirement accords less favourable treatment to imported cigarettes than that accorded to like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994;

¹⁷⁹Panel Report, para. 7.307.

- (d) *finds* that the Panel made an objective assessment of the matter before it, as required by Article 11 of the DSU, in its consideration of Honduras' claim against the bond requirement "as such"; and,
- (e) *finds no error* in the Panel's treatment of Honduras' contentions regarding the timing of payment of the Selective Consumption Tax.

129. At the oral hearing, the participants agreed that the tax stamp regime as a whole had been altered by a new decree in October 2004.¹⁸⁰ Both participants nevertheless requested the Appellate Body to rule o

Signed in the original in Geneva this 7th day of April 2005 by:

Luiz Olavo Baptista
Presiding Member

John Lockhart
Member

Giorgio Sacerdoti
Member

ANNEX 1

**WORLD TRADE
ORGANIZATION**

WT/DS302/8
24 January 2005
(05-0297)

Original: English

**DOMINICAN REPUBLIC – MEASURES AFFECTING THE IMPORTATION
AND INTERNAL SALE OF CIGARETTES**

Notification of an Appeal by the Dominican Republic
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 24 January 2005 , from the Delegation of the Dominican Republic, is being circulated to Members.

Pursuant to Articles 16.4 and 17.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the Dominican Republic appeals certain issues of law and legal interpretation in the Panel Report in *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* (WT/DS302/8) 3T

ANNEX 2

**WORLD TRADE
ORGANIZATION**

WT/DS302/9
7 February 2005
(05-0517)

Original: English

**DOMINICAN REPUBLIC – MEASURES AFFECTING THE IMPORTATION
AND INTERNAL SALE OF CIGARETTES**

Notification of an Other Appeal by Honduras
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 7 February 2005, from the Delegation of Honduras, is being circulated to Members.

Pursuant to Rule 23 of the Appellate Body's Working Procedures for Appellate Review, Honduras hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, (the "Panel Report") and certain legal interpretations developed by the Panel in that Report.

Honduras seeks appellate review of:

- a) the Panel's findings and conclusion set out in paragraphs 7.291-7.294 that there are tax liabilities in addition to the Selective Consumption Tax that the bond requirement secures;
- b) the Panel's findings and conclusion, set out in paragraphs 7.297-7.301 of the Panel Report, that it was not demonstrated that the fixed amount of the bond accords to imported cigarettes treatment less favourable than that accorded to domestic cigarettes;
- c) the Panel's findings and conclusion, set out in paragraphs 7.306-7.308 of the Panel Report, that the difference in timing of the payment of the Selective Consumption Tax between domestic producers and importers in connection with the bond is not a matter within the Panel's terms of reference; and
- d) the Panel's conclusion, set out in paragraphs 7.310-7.311, that Honduras had failed to establish that the bond requirement accords less favourable treatment to imported cigarettes than that accorded to the like domestic products.

The above findings and conclusions are based on the following legal errors:

- the Panel did not make an objective assessment of the matter before it, namely, Honduras's challenge to the bond requirement on its face, because it examined the "application" of the bond requirement, contrary to Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") (paras. 7.291 – 7.294 of the Panel Report);
- the Panel erred in examining the market conditions in the Dominican Republic in order to determine the consistency of the bond requirement with Article III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT") (paras. 7.297 – 7.301 of the Panel Report);
- the Panel's error was compounded by the fact that the Panel made unsubstantiated assumptions with respect to the per-unit cost of the bond fee for importers, did not determine the per-unit cost of the bond fee for domestic producers and did not make the comparison between the per-unit costs for importers and domestic producers (paras. 7.297 – 7.301 of the Panel Report);
- the Panel erred in its finding that a difference in costs for importers of posting the bond do not alter the conditions of competition in the Dominican Republic's market and, therefore, do not create less favourable treatment for imported products within the meaning of Article III:4 of the GATT (paras. 7.297 – 7.301 of the Panel Report);
- the Panel failed to make a finding that importers face an additional burden compared to domestic producers, even though only importers have to post the bond and pay the Selective Consumption Tax upon importation, which is contrary to the requirement of Article III:4 of the GATT, (paras. 7.292 – 7.294 of the Panel Report); and
- the Panel erred in characterising the difference in timing of the payment of the Selective Consumption Tax in connection with the posting of the bond as a separate claim which was not within the terms of reference of the Panel (paras. 7.306 – 7.308 of the Panel Report).

Honduras requests the Appellate Body to reverse or modify, where appropriate, the findings or conclusions of the Panel. The provisions of the WTO Agreement that Honduras considers the Panel to have erroneously interpreted or applied are Article III:4 of the GATT and Article 11 of the DSU.
