

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

Report of the Panel

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TABLE OF WTO CASES CITED IN THIS REPORT

Short Title

Full Case Title and Citation

Short Title	Full Case Title and Citation
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the</i>

Short Title	Full Case Title and Citation
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS165/AB/R, DSR 2001:II, 413
<i>US – FSC</i>	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
<i>US – FSC</i>	Panel Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/R, adopted 20 March 2000, as modified by the Appellate Body Report, WT/DS108/AB/R, DSR 2000:IV, 1675
<i>US – FSC</i> (Article 21.5– EC)	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Steel Plate</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Steel Plate from India</i> , WT/DS206/R and Corr.1, adopted 29 July 2002
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
<i>US – Wool Shirts and Blouses</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R, DSR 1997:I, 343

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<i>Canada – FIRA</i>	Panel Report, <i>Canada – Administration of the Foreign Investment Review Act</i> , adopted 7 February 1984, BISD 30S/140.
<i>Canada – Provincial</i>	

restriction" under the Articles of Agreement of the International Monetary Fund. On 25 June 2004 the IMF sent its response to the Panel.⁶ The letter from the IMF was circulated to Parties and the Panel invited Parties to make comments. Honduras made some comments and the Dominican Republic did not submit any comments.

1.9 The Panel gave the parties a draft version of the descriptive part of the Report for their comments on 9 August 2004. The Panel issued its interim report to the parties on 21 September 2004. The Panel issued its final report to the parties on 20 October 2004.

II. FACTUAL ASPECTS

2.1 The specific measures at issue in the present case are the following:

2.2 The imposition by the Dominican Republic of a transitional surcharge on all imports, described as a "transitional surcharge for economic stabilisation" (*recargo transitorio de estabilización económica*), in accordance with Decrees 646-03 and 693-03.⁷ The surcharge currently amounts to 2 per cent of the c.i.f. value of the imported goods.

2.3 The imposition by the Dominican Republic of a foreign exchange fee on all imports (*comisión de cambio*), in accordance with the Seventeenth Resolution of the Dominican Republic Central Bank's Monetary Board dated 24 January 1991 as amended, *inter alia*, by the First Resolution of 27 September 2001, the First Resolution of 20 August 2002, and the First Resolution of 22 October 2003. The current level of the fee is 10 per cent calculated on the value of the imports at the selling exchange rate for foreign currency. The surcharge applies to both bound and unbound tariff items.

2.4 The requirement by the Dominican Republic that tax stamps be affixed to cigarette packets in the territory of the Dominican Republic, pursuant to Article 37 of Decree 79-03 – Regulation on the Implementation of Section IV of the Tax Code (*Reglamento para la Aplicación del Título IV del Código Tributario de la República Dominicana*)⁸ and Articles 1 and 2 of Decree 130-02.⁹

2.5 The rules and the administrative practice used by the Dominican Republic in order to determine the tax base for the purpose of applying the Selective Consumption Tax (*Impuesto Selectivo al Consumo*) to cigarettes, in accordance with Article 367 of its Tax Code (*Código Tributario de la República Dominicana*)¹⁰, Article 3 of Decree 79-03 and Article I of General Rule 02-96.¹¹ More specifically, Honduras identifies three types of situations in this regard: (i) the regulations used to establish the value of imported cigarettes, in order to determine the tax base for the Selective Consumption Tax (SCT); (ii) the determination of the tax base for imported cigarettes in specific cases; and, (iii) the lack of publication of the surveys conducted by the Dominican Republic Central Bank that are used to determine the value of cigarettes for the purpose of applying the SCT.

⁶ Letter dated 25 June 2004 addressed to Chairman of the Panel, from the General Counsel of the International Monetary Fund, in response to Panel request for information (See Annex D).

⁷ The text of Decree 646-03, dated 30 June 2003, and Decree 693-03, dated 16 July 2003, of the Dominican Republic was submitted by Honduras, as Exhibit HOND-2.

⁸ The text of Decree 79-03 of the Dominican Republic, dated 4 February 2003, approving the Regulations on the implementation of Section IV of the Tax Code (*Reglamento para la Aplicación del Título IV del Código Tributario de la República Dominicana*, the Regulation), was submitted by Honduras, as Exhibit HOND-4.

⁹ The text of Decree 130-02 of the Dominican Republic, dated 11 February 2002, was submitted by Honduras, as Exhibit HOND-5.

¹⁰ Portions of the text of the Dominican Republic Tax Code, Law 11-92 (*Código Tributario de la República Dominicana*, as modified by Law 147-00) were submitted by Honduras, as Exhibit HOND-6.

¹¹ The text of General Rule 02-96 of the Dominican Republic, dated 1 June 1996, was submitted by Honduras, as Exhibit HOND-7.

2.6 The requirement by the Dominican Republic that importers of cigarettes post a bond to ensure payment of taxes, pursuant to Article 376 of the Tax Code and Article 14 of Decree 79-03.

III.

the Panel find that the requirement is justified by the general exception in Article XX(d) of the GATT.

- to dismiss the claim that the requirement that importers of cigarettes post a bond is inconsistent with Article XI of the GATT or, in the alternative, with Article III:4 of the GATT. Nevertheless, should the Panel find that this requirement is inconsistent with either Article XI or Article III:4, the Dominican Republic requests that the Panel find that the requirement is justified by the general exception in Article XX(d) of the GATT.
- to dismiss the claim that the transitional surcharge on imports is inconsistent with Article II:1 of the GATT.
- to dismiss the claim that the transitional foreign exchange fee is inconsistent with Article II:1 of the GATT or find that it is an exchange measure justified by Article XV:9(a) of the GATT.

IV. ARGUMENTS OF THE PARTIES

A.

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packets in these warehouses in the presence of tax inspectors. This requirement and their administrative procedures are established by Article 37 of Decree 79-03 and Articles 1 and 2 of Decree 130-02.

(d) The application of the Selective Consumption Tax for certain imported cigarettes

4.4 The Dominican Republic establishes a Selective Consumption Tax on certain products, such as tobacco products. In order to apply the tax rate to certain imported cigarettes, the Dominican Republic determines the value of these products based on the retail selling price of the so-called "nearest similar product". According to Article 367 (b) of the Tax Code, the determination of the value of domestic cigarettes for the purpose of the tax must be based on the retail selling price of each brand, as provided in the survey. By contrast, the tax base for imported cigarettes is the value of the "nearest similar product on the domestic market". There are no regulations in the Tax Code which establish the criteria and procedures that should be used to determine the "nearest similar product on the domestic market".

4.5 Furthermore, Article 3 of Regulation 79-03 reaffirms that the tax base for both domestic and imported cigarettes is the retail selling price as determined by the average market price in accordance with the survey. However, not all imported cigarettes are included in the survey and therefore, for these products, the Dominican Republic uses the price of the "nearest similar product". The Dominican Republic has not published the criteria that it uses to determine the "nearest similar product".

4.6 On the other hand, the General Rule 02-96 specifies that the tax base for the Selective Consumption Tax for domestic goods shall be determined on the basis of the price to the retailer of the product. Pursuant to this provision, the tax base for tobacco products, including domestic cigarettes, is determined by increasing by 20 per cent the listed price of the cigarettes. The survey is not used to establish the tax base for these domestic products.

4.7 Honduras exports to the Dominican Republic cigarettes of the brands *Viceroy* and *Belmont*. For the purpose of applying the Selective Consumption Tax to *Viceroy* cigarettes, the Dominican Republic bases the value of the imported product on what it considers to be the nearest similar product in the domestic market. In this regard, the Dominican Republic disregards the retail selling price of *Viceroy* as the relevant factor in determining the tax base for applying the Selective Consumption Tax. The Dominican Republic does not consider *Líder* cigarettes as the nearest similar product to *Viceroy* cigarettes, even though they both sell for the same retail selling price. The result is that *Viceroy* cigarettes are deemed to be selling at a retail price higher than the actual selling price and therefor.²⁵ - Tc 0 Ta15 1112-0.0628 Tc 0.917 Tw ice hipayctiva re. oiw (cig3-12.7ard, the Domcmoun5 e.185 -0. Viceroy

(b) The foreign exchange fee is inconsistent with Article II:1(b) of the GATT

(i) *The foreign exchange fee is a duty or charge other than an ordinary customs duty*

4.23 As noted above, the Dominican Republic imposes a foreign exchange fee on all imports at the same a -12.75 .75aistt a foreig -17 customs duty

(c) The requirement to affix a stamp in the territory of the Dominican Republic is inconsistent with Article III:4 of the GATT

4.27 The Appellate Body has stated that, in order to establish a violation of Article III:4, ~~with~~ (c)

4.31 First, the importer must reopen the boxes and then reopen the cigarette cartons in order to remove the cigarette packets so that the stamp may be affixed on the cigarette packets. The sheets of stamps have to be individually cut and then individually glued onto the packets. Subsequently, the cigarette packets have to be replaced in the cartons and then replaced in the boxes. All these

overall production process is US\$0.01 per thousand cigarettes; that is 0.1 per cent of the c.i.f. average cost. It is reasonable to assume that these costs in terms of percentage would be the same for a domestic producer in the Dominican Republic.

4.34 In the light of the foregoing analysis, Honduras submits that the requirement to affix the stamp in the Dominican Republic modifies the conditions of competition for imported cigarettes in the Dominican Republic to their detriment, and thus treats imported cigarettes less favourably. Therefore, Honduras submits that the measure at issue is inconsistent with Article III:4 of the GATT.

(d) The application of the Selective Consumption Tax for certain imported cigarettes is inconsistent with Article III:2 of the GATT

4.35 Based on the methodology set out by the Appellate Body regarding the analysis of a claim under Article III:2, first sentence, Honduras submits that the measure at issue is inconsistent with Article III:2 of the GATT for the reasons set out below.

(i) *Domestic and imported cigarettes are "like products" within the meaning of Article III:2, first sentence*

4.36 The Appellate Body has stated that it agrees "with the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis".¹⁶ Honduras has established above that imported and domestic cigarettes are "like products". If the Panel were to find that domestic and imported cigarettes were not like products, Honduras submits that domestic and imported cigarettes are nevertheless directly competitive or substitutable and are not similarly taxed in accordance with Article III:2 and Note *Ad Article III:2* of the GATT.

(ii) *Certain imported cigarettes are subject to internal taxes in excess of those applied to like domestic products*

4.37 The Dominican Republic treats like products which sell for the same retail selling price differently. In other words, the Dominican Republic establishes the tax base for certain imported cigarettes such as *Viceroy* on the basis of what it determines to be the retail selling price of the "nearest similar product", whereas it determines the tax base for its domestic cigarettes such as *Líder* and *Marlboro* on their actual retail selling prices. This difference in approach in determining the tax base has led to various complaints being filed with the courts in the Dominican Republic.

4.38 The difference in approach has resulted in lower-priced imported cigarettes being taxed at a rate higher than their actual selling price. In practical terms, this means that cigarettes like *Viceroy* which sell for RD\$18 are taxed at a higher rate than the like domestic products, which sell for the same retail selling price.

4.39 Honduras provides the following table to illustrate the retail selling price of the relevant products:

¹⁶ Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 20.

Brand	Retail Selling Price	Selective Consumption Tax paid	per cent Actual Tax burden
<i>Kent</i>	RD\$ 22.00	RD\$ 6.54	29.73 per cent
<i>Marlboro</i>	RD\$ 26.00	RD\$ 7.73	29.73 per cent
<i>Belmont</i>	RD\$ 20.00	RD\$ 6.13	30.65 per cent
<i>Nacional</i>	RD\$ 24.00	RD\$ 7.36	30.65 per cent
<i>Viceroy</i>	RD\$ 18.00	RD\$ 6.54	36.33 per cent
<i>Líder</i>	RD\$ 18.00	RD\$ 5.34	29.66 per cent

(Information applicable during the period of 17 March – 1 August 2003.)

4.40 From this table, it can be noted that the retail selling prices for *Viceroy* and *Líder* are the same, but they are not taxed on the same basis.

4.41 Due to this difference in taxation, the Selective Consumption Tax applied to Honduras's *Viceroy* cigarettes is in excess of the Selective Consumption Tax applied to its like domestic product, *Líder*. *Viceroy* cigarettes have a higher tax burden of 36.33 per cent as compared to the tax burden of 29.66 per cent for *Líder*. The measure at issue is therefore inconsistent with Article III:2, first sentence, of the GATT.

(e) The failure to establish and/or apply transparent and generally applicable criteria for determining the value of imported cigarettes is inconsistent with Article X:3(a) of the GATT

4.42 The applicable provision is Article X:3(a) of the GATT. This provision applies to the measures falling under the scope of Article X:1 of the GATT

(f) The failure to publish the surveys that are used to determine the Selective Consumption Tax is inconsistent with Article X:1 of the GATT

(i) *The surveys to be used to determine the rates for the Selective Consumption Tax fall under Article X:1*

4.47 Article 3 of Regulation 79-03 confirms that the tax base for both domestic and imported cigarettes is the retail selling price as determined by the average market price in accordance with the survey. The surveys conducted by the Dominican Republic's Central Bank are part of the regulations or administrative rulings of general application pertaining to the determination of the Selective Consumption Tax. Therefore, the survey is a component of the legislation on the Selective Consumption Tax, covered by Article X:1 of the GATT.

(ii) *The surveys to be used to determine the Selective Consumption Tax have not been published*

4.48 However, the survey has not been made publicly available. According to Article X:1, the survey should have been published promptly in such a manner as to enable governments and traders to become acquainted with them. A WTO Panel has stated that: "[i]ndeed, Article X:1 requires the prompt publication of trade-related regulation 'so as to enable governments and traders to become acquainted with them.'"¹⁷

4.49 However, the Dominican Republic has not published the survey in order to enable governments and traders to become acquainted with their content. Therefore, the Dominican Republic has acted inconsistently with Article X:1.

(g) The requirement to post a bond is inconsistent with Article XI:1 of the GATT, or, in the alternative, if the bond requirement is determined to be an internal measure, is inconsistent with Article III:4 of the GATT

4.50 The applicable provision is Article XI:1 of the GATT. However, alternatively, if the bond requirement were considered to be an internal measure, then the provisions of Article III:4, which is cited above, would apply.

(i) *The requirement to post a bond as stated in the applicable law is a restriction inconsistent with Article XI:1*

4.51 In the light of Article 14 of the Regulation, importation would not be allowed unless the bond requirement is complied with. Therefore, the bond requirement constitutes a restriction imposed on the importation of cigarettes into the Dominican Republic. In of 40iWTO jurisprudence

the bond is a security in the event that the tax obligation is not properly discharged. However, importers have to pay the full amount of the Selective Consumption Tax upon the importation of the product. Therefore, with respect to the importers, there is no Selective Consumption Tax liability that the bond requirement would secure. In addition, the bond requirement is a fixed amount of RD\$ 5 million that must be posted by each importer and domestic producer. In contrast, the Selective Consumption Tax is dependent upon variable factors such as monthly volumes of sales and variations in the retail selling price according to market factors. Therefore, there is no direct relationship between the amount required to be guaranteed (i.e. the fixed amount of the bond) and the actual amount giving rise to the tax. These two amounts are not commensurate. This discrepancy is illustrated by the fact that, as of December 2003, an importer that accounted for, say, 4 per cent of the market would have had to pay RD\$4.1 million a month for the Selective Consumption Tax, whereas it would have had to post the bond for RD\$5 million. By the same token, a domestic producer which accounted for, say, 88 per cent of the market would have had to pay RD\$91.5 million a month for the Selective Consumption Tax, whereas it would have had to post the bond for RD\$5 million.

4.53 In the alternative, Honduras submits that the measure at issue for these reasons is inconsistent with Article III:4 of the GATT.

B. FIRST WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. Introduction

4.54 The claims raised by Honduras target six measures, which can be classified in one of the following categories: (1) dead measures¹⁸

(i) *Selective Consumption Tax*

4.59 Honduras's claims under Articles III:2 and X:3(a) of the GATT concerning the SCT are based on the former – and now outdated – provisions of Article 367 of the Dominican Republic Tax Code. Law 3-04 of 9 January 2004 (published on 14 January 2004) amended Articles 367 and 375 of the Tax Code.¹⁹ Articles

conditions of competition in the market place between importers and domestic producers. Article III:4 requires Members to refrain from modifying or upsetting those conditions of competition to the detriment of importers in a manner that affords protection to the domestic producers. It does not require that Members modify the conditions of competition so as to compensate for inherent differences between imported and domestic products and ensure perfect equality in the conditions of competition. The essence of Honduras's argument is that any cost associated with the performance of legitimate regulations must be borne by the State.

4.65 The examination of whether a measure involves "less favourable treatment" of imported products within the meaning of Article III:4 of the GATT 1994 "must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'".²² The thrust of the measure is to enforce the tax laws of the Dominican Republic and avoid the endemic problem of trade in smuggled cigarettes, which has been estimated to lead to US\$25-30 billion in total lost tax revenue by governments around the world annually.²³

4.66 The additional costs that Honduras points to in its first written submission are costs associated with compliance with non-discriminatory internal measures. Also, many of the "additional steps" that Honduras refers to are either avoidable or are steps that domestic producers also have to perform. In any event, the effect that the measure has on importers is negligible. Imports by the Honduran cigarette producer *British American Tobacco* (BAT) into the Dominican Republic increased by more than 80 per cent in value in 2003, compared with the previous year, from US\$454,497 to US\$818,307.²⁴

4.67 The Appellate Body and Panels have held consistently that the general principle in Article III:1 informs the other paragraphs of Article III, including paragraph 4, and guides its interpretation.²⁵ The Panel must determine, therefore, on the basis of the evidence submitted by the complainant, whether the measure has "protective application", i.e. is it applied so as to afford protection to domestic producers.²⁶

4.68 In this case, an examination of the design, architecture, and revealing structure of the requirement to affix a stamp in the territory of the Dominican Republic reveals that the measure is not applied so as to afford protection.²⁷ That conclusion is borne out by the following relevant facts and circumstances, which must be given full consideration:

- (a) The tax stamp is a legitimate, internationally-recognized method to prevent and stymie trade in smuggled cigarettes and the resulting loss of tax revenue.
- (b) The exact same requirement to affix the tax stamps in the territory of the Dominican Republic is imposed on both domestic producers and importers.²⁸
- (c) The effective enforcement of the tax stamp legislation requires the presence of inspectors from the DGII at the production facilities of domestic producers and the facilities of importers of cigarettes at the time the stamps are affixed.²⁹

²² Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 215.

²³ Framework Convention Alliance, "The FCTC and Tobacco Smuggling: NGO Briefing for the

- (d) The Dominican Republic has neither the right nor the resources to relocate DGII officials to foreign countries to enforce the laws of the Dominican Republic abroad and outside of its jurisdiction.
- (e) The costs of complying with legitimate and non-discriminatory laws and regulations in the territory of the State enforcing such laws are inherent in the conduct of international trade. The cost to the importer of Honduran cigarettes *BAT* of complying with the Dominican Republic tax regulation is estimated at US\$65,641.³⁰
- (f) There is concrete evidence in the Dominican Republic that allowing tax stamps to be shipped and affixed abroad results in forgery of such tax stamps and smuggling of the products in question.³¹
- (g) The alleged associated cost of complying with the stamp requirement is a minimal expense that does not have a protective or discriminatory effect on the competitive conditions of importers of cigarettes in the Dominican Republic.
- (h) The tax stamp has no protective effect in practice, as demonstrated by the significant increase in imports of cigarettes by *BAT*

33

4.71 On the other hand,

³⁰Calculation by the Dominican Republic, based on official statistics of imports of *BAT* from 3

4.72 The remaining regulatory "option" that would be theoretically available to the Dominican Republic would be to allow foreign producers to affix stamps abroad without the supervision of the DGII. As experience has shown, that would mean that the Dominican Republic would have to lower its desired level of enforcement. The Appellate Body has recognized, however, that "[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent la

4.80 Moreover, although Article 376 of the Tax Code appears to refer only to the SCT, in practice the Tax Authority of the Dominican Republic treats the bond as a guarantee of compliance with other internal tax obligations incumbent on the domestic producer and the importer of cigarettes.³⁹

4.81 The assertion by Honduras that there is no tax liability for importers that the bond can secure is in any case legally irrelevant for purposes of an examination under Article III:4. Furthermore, even if the timing of the payment of the SCT was legally relevant, which it is not, the issue is outside the terms of reference of the Panel.

4.82 Honduras has also not explained how a specific amount that applies equally to importers and to domestic producers accords treatment less favourable to importers than to domestic producers. The absence of a so-called "direct relationship" between the amount of the bond and the underlying obligation it guarantees applies equally to domestic producers and to importers. Honduras appears to suggest that any bond for a specific amount that guarantees payment of a variable amount is inconsistent with Article III:4 of the GATT.

4.83 Finally, the bond requirement is not applied by the Dominican Republic "so as to afford protection" to domestic producers of cigarettes. The design, architecture, and revealing structure of the bond requirement in Article 14 of Decree 79-03 confirms that the measure is not protectionist in scope, application, or effect.

(iii) *The requirement to affix stamps in the territory of the Dominican Republic and the requirement to post a bond are justified by Article XX(d) of the GATT*

4.84 Should the Panel find the Dominican Republic's stamp and/or bond requirements are inconsistent with other provisions of the GATT, it should nevertheless find these measures are justified because they are necessary to secure compliance with laws or regulations that are not GATT inconsistent in accordance with Article XX(d) and they are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, in accordance with the *chapeau* of Article XX.⁴⁰

The requirement to affix stamps in the territory of the Dominican Republic is justified by Article XX(d) of the GATT

4.85 The Dominican Republic's stamp requirement satisfies the requirements of Article XX(d) of the GATT.

4.86 First, the stamp requirement secures compliance with other Dominican Republic tax laws and regulations; particularly, the Dominican Republic Tax Code, including but not limited to the SCT for cigarettes. The stamp requirement is specifically under the supervision of the DGII, who is charged with securing compliance with the Dominican Republic Tax Code. The stamp requirement also helps prevent cigarette smuggling, which is a widespread problem intimately linked to tax compliance.

4.87 Second, the Dominican Republic Tax Code is consistent with the GATT; and Honduras has not challenged the GATT-consistency of the Tax Code. Moreover, the SCT on cigarettes, as amended by Law 3-04 of 9 January 2004, is consistent with the GATT⁴¹, and this measure is not at issue in this case.

³⁹ Letter from the Director General of Internal Taxes, dated 12 April 2004, submitted by the Dominican Republic as Exhibit DR-12.

⁴⁰ Appellate Body Report, *US – Gasoline*, p. 22.

⁴¹ Law 3-04, *supra* note 19.

4.88 Third, the stamp requirement is "necessary" to secure compliance with the Dominican Republic Tax Code and prevent cigarette smuggling. A measure need not be "indispensable" or "of absolute necessity" to be "necessary" within the meaning of Article XX(d).⁴² The contribution made by the measure to law enforcement, the importance of the common values at issue, and the impact on imports or exports must all be considered.⁴³ The greater the contribution to these factors, the more likely a measure is to be "necessary".⁴⁴

4.89 The stamp requirement contributes greatly to law enforcement because it allows Dominican Republic tax authorities to monitor the placement of stamps on cigarette cartons to ensure compliance with the Dominican Republic Tax Code and prevent cigarette smuggling. A WTO panel recognized that tax evasion could be addressed through prevention techniques, not solely through repressive enforcement strategies.⁴⁵

4.90 There is also international agreement that tax stamps are necessary to prevent cigarette smuggling. The International Conference on Illicit Tobacco Trade (ICITT) has identified tax stamps as a method of labelling that is necessary to constrain distribution of contraband.⁴⁶ The World Health Organization has also stressed the importance of marking cigarette packets.⁴⁷

4.91 Without strict enforcement of its tax laws, the Dominican Republic would face more serious problems of smuggling and tax evasion. Evidence shows that where tax stamps for alcohol are permitted to be affixed abroad, there is a greater risk of smuggling and tax evasion, including through forgery of tax stamps.⁴⁸

4.92 In addition, the slight impact that the measure has on imported cigarettes further supports the conclusion that the stamp requirement is "necessary" to secure compliance with the tax laws of the Dominican Republic. This slight impact is evidenced by the US\$65,641 per year estimated cost to the importer of Honduran cigarettes *BAT* of affixing tax stamps to cigarettes imported from Honduras, and the 80 per cent increase of imports by *BAT* into the Dominican Republic in 2003, compared with the previous year.⁴⁹ Moreover, any additional impact on imports arises from the inherent differences between imports and domestically manufactured goods.

4.93 The Dominican Republic has no reasonable alternatives to prevent tax evasion and cigarette smuggling that would meet the level of enforcement set by the Dominican Republic. The Dominican Republic has the right to determine the level of enforcement of its WTO consistent laws and regulations⁵⁰, and it has done so in a manner that is identical for imported and domestically produced cigarettes. Moreover, it is impractical for the Dominican Republic to

The stamp requirement also satisfies the *chapeau* of Article XX

4.95

important global interests and sovereign rights in

discrimination in the application of the Dominican Republic's bond requirement to imported cigarettes.

4.109 Finally, the application of the Dominican Republic's requirement that importers and domestic manufacturers of tobacco products post a bond is not a "disguised restriction on international trade". The bond requirement is not concealed or unannounced. It is published and available for all to see in Article 376 of the Tax Code and Article 14 of Regulation 79-03. It is not discriminatory, and therefore it is not a disguised restriction. Also, the design, architecture, and revealing structure of the Dominican Republic's bond requirement show no protective application or intent to pursue trade-restrictive objectives.

4.110 In conclusion, the Dominican Republic's requirement to post a bond is a measure that is necessary to secure compliance with the Dominican Republic Tax Code, which itself is consistent with the GATT. This requirement is not applied in a manner that constitutes either arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. Consequently, even if the Panel finds that this requirement is inconsistent with Article XI:1 or Article III:4 of the GATT, it must nevertheless find that this requirement is justified by Article XX(d) of the GATT.

(c) Temporary measures imposed on imports

(i) *The transitional surcharge is consistent with Article II:1 of the GATT*

4.111 Decree 646-03 of 30 June 2003, is no longer in force. It has been replaced by Law 2-04 of 4 January 2004 – enacted before the Panel was established – which establishes a transitional surcharge of 2 per cent on imports.⁶⁰ (The Dominican Republic will rebut Honduras's claim against the transitional surcharge as if it had addressed Law 2-04 of 4 January 2004 instead of Decree 646-03 of 30 June 2003. Nevertheless, the Dominican Republic does not waive its right to argue that Law 2-04 of 4 January 2004 is not within the terms of reference of the Panel.)

Honduras erroneously interprets Article II:1(a) of the GATT

4.112 Honduras misinterprets Article II:1(a) of the GATT. Article II:1(a) only prohibits less favourable treatment than provided for by each Member's Schedule, and as each Schedule records both ordinary customs duties and ODCs, the transitional surcharge cannot be inconsistent with Article II:1(a) solely by virtue of being a levy in addition to ordinary customs duties.

4.113 As Honduras's argument for inconsistency with Article II:1(a) derives from and is dependent on its claim that the transitional surcharge is inconsistent with Article II:1(b), second sentence, the Dominican Republic need not separately rebut Honduras's claim that this measure is inconsistent with Article II:1(a).

The Dominican Republic properly recorded ODCs in its Schedule of Concessions

4.114 Contrary to Honduras's contentions, the Dominican Republic did properly record ODCs applied to cigarettes as of

imposed by the Dominican Republic on cigarettes, including the transitional surcharge, is less than 30 per cent, the transitional surcharge is consistent with Article II:1(b), second sentence.

(ii) *The Dominican Republic has the right to maintain the Foreign Exchange Fee*

The transitional Foreign Exchange Fee is justified by Article XV:9(a) of the GATT

4.115 The Dominican Republic has the right under Article XV:9(a) of the GATT to impose the foreign exchange fee established by the decision of the Monetary Board of 22 October 2003. Where a Member implements exchange restrictions or exchange controls that are consistent with the International Monetary Fund Articles, those exchange measures cannot be the basis for a finding of violation of the GATT.

4.116 The transitional foreign exchange fee is an exchange restriction within the jurisdiction of the IMF, not a charge on imports within the jurisdiction of the GATT. It is provided for in a regulation of the Dominican Republic monetary authorities, not a regulation of the trade or customs authorities, and it applies to exchange transactions, not to import transactions as such. An exchange charge can legitimately be levied only on imports, as a means of implementing a multiple exchange rate system; if so, that does not alter the fact that the nature of the charge is an exchange charge, and not an import charge.

4.117 The practice of the GATT 1947, following the agreed standards of the IMF, was to determine whether a measure was an exchange measure not on the basis of the purpose or effect of the measure in question, but by applying the formal criterion of whether the measure involved a direct governmental limitation on the availability or use of exchange as such. The foreign exchange fee is an exchange measure because it is a direct governmental limitation on the availability or use of exchange as such. It would also qualify as an "exchange control" in the sense of Article XV:9(a), since it effectively and legitimately requires all payments to be channelled through the banking system.

4.118 The foreign exchange fee is being used by the Dominican Republic "in accordance with" the Articles of Agreement of the IMF, as provided in Article XV:9(a). The IMF was aware of the Dominican Republic's non-unified exchange rate and approved its retention until the end of December 2003. On 11 February 2004, the IMF Executive Board completed its first review of the Dominican Republic's performance under the 29 August 2003 stand-by arrangement, and approved the Dominican Republic's request to waive the non-observance of structural performance criteria regarding, *inter alia*, the unification of the foreign exchange market, the continuous performance criteria concerning accumulation of external arrears, exchange rate restrictions, and multiple currency practices.⁶²

The transitional Foreign Exchange Fee is consistent with Article II:1 of the GATT

4.119 Even if the Panel finds that the transitional foreign exchange fee is not an exchange measure justified by Article XV:9(a), the claim that it is inconsistent with Article II:1 must still fail because it is within the level of ODCs recorded in the Dominican Republic's Schedule.⁶³ Through its rectification of 14 September 1994, the Dominican Republic recorded in its Schedule XXIII the list of ODCs "applied by the Dominican Republic as of April 1994". According to that Schedule, a 30 per cent level of ODCs applied to cigarettes as of April 1994.⁶⁴ No Member, including Honduras,

⁶² International Monetary Fund Press Release No. 04/23, 11 February 2004, text at <http://www.imf.org/external/np/sec/pr/2004/pr0423.htm> (visited on 12 April 2004), submitted by the Dominican Republic as Exhibit DR-27.

⁶³ Additions to Schedules, Schedule XXIII – Dominican Republic, G/SP/3, *supra* note 61.

⁶⁴ *Ibid.*

notified any objection to the list of ODCs recorded by the Dominican Republic. Since the total level of ODCs currently imposed by the Dominican Republic on cigarettes, including the foreign exchange fee, is less than 30 per cent, the transitional foreign exchange fee must be found in conformity with Article II:1(b), second sentence.

4.120 The Dominican Republic has rebutted Honduras's claim that the transitional foreign exchange

costs. Necessarily, the affixation is not uniform, and the risk of technical and other imperfections is enhanced. For purposes of the final presentation to the ultimate consumer therefore, imported cigarettes are rendered less appealing than domestic cigarettes.

4.133 That the requirement that the tax stamps be affixed in the territory of the Dominican Republic in the presence of tax authorities is applied equally to both imported and domestic cigarettes is irrelevant in this instance as formal equality is the factor that precisely results in less favourable treatment to imported cigarettes as compared to domestic cigarettes. As Guatemala and the European Communities have referred to, less favourable treatment can arise both from formally different and formally identical treatment of imports and like domestic products. The Dominican Republic likewise

treatment to imported products, as compared to domestic products, by requiring the affixation of stamps in its territory and in the presence of its tax authorities.

4.138 The requirement to post a bond as a condition for the importation of cigarettes into the Dominican Republic is inconsistent with Article XI:1 of the GATT. Based on the distinction cited by the Dominican Republic between measures that fall under the scope of Article XI:1 and measures that fall under the scope of Article III, the requirement to post a bond is a condition for importation related to "the opportunities for importation itself". It applies prior to the entry of both domestic and imported cigarettes into the domestic market. Therefore, the requirement to post a bond does not affect "the competitive opportunities on the domestic market", and therefore, Article XI:1 applies, not Article III. The bond requirement operates as a "restriction" in the context of Article XI:1.

4.139 Even assuming that the Panel were to consider the bond requirement as an internal measure falling under Article III of the GATT, the bond requirement is inconsistent with Article III:1 of the GATT. Article III:1 of the GATT

4.143 Honduras presented specific arguments in support of its claims relating to the Selective Consumption Tax. The Dominican Republic did not present any substantive arguments in specific rebuttal of any of the arguments presented by Honduras in support of these claims. Instead, the sole defence presented by the Dominican Republic is that the claims of Honduras "are based on an outdated version of Article 367 of the Tax Code...", and that "all three claims target measures that the Dominican Republic eliminated on the same day this Panel was established". The Dominican Republic then concludes that the Panel should dismiss the claims of Honduras as "they are based on measures that no longer exist". Law 3-04 was signed by the President of the Dominican Republic on 9 January 2004, and was published in the Official Gazette on 14 January 2004. Through its assertion that "all three claims..." of Honduras in relation to the Selective Consumption Tax "... target measures that the Dominican Republic eliminated on the same day this Panel was established", the Dominican Republic seeks to convey that Law 3-04, published on 14 January 2004, is not in force as of 9 January 2004.

4.144 In any event, under the Constitution and the Civil Code of the Dominican Republic, laws take effect only after publication, and not earlier than the lapse of the periods specified in the Civil Code to be considered known in each part of the territory of the Dominican Republic.

4.145 Thus, Law 3-04 was not in force as of 9 January 2004, prior to its publication on 14 January 2004, and prior to the lapse of the periods provided by law for it to be considered known in each part of the territory of the Dominican Republic. As of 8 December 2003, when the request for the establishment of a Panel was made, the operative provisions of Article 367 of the Tax Code and related provisions that constitute the basis for the claims of Honduras were in force and were in existence. The Panel is therefore competent to examine measures existing as of that date. There are cogent policy reasons for upholding the competence of Panels to examine the WTO consistency of measures that are withdrawn after the request for the establishment of a Panel is made. If withdrawal of a measure after the request for the establishment of a Panel

tax base and the amount of the Selective Consumption Tax bear no relationship, likeness or similarity to the measures that Honduras is challenging. The new Article 367 of the Tax Code does not fall within the terms of reference of this Panel. The Dominican Republic would therefore ask the Panel, as a preliminary matter, to reject Honduras's complaint with respect to these two measures.

4.148 Honduras objects to the bond requirement on the basis of Article

4.155 The only other argument adduced by Honduras against the bond is that its amount is fixed while the amount of the tax is variable. In other words, Honduras considers that a bond whose amount is not a percentage of the tax obligation to which it corresponds is a measure which results in less favourable treatment for imported products. The fact that the amount of the bond is fixed does not imply less favourable treatment for imported cigarettes. Honduras fails to demonstrate that there is discrimination against imported cigarettes in the case of the bond.

4.156 The Appellate Body has stated that Article III:4 is a specific expression of the overarching "general principle" set forth in Article III:1.⁷² In addition to altering the conditions of competition to the detriment of the imported product, the measure in question must be *applied* so as to afford protection to domestic production.⁷³

4.157 The bond is not applied so as to afford protection to domestic production. The Directorate General of Internal Taxes, which is the authority responsible for enforcing the bond, has no discretion regarding its application. The amount of the bond is the same, and it is enforced in exactly the same way. The cost for the importer and for the domestic producer is also identical. Both obtain the bond from insurance companies or banking institutions accredited in the country, which fix their charges according to the laws of the market.

4.158 Honduras's arguments in support of its objection to the stamp requirement must be rejected. Honduras's line of reasoning leaves the importing country no choice but to forego its desired level of enforcement of tax laws or take the measures necessary to apply its laws extraterritorially, regardless of the cost to the government, and regardless of what public international law has to say on the subject.

4.159 The stamp is an internationally recognized instrument for controlling tobacco imports, and its purpose is to prevent the smuggling of cigarettes and the resulting tax evasion.

4.160 GATT and WTO jurisprudence recognize that there can be *de facto* discrimination when the law accords identical treatment to domestic and imported products.⁷⁴ However, differences in the conditions of competition in cases in which treatment is identical do not necessarily mean that there is *de facto* discrimination. In order to establish whether there is such discrimination, it is necessary to determine whether the identical treatment fulfils a legitimate objective, or whether its sole purpose is to protect domestic production. In this case, the identical treatment accorded by the law -i.e. the requirement that the stamp be affixed in the presence of internal tax inspectors- is necessary to ensure the desired level of enforcement of the Dominican Republic's tax laws, whose WTO-consistency Honduras has not challenged.

4.161 It is important to bear in mind here the Appellate Body's recognition that "[i]t is not open to doubt that Members of the WTO have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations".⁷⁵ The Dominican Republic decided that the best way to secure compliance with its tax laws in the case of cigarettes was through direct supervision by the Directorate General of Internal Taxes of the affixation of the stamps. This is what the Dominican Republic determined to be the necessary control measure to ensure the desired level of enforcement of its tax laws. In cases where there has been no direct supervision by the Directorate General of Internal Taxes (DGII) of the affixation of stamps, there have been problems of smuggling and stamp

⁷² Appellate Body Report, *EC – Asbestos*, para. 93.

⁷³ See Panel Report, *Canada – Periodicals*, para. 5.38.

⁷⁴ GATT Panel Report, *US – Section 337*, para. 5.11.

⁷⁵ Appellate Body Report, *Korea – Various Measures on Beef*, para. 176.

forgery. As the Dominican Republic demonstrated with documentary evidence, this has occurred in the case of alcoholic beverages.⁷⁶

4.162 The only way to maintain the desired level of enforcement -that is, to prevent tax evasion by requiring that the stamp be affixed under the supervision of inspectors- while at the same time permitting, as Honduras would require, that the stamp be affixed during the production of the

4.163 It is costly because it would require the Dominican Republic to have more inspectors⁷⁷ out public Dominican laws in the territory of other sovereign States in which it has neither jurisdiction nor State enforcement.⁷⁸ obligation would require the Dominican Republic to have an inspector in each one of its provinces.⁷⁹

4.164 Besides, to require that the stamps be affixed under the supervision of inspectors of the Directorate General of Internal Taxes in the territory of the Dominican Republic would be to create whatever differences in the conditions of competition are not the result of the laws of the Dominican Republic. The presence of official inspectors is no different in nature from the additional cost of transport,⁸⁰

4.165 Even

discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. The stamp requirement meets the three criteria of Article XX(d). First, it is a measure which *secures* compliance with domestic laws; second, these laws are *consistent*

4.174 The stamp requirement is also consistent with the *chapeau* of Article XX. The measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail. As in the case of domestically produced cigarettes, a tax stamp must be affixed in the presence of inspectors from the Directorate General of Internal Taxes to every packet of imported cigarettes, regardless of its origin. Consequently, there is no discrimination of any kind within the meaning of Article XX.

4.175 Lastly, the measure is not a disguised restriction on international trade. The stamp requirement fulfils a legitimate objective: to prevent smuggling and secure the payment of taxes. There can be no trade restriction when imports of cigarettes from Honduras increased by more than 80 per cent between 2003 and 2004, and by more than 4,800 per cent during the first quarter of this year as compared to the same quarter in 2003.⁹⁵

4.176 The arguments the Dominican Republic has adduced thus far to justify the stamp requirement under Article XX(d) of the GATT apply *mutatis mutandis* to the obligation to post a bond. In conclusion, both the stamp requirement and the bond requirement are measures which, even if they were inconsistent with Article III:4 of the GATT – which they are *not* – would in any case be justified under the general exception in Article XX(d).

4.177 The foreign exchange fee is an exchange control or exchange restriction within the meaning of Article XXIII(a) of the GATT. The measure is not a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, including Article II, can preclude a WTO Member, including the Dominican Republic, from maintaining such a measure.

4.178 The

4.182 C... duras asserts, the Dominican Republic did record in its Schedule of tariff concessions duties or charges applied to imports of cigarettes, at a level that far exceeds the... surcharge and the foreign exchange fee.

4.183 U... of Article II, if a Member applies an ordinary customs duty to imports of a product at a level higher than the tariff bound in its Schedule for that product, the Member is violating its obligation under Article II. Similarly, if a Member imposes *other duties or charges* on imports of a product at a level higher than the level of other duties or charges bound in its Schedule for that product, the Member is likewise in violation of its obligation under Article II. On the other hand, a Member is not in violation of that obligation merely because it has levied duties or charges other than those bound in its Schedule. What determines whether a Member has met its obligation under Article II is the level of duties or charges actually levied, as compared to the level bound in its Schedule. According to this criterion, the Dominican Republic has faithfully fulfilled its obligations under Article II.

4.184 The Dominican Republic has recorded, in its Schedule XXIII of tariff concessions, a level for other duties or charges of 10 per cent *ad valorem* levied on cigarettes classified under tariff heading 2402, together with a 5 per cent ad valorem surcharge and the foreign exchange fee, equal to 15 per cent of the value of imported cigarettes. The Dominican Republic claims that this level is no higher than that recorded in the Schedules of the Dominican Republic and other WTO Members "treatment no less favourable than that provided for in the Schedules of the Dominican Republic and other WTO Members" in accordance with Article II:1(b) of the GATT.

4.185

2. Legal arguments

- (a) The requirement to affix a stamp in the territory of the Dominican Republic is inconsistent with Article III:4 of the GATT

4.188 The requirement that a stamp be affixed on cigarette packets in the territory of the Dominican Republic is inconsistent with Article III:4 of the GATT because it accords to imported cigarettes treatment less favourable than that accorded to domestic cigarettes. The Dominican Republic argues that because the requirement applies equally to both imported and domestic cigarettes, there is no inconsistency with Article III:4. However, in this instance, formal equality is the very factor that results in less favourable treatment being accorded to imported cigarettes as compared to domestic cigarettes: by imposing costs and administrative burdens on importers that domestic producers do not have to bear and by making imported cigarettes less attractive than domestic cigarettes for the consumer. Thus, an entity wishing to engage in the business of selling cigarettes in the Dominican Republic has two options: (i) to buy from a domestic producer or (ii) to import. If that entity were to purchase from a domestic producer, it could sell the domestic cigarettes immediately after purchase. On the other hand, if that entity were to import cigarettes, it could not sell the imported cigarettes immediately even after customs clearance. At its own cost and expense: (i) it must make a prior investment in warehouses or similar facilities (ii) hire manpower and (iii) go through the process of unpacking, affixing stamps and repacking, all of which are essentially additional production processes. Therefore, there is a built-in disincentive against importing cigarettes, as compared to buying from domestic producers. As a consequence, the requirement distorts conditions of competition between imported cigarettes and domestic cigarettes, to the disadvantage of imported cigarettes. The Dominican Republic has argued that the "additional costs are inevitably linked to the condition of an imported product" and are basically the result of the "inherent differences in the normal conditions under which imported products compete with domestic products". Honduras reiterates that the additional costs result from the imposition of the stamp affixation requirement and that they are not the inherent costs of doing business. Inherent costs of doing business would include freight charges and insurance premiums. Any additional cost that is incurred as a result of governmental action cannot be an "inherent cost". Honduras considers that whether the governmental action is origin-neutral or not is completely irrelevant in order to determine that the measure at issue has caused additional costs to importers. The Dominican Republic argues that "many of the 'additional steps' that Honduras refers to... are either avoidable or are steps that domestic producers also have to perform... The step of unpacking cigarettes from cartons before affixing stamps could be avoided if importers simply packaged individual cigarette packets into boxes". In Exhibits HOND 14, 15, 23, 24 and 25, Honduras had substantiated the number of steps and additional costs that importers have to undergo. In contrast, the Dominican Republic has made an assertion that these steps are avoidable, but has not specified which steps would be avoidable nor has it provided any proof to support this assertion. In Exhibit DR-3, the Dominican Republic has described the steps that a domestic producer in the Dominican Republic has to undertake in order to comply with the stamp requirement. There is no indication that the domestic producers have to comply with steps 3, 4, 6, 7 and 8 of the steps required for imported goods as stated in the comparative diagram presented in the first submission of Honduras. The Dominican Republic has suggested that the step of unpacking cigarettes from cartons before affixing stamps could be avoided if importers simply packaged individual cigarette packets. As demonstrated in Exhibit HOND-39, it is not feasible to export individual cigarettes or to export unwrapped cigarette packets as they would lose their firmness, freshness, humidity and visual attractiveness, and would be more susceptible to damage in the course of transportation.

4.189 Honduras submits that whether or not the effect of the measure on imported products is negligible is irrelevant for the purpose of establishing a violation of Article III:4. as submitted to the Hor05 edemo

trade volumes are not a relevant factor to be taken into consideration in this dispute, Honduras nevertheless observes that in the context of its market share of cigarettes in the Dominican Republic, \$65,641 per year represents 8.41 per cent of the total amount of sales by Honduran exporters to the Dominican Republic. This amount is not negligible for a country like Honduras. Indee TD -0.0387 c0387

- (b) The requirement to affix a stamp in the territory of the Dominican Republic is not justified under Article XX(d) of the GATT

4.193 The Dominican Republic has argued that if the Panel finds that the stamp requirement is inconsistent with Article III:4, then it further submits that the stamp requirement is justified under Article XX(d) of the GATT. Article XX(d) is an affirmative defence and the Dominican Republic has the burden of establishing that the requirement at issue is justified under that provision. Honduras considers that the Dominican Republic has not discharged that burden. The Dominican Republic states that the requirement that stamps be affixed in its territory is a measure necessary to secure compliance with "other Dominican Republic tax laws and regulations; particularly, the Dominican Republic's Tax Code, including but not limited to the [Selective Consumption Tax] for cigarettes". However, the Dominican Republic has failed to demonstrate that Selective Consumption Tax and the other fiscal laws and regulations that the Dominican Republic claims to enforce through the requirement to affix stamps on cigarettes in the territory of the Dominican Republic are consistent with the GATT; it has merely asserted the GATT-consistency of these measures, without any substantiation. In addition, it has not specified which "tax laws and regulations" the stamp requirement is intended to secure compliance with. It has not provided any details on the relevant "tax laws or regulations" nor did it provide any copies of the relevant rules thereof. Therefore, Honduras asks that the Panel draw an adverse inference and find that the Dominican Republic's tax laws insofar as they relate to the Selective Consumption Tax are inconsistent with the GATT. Even if the Panel were to find that the Dominican Republic has, at the very least, identified the three taxes listed in its reply to the Panel's question, Honduras then submits that, as the party bearing the burden of proof, the Dominican Republic has failed to demonstrate that the Selective Consumption Tax, the tax on the transfer of goods and services (ITBIS) and the income tax are consistent with the GATT.

4.194 Even if the Panel were to find that the tax laws and regulations of the Dominican Republic are not inconsistent with the GATT, then Honduras submits that the stamp requirement is not a measure to secure compliance with the Selective Consumption Tax, the ITBIS and the income tax. The measure at issue is contained in the provisions of the specific Regulations of the Application of Title IV of the Tax Code (Selective Consumption Tax) and not in the general tax laws and regulations of the Dominican Republic. An examination of the design, structure and architecture of the measure at issue reveals that it is not related to any tax laws or regulations, other than the specific Regulations for the Application of Title IV of the Tax Code (Selective Consumption Tax). As the party bearing the burden of proof, the Dominican Republic has failed to demonstrate that the stamp requirement is designed to secure compliance with the laws imposing the Selective Consumption Tax or other tax laws.

4.195 Furthermore, the Dominican Republic has stated that: "[t]he stamp requirement exists as a laws.

proof on this matter, it nevertheless takes this opportunity to demonstrate that the stamp requirement is applied in a manner constituting arbitrary and unjustifiable discrimination.

4.199 As demonstrated in Exhibit DR-3 (RP-01), the Dominican Republic treats payments on tax stamps for domestic cigarettes as an advance payment of the Selective Consumption Tax. For domestic cigarettes, the effective cost of tax stamps is zero as it is credited as part of the payment for the Selective Consumption Tax. For imported cigarettes, the cost of the stamps is in addition to the Selective Consumption Tax. The Dominican Republic has defined "arbitrary" as "dependent on will or pleasure; dependent on the decision of a legally recognized authority; discretionary" or "based on mere opinion or preference as opposed to the real nature of things; capricious, unpredictable, inconsistent". Honduras notes that there is no provision either in the Tax Code or in the Regulations for the Application of the Selective Consumption Tax which would authorise domestic producers to deduct the cost of the stamp from the Selective Consumption Tax. Thus, Honduras submits that such discriminatory treatment in the application of the stamp requirement depends on the will of the Dominican Republic's tax authorities, and therefore, it is "arbitrary" according to the Dominican Republic's own definition. This discriminatory application of the tax stamp is also "unjustifiable" as there is no reason for such less favourable treatment accorded to imported cigarettes.

4.200 The Dominican Republic has suggested that in WTO jurisprudence, "unjustifiable discrimination means discrimination that is not unavoidable or discrimination that is coercive". It added that "in *Argentina – Hides and Leather*, in particular, the Panel equated the *question of whether discrimination is justifiable with the question of whether it is unavoidable*. The Panel in that case found the application of the measures in question was not justifiable because the

Republic has acknowledged that out of the 494 companies on the list of reassessment for the period of March 2003 to April 2004, only cigarette and tobacco companies on that list had to post a bond. Furthermore, based on Exhibit DR-28, it appears that the reassessments have been made with respect to unpaid customs duties and other charges, and not the Selective Consumption Tax. Therefore, the Dominican Republic has not demonstrated that the reassessments are necessary to cover shortfalls in the collection of the Selective Consumption Tax. Following from that conclusion, the Dominican Republic has not demonstrated that the bond requirement is a measure necessary to secure reassessments of the Selective Consumption Tax.

4.210 The Dominican Republic has argued that "bonding and guarantee requirements" have been identified by the 2002 International Conference on Illicit Tobacco Trade "as an aid to monitoring and documenting the movement of tobacco products to ensure control over the movement of such goods". As Honduras has previously stated, the document that the Dominican Republic refers to is not legally binding. In any event, Honduras considers that the bond identified by the 2002 ICITT is a bond of a different nature than that currently required by the Dominican Republic. The bond that the ICITT identified "as an aid to monitoring and documenting the movement of tobacco products to ensure control over the movement of such goods" is a bond intended to be provided by the exporters with the view to tracking and tracing the movement of tobacco products from the exporters' factory to the declared importer or buyer in the importing country; it does not refer to bonds imposed on importers to secure the payment of general tax obligations. Furthermore, the fact that the bond may be "an aid" does not mean that it is necessary. Recalling the Appellate Body finding in *Korea – Various Measures on Beef*, a measure that is "necessary" must be closer to "indispensable" than to "making a contribution". The Dominican Republic has contended that WTO Members have the right to determine the level of enforcement of their laws and regulations. However, the Dominican Republic only partially quoted the Appellate Body's finding. The full quote, contained in paragraph 176 of the Appellate Body Report in *Korea – Various Measures on Beef* should be considered. Honduras fully agrees that WTO Members have the right to determine for themselves the level of enforcement of their WTO-consistent laws and regulations, provided that the condition set forth by the Appellate Body, i.e. that such law and such level of enforcement must be the same for imported and domestically-produced products. In this case, that condition is not observed by the Dominican Republic.

4.211 Furthermore, in Exhibit DR-12, the Dominican Republic attempts to link the bond requirement with the circumstances provided for in Article 81 of the Tax Code. However, this provision of the Tax Code is not applicable.

4.212 As it is clear that the bond requirement cannot be provisionally justified under Article XX(d), then there is no need for the Panel to proceed with the examination of compliance with the *chapeau* of Article XX(d).

(f) The Selective Consumption Tax and its application are inconsistent with Articles III:2, Article III.4, X:1, X:3(a) of the GATT

4.213 With respect to the Selective Consumption Tax imposed under Article 367 of the Dominican

- that the Dominican Republic's failure to publish the surveys that are used to determine the Selective Consumption Tax is inconsistent with Article X:1 of the GATT.

4.214 The Dominican Republic has not presented any substantive arguments in specific rebuttal of any of the claims made by Honduras. Instead, the sole defence presented by the Dominican Republic is that the claims of Honduras "are based on an outdated version of Article 367 of the Tax Code...", and that "all three claims target measures that the Dominican Republic eliminated on the same day this Panel was established". The Dominican Republic states that "Law No. 3-04 of 9 January 2004 amended Articles 367 and 375 of the Tax Code", and that "Articles 367 and 375 of the Tax Code, as amended, establish a specific and identical tax base for the [Selective Consumption Tax] for imported and domestic cigarettes". Furthermore, according to the Dominican Republic, Law 3-04 was "enacted and published on [1]4 January 2004". The Dominican Republic then concluded that the Panel should

4.220 T

consultations and the request for the establishment of the Panel challenged the transitional surcharge as applied to all "imported goods". In *US – FSC*, the United States argued that a claim brought by the EC concerning the U.S. Foreign Sales Corporation scheme and its inconsistency with Articles 3 and 8, in conjunction with Articles 9.1(d), 10.1 and 10.3 of the Agreement on Agriculture, was inconsistent with Article 6.2 of the DSU as the EC had failed to identify specific products. Following the same reasoning, the text of the Panel request by Honduras shows that the claim regarding the WTO-inconsistency of the transitional surcharge has an "all-

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or the Selective Consumption Tax. Furthermore the products listed in Exhibit DR-19 and in Law 11-92 and the respective *ad valorem* tax rates imposed on them are identical.

4.233 Considering that "other duties or charges" may be levied only if they were imposed on 15 April 1994 and only to the extent of the levels applied on that date, it is incumbent on the Dominican Republic to establish that as of 15 April 1994, there was another law in existence (other than the legislation establishing the Selective Consumption Tax) under which "other duties or charges"

imposed on those tariff items, the three-year prescriptive period applies only to the "existence of an 'other duty or charge' ... at the time of the original binding, as well as the consistency of any 'other duty or charge' with the previously bound level". In short, if a Member that had a previously bound concession on a tariff item imposed a 10 per cent *ad valorem* "other duty or charge" at the time of the first incorporation of its concession in the appropriate Schedule and imposed a 20 per cent *ad valorem* "other duty or charge" on that tariff item on 15 April 1994, other Members had three years after the

reference of the Panel, and therefore, requests the Panel to examine the WTO-consistency of the foreign exchange fee as it applies to products other than cigarettes.

4.246 The imposition of the foreign exchange fee is inconsistent with Article II:1(b) of the GATT, in relation to the Understanding, because it was not recorded as an "other duty or charge" in the Dominican Republic's Schedule. The foreign exchange fee currently applied is imposed pursuant to the First Resolution of the Monetary Board of 22 October 2003. The operative act giving rise to the accrual of "other duties and charges" under Article II:1(b) is "importation". The operative act giving rise to the accrual of the foreign exchange fee is likewise "importation", and not the purchase of foreign currency to pay for the imported products. Thus, regardless as to when payment is actually made, importation gives rise to the liability for the foreign exchange fee. Furthermore, the foreign exchange fee is computed on the "value of imports at the selling rate of foreign exchange". This is no different from the "transaction value" for purposes of the imposition of customs duties. The phrase "at the selling rate of foreign exchange" does not effectively establish a distinction between customs duties and the foreign exchange fee, as the "transaction value" of most, if not all, imports is denominated in the currency of the exporter, and customs duties are paid in the currency of the importer. Invariably, in the imposition of customs duties, there is also a conversion from one currency to another. Thus, the foreign exchange fee constitutes another "duty or charge" imposed on or in connection with importation within the meaning of Article II:1(b) of the GATT.

4.247 Furthermore, Honduras makes the following points:

- The nature and level of "other duties or charge" levied on bound tariff items should have been recorded in the Schedules of concessions annexed to the GATT 1994 against the tariff item to which they apply.
- The recording of a tax or charge under the Schedules of concessions does not change the legal character of "other duties or charges".
- In its Schedule, the Dominican Republic had recorded only the Selective Consumption Tax, an internal tax.
- Therefore, for all intents and purposes, the Dominican Republic had not recorded any "other duties or charges" in its Schedule, including the foreign exchange fee.
- Members retain their right to challenge at any time the WTO consistency of "other duties or charges" imposed by other Members.

4.248 Even assuming that the Dominican Republic had recorded the foreign exchange fee as an "other duty or charge" in its Schedule, the foreign exchange fee would be inconsistent with Article II:1(b) of the GATT because it is imposed at a rate in excess of the rate applicable on 15 April 1994.

4.249 The foreign exchange fee currently applied pursuant to the First Resolution of the Monetary Board of 22 October 2003 is 10 per cent of the value of imports. According to the Dominican Republic, the "only duty or charge in force on 15 April 1994 was the exchange fee, at a rate of 1.5 per cent..." Thus, the rate currently applied is higher than that imposed on 15 April 1994. This is inconsistent with Article II:1(b) of the GATT, which provides that "all other duties or charges of any kind imposed on or in connection with... importation [shall not be] in excess of those imposed on [15 April 1994]".

4.250 The foreign exchange fee is not justified under Article XV:9 of the GATT. The International Monetary Fund ("IMF") has its own "guiding principle" in determining what constitutes a "[foreign] exchange restriction". As cited by the Dominican Republic, "[t]he guiding principle in ascertaining

whether a measure is a restriction on payments and transfers for current transactions under Article VIII, Section 2, is whether it involves a direct governmental limitation on the availability or use of exchange as such".

4.251 Since there does not exist in the WTO "a formal decision on how to distinguish between trade and exchange controls ... the [WTO Members] have thus in practice used the same definition as the IMF even though they have not formally taken a decision to that effect". Thus, applying the IMF's guiding principle, Honduras submits that the foreign exchange fee is not a "[foreign] exchange restriction" because it is not a "direct... limitation on the availability or use of exchange as such". "As such" in relation to "limitation on the availability or use" means that the limitation must be on access to or the use of (foreign) exchange, as such, or per se. While the foreign exchange fee increases the costs of imports (which renders it a "trade restriction"), the availability of foreign exchange to pay for those imports remains unrestricted.

4.252 The Dominican Republic itself confirms that the foreign exchange fee is a measure applied to

F. SECOND WRITTEN SUBMISSION OF THE DOMINICAN REPUBLIC

1. Introduction

4.257 The Dominican Republic responds to Honduras's latest arguments in this second written submission, which is organized into three sections, showing the measures challenged by Honduras are not GATT-inconsistent or are justified by the GATT. The First Section deals with the "Dead Measures": (a) the manner in which the Selective Consumption Tax (SCT) tax base was determined, (b) the manner in which the Dominican Republic administered the provisions used to determine the "nearest similar product in the domestic market", and (c) the Central Bank surveys that identified the retail price to be used as the SCT tax base. The Second Section deals with the "Measures Applied to Guarantee Compliance with Internal Tax Laws": (a) the obligation of domestic producers and importers to post a bond, and (b) the requirement to affix tax stamps to domestic and imported cigarette packets in the presence of tax inspectors in the territory of the Dominican Republic. The Third Section deals with the "Temporary Measures Imposed on Imports": (a) the transitional surcharge, and (b) the foreign exchange fee.

2. Rebuttal of Honduras's claims

(a) Dead measures

4.258 The Panel should issue no recommendations and make no findings regarding withdrawn laws and practices of the Dominican Republic because: (i) recommendations in this case would be legal error and devoid of purpose, inutile, and redundant; (ii) there is no evidence that the measures are still in place or have lingering effects; (iii) there is no evidence that the Dominican Republic will reintroduce the measures; and (iv) the measures were revoked before the Panel began its adjudication process.

(i) *The measures challenged by Honduras have been withdrawn*

4.259 Honduras continues to argue against (a) the manner in which the SCT tax base was determined, (b) the manner in which the Dominican Republic administered the provisions used to determine the "nearest similar product in the domestic market", and (c) the Central Bank surveys that identified the retail price to be used as the SCT tax base (the "Dead Measures"). However, those measures were based on a version of Article 367(b) of the Dominican Republic Tax Code that has been radically modified by Law 3-04 of 9 January 2004. The current determination of the SCT tax base is completely different, and the Central Bank surveys no longer exist, as confirmed by the Directorate General of Internal Taxes (DGII). Even Honduras agrees that the Dominican Republic has completely eliminated the challenged measures.¹⁰² Therefore, the Panel should dismiss Honduras's claims regarding these Dead Measures.

(ii) *A recommendation with respect to the dead measures would constitute legal error*

4.260 WTO jurisprudence makes clear that Panels should not rule on expired or withdrawn measures.¹⁰³ In fact, it is legal error for Panels to issue recommendations regarding measures no longer in existence, or make findings regarding such measures unless necessary to "secure a positive solution" to the dispute.¹⁰⁴

¹⁰² See Replies of Honduras to the questions addressed by the Panel, 27 May 2004, reply to question No. 39, p. 31.

¹⁰³ Panel Report, *Japan – Film*, para. 10.58.

¹⁰⁴ Appellate Body Report, *US – Certain EC Products*, para. 81; Panel Report, *Chile – Price Band System*, para. 7.112.

4.261 In addition, making recommendations in this case would violate the principle of judicial economy, which states that Panels should address only those claims on which a finding is necessary for recommendations and rulings that would resolve the matter at issue and "secure a positive solution to the dispute".¹⁰⁵ In *India – Autos*, the Panel considered modifications made by India during the proceedings because it felt those changes may affect its ability to make meaningful recommendations to the DSB.¹⁰⁶ This shows that if a finding or recommendation cannot help secure a positive solution, the Panel should not make that finding or recommendation.

(iii) *There is no evidence that the dead measures are still in place or have lingering effects*

4.262 In cases where Panels have made findings regarding withdrawn measures, those measures have been carried forward in some way. For instance, the Panel in *EC – Poultry* found it not moot to examine a measure that was within its terms of reference, but which had been withdrawn, because of such "lingering effects".¹⁰⁷ Similarly, in *India – Autos*, a case cited by Honduras, the Panel considered withdrawn measures, noting that although the challenged framework measure had ceased to operate, related Memorandums of Understanding (MOUs) remained.¹⁰⁸ The circumstances in the present case are fundamentally different. Honduras does not contest that the Dead Measures have In cases where

meeting until almost two months after establishment. Therefore, the Panel should not review these Dead Measures.

4.266 In its Replies to Questions Addressed by the Panel

4.271 The bond requirement is outside the scope of Article XI:1 because, contrary to Honduras's argument¹¹⁸, it is not a "condition" for the importation of cigarettes that applies "*prior*" to importation, as there is no law or regulation in the Dominican Republic that stipulates such. Article 14 of Decree 79-03 provides that importers and domestic producers of cigarettes alike must provide the bond, which is enforced by the DGII. Article 40 of Decree 79-03 requires importers of cigarettes to obtain an import license from the DGII, but posting the bond is *not* among the conditions for obtaining a license.¹¹⁹ Moreover, after a bond is posted, a local producer or importer must simply renew it prior to expiration – i.e. importers need not post a new bond every time they import. Customs authorities do not even check if an importer has posted the bond, as evidenced by the fact that the importer *BAT República Dominicana* has been importing cigarettes from Honduras for years despite never posting the bond.¹²⁰

4.272 The bond requirement is also outside the scope of Article XI:1 because it is an internal measure that applies equally to imported and domestic cigarettes, not a measure "on the importation" of cigarettes. When an applied measure leads to the same result for both imported and like domestic products, it is subject to Article III:4, not Article XI:1.¹²¹ Honduras admits that the bond's application leads to the same result¹²², and it does not deny that the bond requirement applies identically to importers and domestic cigarette producers.¹²³ Rather, it argues that identical treatment between imported and domestic products can result in less *favourable* treatment¹²⁴, which is a separate issue under the purview of Article III.

4.273 Even if the bond requirement is a measure "on the importation" of cigarettes, Honduras has not established that it prohibits or restricts the importation of cigarettes, as its only argument along these lines is based on the same incorrect assertion highlighted above that the bond requirement is a "condition" for the importation of cigarettes.¹²⁵ The facts show that Dominican Republic authorities do not regard nor require, either *de jure* or *de facto*, the posting of the bond as a pre-requisite for the importation of cigarettes, as evidenced by the fact that *BAT República Dominicana* has been importing cigarettes for several years without ever having posted the bond.¹²⁶ Honduras also specifically chose not to answer the Panel's question asking whether its cigarette exports to the Dominican Republic had suffered restrictive effects, given the fact that such exports seem to have increased.¹²⁷

4.274 In conclusion, the Dominican Republic requests the Panel find that the bond requirement is not a measure "on the importation" of cigarettes, and therefore outside the scope of Article XI:1. Should the Panel find otherwise, the Dominican Republic requests the Panel find that it is not a "prohibition" or "restriction" on the importation of cigarettes, and therefore not contrary to Article XI:1.

¹¹⁸ Oral statement of Honduras to the Panel, 11 May 2004, para. 79 (English version). Replies of Honduras to the questions addressed by the Panel, 27 May 2004, reply to question No. 35, p. 30.

¹¹⁹ Decree 79-03, *supra* note 8, Article 40.

¹²⁰ Certification by the Director General of Customs, dated 26 May 2004, submitted by the Dominican Republic as Exhibit DR-43. Certification by the Directorate General of Internal Taxes, dated 24 May 2004, submitted by the Dominican Republic as Exhibit DR-35.

¹²¹ Panel Report, *EC – Asbestos*, paras. 8.91-8.99.

¹²² Oral statement of Honduras to the Panel, 11 May 2004, para. 79 (English version). See also Replies of Honduras to the questions addressed by the Panel, 27 May 2004, reply to question No. 35, p. 30.

¹²³ Replies of Honduras to the questions addressed by the Panel, 27 May 2004, reply to question No. 31, p. 27.

¹²⁴ *Ibid.*

¹²⁵ Oral statement of Honduras to the Panel, 11 May 2004, para. 80 (English version). First written submission of Honduras, 16 March 2004, para. 113.

¹²⁶ See Certification by the Directorate General of Internal Taxes, *supra* note 120.

¹²⁷ Replies of Honduras to the questions addressed by the Panel, 27 May 2004, reply to question No. 32, p. 29.

The bond requirement is also outside the scope of Article III:4 of the GATT

4.275 The bond requirement is outside the scope of Article III:4, and consequently cannot be contrary to that Article, because it does not *affect* the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported cigarettes.¹²⁸ The Appellate Body has agreed that it is a requirement that, in addition to being an internal measure, a measure must fall within the scope of Article III:4.¹²⁹ In fact, Honduras has stated, in unequivocal terms, that "the requirement to post a bond *does not affect*" these specific transactions.¹³⁰ The bond does not preclude cigarette importers from clearing cigarettes through customs, selling or offering them for sale, transporting them, or distributing them within the territory of the Dominican Republic. Moreover, it does not preclude consumers from buying or using imported cigarettes. As already mentioned, *BAT República Dominicana* has been importing and selling cigarettes in the Dominican Republic for years, despite not having posted the bond.¹³¹

Alternatively, the bond requirement is consistent with Article III:4 of the GATT

4.276 Assuming the bond requirement is within the scope of Article III:4, it is nevertheless not contrary to that Article since it does not accord "less favourable treatment" to imported cigarettes, which according to the Appellate Body depends on whether a measure "modifies the *conditions of competition* in the relevant market to the detriment of imported products".¹³² Honduras acknowledges that the bond "does not affect *per se* 'the competitive opportunities on the domestic market,'"¹³³ and it has not disagreed that the bond applies identically to importers and domestic producers.¹³⁴ Honduras argues instead, based on *US – Section 337/EC – Tariff Information*, that the bond requirement is not inconsistent with Article III:4 of the GATT.

is consistent with Note *Ad* Article III. In any event, the timing issue is not within the Panel's terms of reference.

4.279 Honduras has also not demonstrated how the identical treatment accorded to domestic and imported cigarettes by the bond requirement modifies conditions of competition "to the detriment of imported products".¹³⁹ To ascertain detriment and find an Article III:4 violation, the Panel must determine whether differences in conditions of competition afford protection to domestic producers¹⁴⁰, which Honduras has not shown. To the contrary, the fact that cigarette imports into the Dominican Republic have increased in recent years shows that importers have not been disadvantaged by the bond requirement.¹⁴¹

(ii) *The stamp requirement for imported and domestic cigarettes is consistent with Article III:4 of the GATT*

4.280 Honduras has not established that the stamp requirement accords "less favourable treatment" to imported cigarettes, thereby violating Article III:4, as it has not shown that the stamp affords protection to domestic producers, which is a necessary inquiry under Article III:4.¹⁴² Honduras argues that affording protection to domestic industry "is not a material element" of Article III:4,¹⁴³ citing the Appellate Body's statement in *EC - Tariffs* (WT/DS105/AB/R, paras. 75-77) and *EC - Bananas III* (WT/DS22/AB/R, para. 284). Honduras also cites the Appellate Body's statement in *EC - Bananas III* (WT/DS22/AB/R, para. 284) that "the fact that a measure affords protection to domestic industry is not a material element of Article III:4" (citing the Appellate Body's statement in *EC - Tariffs* (WT/DS105/AB/R, paras. 75-77)).

WT/DS302/R Doc. ID: D1019-92.2570-0008 Tw (citing the Appellate Body's statement in EC - Tariffs (WT/DS105/AB/R, paras. 75-77))

effect on imports.¹⁵¹ Honduras has not reconciled this fact with its assertions that the stamp requirement adds costs to the production process and affects the presentation of cigarettes to consumers.

4.284 The Dominican Republic reiterates that any difference in the conditions of competition between imported and domestic products caused by the stamp requirement is inherent in the nature of imported products, not the result of formally equal treatment as Honduras claims.¹⁵² While Article III:4 prohibits Members from modifying the conditions of competition to the detriment of imported products, it does not require Members to compensate for the inherent differences between imported and domestic products.

(iii) The requirement to affix stamps in the territory of the Dominican Republic and the requirement to post a bond are justified by Article XX(d) of the GATT

4.285 The Dominican Republic has argued, in the alternative, that the stamp and bond are both justified by GATT Article XX(d), as they are necessary to secure compliance with the Dominican Republic's GATT-consistent tax laws, and are consistent with the Article XX

4.289 Honduras primarily argues the stamp is not a *necessary* measure, claiming it does not alert tax authorities that applicable taxes have been collected¹⁵⁷, especially since the dispute is over cigarettes that enter through regular customs channels.¹⁵⁸ Honduras's argument misses the point of the stamp requirement and is wrong for two reasons. First, even if customs agents collect the taxes, the stamp still serves to alert authorities that required taxes have been paid. Second, alerting authorities is only one objective of the stamp requirement. Another is to foreclose non-legitimate channels of commerce and ensure cigarettes enter through regular channels, thereby allowing authorities to log the number of cigarette imports and account for the taxes on those cigarettes. Without stamps, cigarette smuggling would increase, leading to a diminution of tax collection. Thus, the stamp requirement is indeed necessary to secure tax compliance.

4.290 Honduras also argues the stamp requirement is not necessary because there are reasonable alternatives. However, these alternatives would not achieve zero tolerance of tax evasion and cigarette smuggling, which the Dominican Republic has the sovereign right to pursue.¹⁵⁹

within the level of other duties or charges (ODCs) recorded by the Dominican Republic in its Schedule. As the Dominican Republic has explained, GATT Article XV establishes that where a Member implements exchange restrictions or exchange controls consistent with the Articles of Agreement of the International Monetary Fund (IMF), those exchange measures cannot be the basis for a GATT violation.

4.299 Honduras wrongly tries to resurrect its Article

to give them full and fair opportunity to defend.¹⁹⁵ As the Appellate Body recognizes, an important element of due process is setting terms of reference early.¹⁹⁶ Although a complainant's Panel request initially defines the terms of reference, they can be narrowed by the proceedings. A complainant that does not raise, in its first written submission, claims listed in its request for the establishment of a Panel should be deemed to have waived such claims.¹⁹⁷ Otherwise, respondents may not have adequate opportunity to respond, as in the case where a complainant raises a claim for the first time during its closing statements at the second Panel meeting with the parties.

4.307 The product coverage of a dispute is an integral element of the terms of reference that must also be defined at an early stage so as not to thwart due process and equity.¹⁹⁸ The present case has been confined specifically to cigarettes based on consultations between the parties, Honduras's reference to the surcharge and exchange fee "as [they apply] to the bound item of cigarettes"¹⁹⁹, and the very title of this dispute. Therefore, Honduras may not expand the product coverage of its challenge to the surcharge and exchange fee at this late stage, as it attempts to do²⁰⁰, for that would undermine due process, equity, and good faith.

3. Conclusion

4.308 For these reasons, the Dominican Republic again asks the Panel to dismiss Honduras's claims.²⁰¹

G. ORAL STATEMENT OF THE DOMINICAN REPUBLIC AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

1. Introduction

4.309 The Dominican Republic declared that it intended to use the opportunity to respond directly to the assertions made by Honduras in its latest written submission to the Panel which, in its opinion, remains silent as regards many of the arguments and much of the documentary evidence submitted by the Dominican Republic.

4.310 The Dominican Republic began with a general remark. Honduras claims that in this case, what is at issue is the effectiveness of the GATT as a legal framework securing the results of market access negotiations.²⁰² The main theme of this dispute is not the threat of market access concessions, as Honduras contends. What this dispute is essentially about is an importing country that is enforcing its laws in its own territory, laws which are applied in an identical manner to domestic products and
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2. Stamp requirement for domestic and imported cigarettes

4.312 Before turning to Honduras's arguments regarding the stamp requirement, it is important to remember that in its purpose, design, structure and application, the stamp requirement is intended to secure compliance by taxpayers with their fiscal obligations and to combat smuggling. In that respect, it has been an effective measure.

4.313 Honduras argues that if the Panel recognizes that the stamp requirement for cigarettes is a legitimate measure, this could lead to the imposition of the requirement for any product.²⁰³ The Dominican Republic has explained that it is the particular circumstances surrounding smuggling and tax evasion in the case of cigarettes that justify the stamp requirement. Until Honduras has acknowledged that there is a global problem of smuggling of tobacco products, and until it has recognized that the stamp requirement contributes to eliminating or preventing such smuggling, it will not be able to understand that the affixing of stamps in the presence of inspectors from the Directorate General of Internal Taxes is a legitimate, non-discriminatory and necessary measure.

4.314 Unfortunately, Honduras continues to ignore these two fundamental facts. The Dominican Republic has submitted documentary evidence showing that the problem of the smuggling of tobacco

income tax in accordance with Articles 267 to 334 of the Dominican Republic Tax Code.²¹⁵ In its first written submission, the Dominican Republic pointed out that the Selective Consumption Tax is collected in accordance with Article 367 of the Tax Code as amended by Law 3-04 of 9 January 2004.²¹⁶ This was confirmed by a letter from the Director General of the DGII, submitted as Exhibit DR-2.²¹⁷

4.321 Honduras's second argument is that the Dominican Republic's tax laws are contrary to the GATT.²¹⁸ Honduras refers in particular to the Selective Consumption Tax, and then goes on to repeat the same argument with respect to the bond requirement.²¹⁹ And yet, the Dominican Republic did demonstrate that the Selective Consumption Tax is GATT-consistent. The Selective Consumption Tax on imported and domestic cigarettes is a specific duty of RD\$0.48 per cigarette, both in the case of the imported product and in the case of the domestic product. The tax base is provided for by Article 367(c) of the Tax Code, as amended by Law 3-04 of 9 January 2004. The specific amount is provided for by Article 375, paragraph V, of the Tax Code, as amended by Law 3-04. This was all mentioned by the Dominican Republic in its first written submission.²²⁰ No further explanation is needed to demonstrate that the Selective Consumption Tax on cigarettes is not contrary to the national treatment obligation or any other obligation under the GATT. The Dominican Republic has established a *prima facie* case of consistency of its

4.324 The Dominican Republic has demonstrated how the stamp requirement contributes to securing the desired level of enforcement of its tax laws. Since the introduction of the stamp requirement, there has been practically no cigarette smuggling. On the other hand, in the case of alcoholic beverages and matches, for which the stamp requirement is different, smuggling continues to pose a problem. Nor is there any question of the importance of tax laws and the payment of taxes, especially in a country with little resources like the Dominican Republic. Finally, the Dominican Republic has demonstrated that the impact of the stamp requirement on imports of cigarettes is almost nil. This can clearly be seen from the growth rate in cigarette imports from Honduras, which reached more than 4,800 per cent during the first quarter of this year as compared to the same period last year.²²⁴ Thus, following the Appellate Body's interpretation of the word "necessary" in Article XX(d), the Dominican Republic can only conclude that the stamp requirement is a measure that is necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of the Agreement.

4.325 Honduras asks how the stamp requirement can secure compliance with tax obligations when

arbitrary and unjustifiable, between countries where the same conditions prevail.²³¹ Secondly, Honduras's entire argument concerning the *chapeau* is based on the incorrect assumption that the purchase of the stamp by the domestic producer is credited towards payment of the Selective Consumption Tax.²³² Honduras bases this assumption on an internal document of one of the domestic cigarette producers in the Dominican Republic which was presented as Exhibit DR-3 merely to illustrate the procedure followed by domestic producers in requesting and obtaining the stamps. The contents of that document do not implicate the Government of the Dominican Republic. In any case, paragraph III of Article 37 of Decree 79-03 expressly stipulates that stamp payments shall not be credited to the payment of the Selective Consumption Tax. This is confirmed by the certification from the Directorate General of Internal Taxes that the Dominican Republic circulated as Exhibit DR-50. Thus, since the payment of stamps is not an advance on the payment of the Selective Consumption Tax, the only arguments put forward by Honduras with respect to the consistency of the Dominican Republic's measures with the *chapeau* of Article XX are discredited.

4.328 In conclusion, the Dominican Republic has shown that the stamp requirement is not contrary to Article III:4 of the GATT, and even if it were, it would be justified under Article XX(d) of the GATT.

3.

which the Selective Consumption Tax is established.²⁴⁰ This is not a response to what is the actual practice of the authorities of the Dominican Republic. That practice qualifies the measure in the same way that the letter of the law qualifies the measure. The ruling of the Panel in the *US - Section 301 Trade Act* confirms this.²⁴¹

4.336 In that case, the practice and statements of the authorities of the United States Government were sufficient to reverse the conclusion that the letter of sections 301-310 of the United States Trade Act was contrary to the provisions of the Dispute Settlement Understanding. Likewise, in this case, the practice of the Dominican Government authorities should be taken into account. Exhibit DR-12 establishes that the practice of the authorities of the Dominican Republic is to use the bond established under Article 376 of the Tax Code and Article 14 of Decree 79-03 as a guarantee of compliance with other taxes.

4.337 Another of Honduras's arguments with respect to the Dominican Republic's defence under Article XX(d) of the GATT is that the Dominican Republic failed to specify all of the obligations in respect of which compliance is secured by the bond.²⁴² This is yet another of Honduras's contradictions. On the one hand, Honduras argues that the bond does not secure compliance with any obligation, and on the other hand, it argues that it secures compliance with more than one obligation.²⁴³ Moreover, Honduras speculates, without any grounds, that these other unspecified obligations may be contrary to the GATT.

4.338 When it comes to demonstrating that the obligations in respect of which compliance is secured by the bond are contrary to the GATT, Honduras once again relies on a version of Article 367(b) of the Tax Code that no longer exists.²⁴⁴ The Dominican Republic has shown that the Selective Consumption Tax under the current law cannot under any circumstance be considered contrary to the GATT. It is now up to Honduras to provide evidence to the contrary, and it has not done so. Rather, Honduras persists in asking the Panel to examine a law and a measure that no longer exist.

4.339 With respect to the bond, Honduras repeats what it said with respect to the stamp requirement. It asks how the bond can secure compliance with tax obligations if there are other products that are subject to the Selective Consumption Tax but not to the same bond requirement.²⁴⁵ The Dominican Republic reverts to the reply it gave to the same argument by Honduras with respect to the stamp requirement. No other product subject to the Selective Consumption Tax is as likely to be smuggled as cigarettes and alcoholic beverages.

4.340 Honduras recognizes the Dominican Republic's right to establish its desired level of enforcement. However, it maintains that according to the Appellate Body, the level of enforcement must be the same for domestic products as for imported products. It argues that in the case of the bond for cigarettes in the Dominican Republic, the level is not the same. The Dominican Republic agrees. The level of enforcement is more strict for domestically produced cigarettes. In its reply to questions 80 and 81 of the Panel, the Dominican Republic explains how in the case of domestically produced cigarettes, the bond must be posted as a pre-requisite to the marketing of the product.²⁴⁶ In the case of imported cigarettes, on the other hand, the bond is not a prerequisite to importation. If this were not so, it would mean that *BAT República Dominicana*

transportation, which raises a product's delivered price and consequently, the final price of the imported product".²⁶¹ Honduras wished to note that transportation costs are not "inherent" in the nature of imported products. It must be noted that transportation costs will also be incurred for the shipment within a country and sometimes the domestic transportation costs may be higher than the transportation costs for imported products. For example, an imported product shipped to Geneva from Ferney-Voltaire in neighbouring France would have lower transportation costs than a product shipped to Geneva from Zurich. Therefore, it is not correct to say that transportation costs are inherent costs in the nature of imported products.

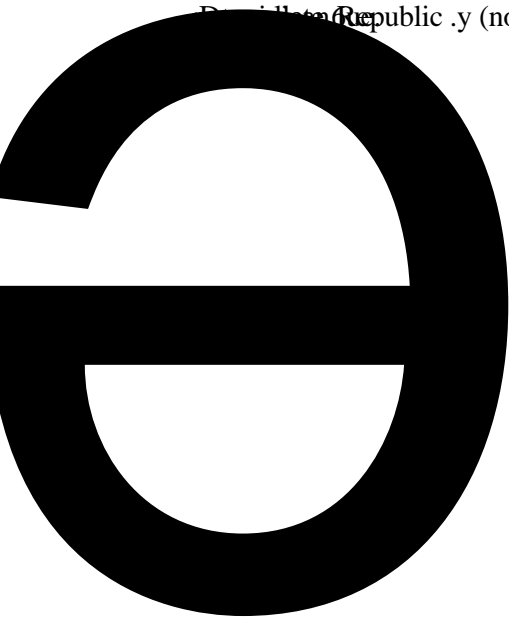
4.364 In addition, the costs arising from compliance with the stamp requirement can hardly be considered as costs arising from the "inherent" differences between imported and domestic cigarettes. Instead, they are costs which arise from the different points in time at which the stamp must be affixed on imported cigarettes as compared to domestic cigarettes. They do not arise as a result of the "inherent differences" between imported and domestic goods. The costs are directly caused by a measure imposed by the Government of the Dominican Republic.

4.365 Moreover, under Article III:4, once a product has cleared customs, it should be subject to the same laws and requirements as a domestic product and should be treated no less favourably than the like domestic product. The issue of whether there are "inherent differences between imported and domestic products" is, therefore, irrelevant under Article III:4.

4.366 In its second submission, the Dominican Republic reiterates that Honduras has not established that the measure in question "has a protective application – i.e. that it affords protection to domestic producers".²⁶² Honduras rebutted this argument in detail in its oral statement at the first hearing and in its second submission.²⁶³ Honduras emphasizes that the Appellate Body has sharply rejected the approach suggested by the Dominican Republic. It ruled that "Article III:4 does not specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure 'afford[s] protection to domestic production'".²⁶⁴

4.367 In its second submission, the Dominican Republic reiterates that because the volume of cigarette imports has increased, then "the stamp requirement has had no, or at most negligible, effect on imports and therefore has not been detrimental to the imported product".²⁶⁵ Again, Honduras has rebutted this argument in detail. The Appellate Body has also specifically addressed this issue. It stated: "...it is irrelevant that 'the trade effects' of the tax differential between imported and domestic products, as reflected in the volume of imports, are insignificant or even non-existent; Article III

Dominican Republic (not replicated in the Appellate Body report on TDS/1805/TDS/36-CO/1357/Handbook), 00784T4



total imports is 1.5 per cent in 2001, 23.7 per cent in 2002 and 11.9 per cent in 2003. The information presented in these two exhibits of the Dominican Republic is inconsistent and contradictory.

products. Therefore, it must be subject to the disciplines of either Article XI or Article III. Honduras therefore maintains the argument that it has presented throughout these proceedings on this issue.

4.375

constitutes an import restriction within the meaning of Article XI:1 whether or not it actually impeded imports ..."²⁷⁰

4.379 In the context of its claim that the bond requirement falls under Article XI, Honduras stated in its reply to Question 35 addressed by the Panel that "... the requirement to post a bond does not affect 'the internal sale, offering for sale, purchase, transportation, distribution or use of products, an internal quantitative regulations requiring the mixture, processing or use of products in specified amount or proportions'". Honduras noted that the Dominican Republic's argument that Article III:4 is not applicable to the bond requirement, attempts to make reference to this reply of Honduras as support. However, Honduras took the opportunity to note that this reply was provided to respond to the Panel's question on whether the measure fell under Article III or Article XI. It has been the consistent position of Honduras that the bond requirement falls under Article XI:1. Honduras has also made an "in the alternative" claim, that should the Panel find that the measure does not fall within Article XI:1, then it should assess the bond requirement under Article III:4. The Dominican Republic has therefore misunderstood the context in which Honduras's reply was given.

4.380 In conclusion, Honduras has established that the bond requirement is *prima facie* inconsistent with the Dominican Republic's obligations under Article XI:1, or, in the alternative, with Article III:4. The Dominican Republic has failed to rebut Honduras's claim. In addition, the Dominican Republic has attempted to justify its violation of its GATT obligations by seeking recourse to Article XX(d), but has failed to demonstrate that its measure is justified by that provision.

4.381 With respect to the Selective Consumption Tax, Honduras claims that the application of this tax as it applied on the date of request -0.195on.

- An examination by the Panel of the Selective Consumption Tax claims would be "contrary to the principle of judicial economy"²⁷⁴
- An examination by the Panel of the Selective Consumption Tax claims is unwarranted because of two factual circumstances:
 - These measures do not have lingering effects²⁷⁵, nor is there a danger of their reinstatement²⁷⁶
 - And the Selective Consumption Tax claims involve measures which were altered before the date of functioning of the Panel.²⁷⁷

4.384 Honduras is of the view that these arguments are without merit and will respond to each of these grounds in turn.

4.385 First, the Dominican Republic contends that recommendations by the Panel regarding the Selective Consumption Tax (as it stood on the date of establishment of the Panel) would constitute "legal error" on the basis of certain observations of the Appellate Body in the *US-Certain EC Products* case. The Appellate Body report in *US-Certain EC Products* does not stand for the proposition that a Panel cannot make findings in respect of measures that are no longer in existence. The Appellate Body merely stated that "[t]he Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists".²⁷⁸ In that case, there was a disagreement between the parties concerning the measures that were at issue in the terms of reference of the Panel.

4.386 In this case, there is agreement between the parties as to the measure at issue covered by the terms of reference. As noted above, the Dominican Republic conceded that the Selective Consumption Tax as challenged by Honduras is within the terms of reference of the Panel. Therefore, the Panel need not, and cannot, examine any replacement measure.

4.387 Indeed, Honduras submits that the Panel cannot examine the characteristics of any

can be found in the Panel's report in *US-Certain EC Products* at paragraph 136. The Panel's report in *US-Certain EC Products* is available at www.wto.org.

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The Panel's report in *US-Certain EC Products* is available at www.wto.org.

resolve the dispute between the parties".²⁷⁹ The principle of judicial economy involves discretion to decline to rule on particular issues, but only if the resolution of those issues is not necessary to resolve the dispute. In this case, the dispute concerns the Selective Consumption Tax as it stood as of the time of the request for the establishment of the Panel, or as of the time of the Panel's establishment, at the latest. The Panel has a duty to resolve this dispute.

4.390 The cases cited by the Dominican Republic do not support its position on this point. In *Australia – Salmon*, the Appellate Body did not invalidate the Panel's findings because they were contrary to the "principle of judicial economy". Indeed, it did precisely the opposite; it found fault with the Panel for not making findings on matters within the terms of reference.²⁸⁰ The Dominican Republic cites the Panel in *Chile – Price Band System* to the effect that "a panel is required to make the recommendation to bring a measure which it has found inconsistent into conformity *if* that measure is still in force. Conversely, when a Panel concludes that a measure *was* inconsistent with a covered agreement, the said recommendation cannot and should not be made".²⁸¹ Honduras notes that this finding of the Panel was not reviewed by or endorsed by the Appellate Body on appeal.

4.391 Third, the Dominican Republic contends that an examination by the Panel of the Selective Consumption Tax is unwarranted because of factual circumstances. The presence of "lingering effects" or a "danger of reintroduction" is not a prerequisite for the examination of measures which are terminated after the date of establishment of the Panel. These tests were not even considered by the Panels in *United States – Wool Shirts and Blouses*²⁸² and *Indonesia – Autos*²⁸³, where findings were made in respect of measures terminated or modified in the course of the proceedings. In any case the Dominican Republic cannot assert that Honduras has not provided evidence regarding the possibility of reintroduction of the Selective Consumption Tax system as it stood on the date of establishment of this Panel. Honduras has presented 10 exhibits demonstrating this possibility.²⁸⁴ The Dominican Republic has not responded to this evidence.

4.392 In a similar vein, the Dominican Republic relies on the fact that the Selective Consumption Tax claims involve measures that were revoked before the organizational meeting of the Panel. It fails to explain why the status of the measures at the time at which the Panel "started its adjudicative process"²⁸⁵ should be the relevant standard. This assertion is directly contrary to consistent GATT/WTO jurisprudence to the effect that the relevant time to assess whether a measure is within the terms of reference is the time at which the Panel is established.²⁸⁶ The Dominican Republic's assertion lacks any basis.

4.393 Moreover, the Dominican Republic elaborates on this flawed standard by stating "[t]here is no reason to believe that the precise moment when a Panel is established is the moment it begins its adjudication process".²⁸⁷ At least one Panel has taken a different view. In *Argentina – Textiles and Apparel*, the Panel observed: "the Argentine measure under consideration was revoked before the Panel was established and its terms of reference set, i.e. before the Panel started its adjudicative process".²⁸⁸

²⁷⁹ Appellate Body Report, *US – Lead and Bismuth II*, para.71.

²⁸⁰ Appellate Body Report, *Australia – Salmon*, paras. 225 -226.

²⁸¹ Panel Report, *Chile – Price Band System*, para.7.112 (italics in original).

²⁸² Panel Report, *US – Wool Shirts and Blouses*.

²⁸³ Panel Report, *Indonesia – Autos*.

²⁸⁴ Information provided by Honduras as Exhibits HOND-40 to HOND-49.

²⁸⁵ Second written submission of the Dominican Republic, 10 June 2004, para. 15.

²⁸⁶ See e.g. Panel Report, *India – Autos*, para. 7.22; Panel Report, *Argentina – Textiles and Apparel*, para. 6.11; Panel Report, *US – Gambling*, para. 6.19; Panel Report, *US – Shirts and Blouses*, para. 6.19; Panel Report, *US – Gasoline*, para. 7.22; Panel Report, *US – Apples*, para. 7.15. Indonesia, para. 7.10; HOND

4.394 Honduras notes that in all the cases where a Panel chose not to examine a measure, the measure in question was terminated before the date of establishment of the Panel. That is not the situation in this case. In this case, the Selective Consumption Tax claims are within the terms of reference and this Panel is under a duty, deriving from Article 11 of the DSU, to assess those claims. In *Japan – Alcoholic Beverages II*, the Appellate Body held that a failure to address the full range of matters included in the terms of reference constituted an "error of law".²⁸⁹ It has reiterated this principle in *Australia – Salmon*²⁹⁰ and *Japan – Agricultural Products II*.²⁹¹

4.395 Lastly, Honduras noted that the Dominican Republic requests an additional finding that the Selective Consumption Tax, as it stood at the date of the establishment of the Panel, does not result in any nullification and impairment of benefits to Honduras. Honduras noted that Article 3.8 of the DSU states the presumption of *prima facie* nullification or impairment of benefits in cases where there is an infringement of the obligations assumed under a covered agreement.

4.396 Turning to the Transitional Surcharge and the Foreign Exchange Fee, Honduras claims that the transitional surcharge and the foreign exchange fee constitute a charge imposed on or in connection with importation inconsistent with Article II:1(a) and (b) of the GATT.

4.397 Article II:1(b) must be construed in light of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994. Paragraph 1 of the Understanding provides that "the nature and level of any 'other duties or charges' levied on bound tariff items, as referred to in that provision

4.402

Thus, the transitional surcharge and the foreign exchange fee were not "properly recorded" in the Dominican Republic's Schedule of Concessions.

4.405 Even assuming that the transitional surcharge and the foreign exchange fee were imposed on 15 April 1994, pursuant to paragraph 7 of the Understanding, the Dominican Republic had a period of six months from "the date of deposit of the instrument" referred to in that paragraph within which to inscribe the same in its Schedule of Concessions. That six-month period has long since expired, and, after the expiration of that period, the Dominican Republic was no longer authorized to add the transitional surcharge or the foreign exchange fee in its Schedule of concessions. This being the case, notwithstanding that the Dominican Republic had imposed the foreign exchange fee on 15 April 1994 at the rate of 1.5 per cent *ad valorem*, after the expiration of the six-month period, having failed to add the foreign exchange fee in its Schedule of Concessions, the continued imposition of the foreign exchange fee after that period at any level, including the present level of 10 per cent, is inconsistent with Article II:1(b) of the GATT. Article II:1(b) cannot be construed independently of the Understanding.

4.406 In its second submission, the Dominican Republic contends that "Honduras's challenge to the Dominican Republic's [other duties or charges] is barred by paragraph 4, second sentence, of the Understanding and therefore must not be allowed to proceed".²⁹⁸ In Honduras view, this argument is based on an incorrect interpretation of the scope and coverage of paragraph 4.

4.407 In Honduras's view, paragraph 4 does not apply because what the Dominican Republic recorded under "other duties or charges" was an internal tax, not "other duties or charges" within the meaning of Article II:1(b). Even if the transitional surcharge and the foreign exchange fee were somehow to be covered by the recording of the Selective Consumption Tax, the conditions set out in paragraph 4 to make this provision applicable would still not be met.

4.408 As indicated in its first sentence, paragraph 4 applies only to "other duties or charges" imposed on "a tariff item [that had] previously been the subject of a concession". (The Dominican Republic omitted the first sentence of paragraph 4 when it cited that paragraph in paragraph 84 of its Second written submission.) Therefore, this provision does not apply to any product that has not been the subject of a previous concession. Furthermore, the three-year deadline only applies to the right to challenge the recording of an other duty or charge which was not in existence at the time of the original binding or which was recorded at a higher level than that of the previously bound level. It is only in these situations that other Members had a three-year period to challenge the existence or consistency with the previous bindings.

4.409 The situation contemplated under the exception in paragraph 4 is not relevant to this dispute, as Honduras has not made a claim on any "tariff item [that had] previously been the subject of a concession", i.e. prior to 15 April 1994. Paragraph 4 does not apply to a challenge of a recording of an "alleged other duty or charge" which was not in fact imposed as of 15 April 1994.

4.410 This is the situation in this case. Therefore, paragraph 5 is applicable. Paragraph 5 states that Members retain the right to challenge the consistency of a recording of an "other duty or charge" with a Member's rights and obligations under GATT 1994 at any time.

4.411 In further support of its arguments relative to the three-year prescriptive period, in paragraph 84 of its second written submission, the Dominican Republic quoted selected portions of paragraphs 7 to 10 of the paper entitled "Article II:1(b): Legal Questions, Note by the Secretariat, MTN.GNG/NG7/W/61, 16 November 1989" and presented the paper as Exhibit DR-49. Reading only the selected portions quoted by the Dominican Republic, one might be misled into concluding

²⁹⁸ Second written submission of the Dominican Republic, 10 June 2004, para. 84.

that the three-year prescriptive period is applicable to this dispute. The Dominican Republic omitted the following wording in paragraph 7, which precedes the portion quoted by the Dominican Republic:

- (i) The point had been made that the inscription of ODCs in schedules would not establish their legality in terms of consistency with other GATT obligations, and that it should always remain possible for third countries to challenge the legal character of any particular charge... However it had also been suggested that ..."
- (ii) [The Dominican Republic's selective quote starts with the portion immediately after this omitted portion: "... the consistency of a recorded charge with the obligation under Article II:1(b) ... might be regarded as being established if it were not challenged within an agreed period, such as three years from the date of inscription..."]

4.412 Indeed, a close scrutiny of Exhibit DR-49 indicates that it is a Note prepared by the Secretariat to provide advice on "two issues of a legal nature arising from the proposal that 'other duties or charges' (ODCs) should henceforth be recorded in tariff schedules".²⁹⁹ It is not part of the negotiating history of the Understanding nor does it constitute under Article XVI:1 of the Marrakesh

V. ARGUMENTS OF THE THIRD PARTIES

A. CHILE

1. Introduction

5.1 Chile declares that, as indicated in Annex DR-

"...[i]n previous GATT/WTO cases, where a *measure* included in the terms of reference *was otherwise terminated* or amended after the commencement of the panel proceedings, panels have nevertheless made findings in respect of such a measure."³⁰⁵

5.8 Chile insists that the Panel must rule on the issues referred to it by the parties, in this case Honduras, in order to comply with one of the basic objectives of the WTO dispute settlement system, i.e. providing security and predictability to the multilateral trading system.

5.9 Chile argues that, although it seems the new methodology would guarantee equal treatment between domestically produced goods and imported goods, not only are there legal discriminations, but *de facto* discriminations as well, so that there could still be other instances of discriminatory treatment, for example in the way in whi

produced. In fact, this is what the Dominican Republic itself has established for other products. The requirement to affix the stamps in the territory of the Dominican Republic makes the procedure more cumbersome than necessary to comply with the legitimate objective, (e.g. practical problems associated with the unpacking and repacking of cigarettes); it increases costs; and it discourages imports. Chile insists that none of these can be considered to be normal costs associated with importation as the Dominican Republic claims. Nor can it be claimed that since this cost represents a very low percentage of the earnings of the importing company, there is no discrimination.

5.16

5.22 Chile insists that the fact the Dominican Republic revoked certain elements of its tax legislation applied to cigarettes that were challenged by Honduras does not relieve the Panel from ruling on their consistency with the WTO.

7. Other duties or charges

5.23 The Dominican Republic states that it bound, under the WTO, a list of "other duties or charges" applied to imports. That list, according to the Dominican Republic, can be said to include all of the duties and charges applied to imports to the extent that they do not exceed the 30 per cent binding in its Schedule XXIII. Consequently, the transitional surcharge on imports (2 per cent) and the foreign exchange fee are consistent with Article II:1(b) of the GATT 1994, second sentence, since together they do not exceed the 30 per cent bound rate.

5.24 Chile point outs that the Dominican Republic's Schedule XXIII contains a list of imported products subject to the *Impuesto Selectivo en Aduanas* (Selective Customs Tax). The Schedule makes no mention of the transitional surcharge on imports or the foreign exchange fee, or indeed any other tax. Consequently, the other "duty or charge imposed on or in connection with importation" bound by the Dominican Republic is the Selective Customs Tax.

5.25 Chile remarks that, although this Selective Customs Tax is not defined, it appears to be a certain tax which is (in the language of Article II:1(b), second sentence) "imposed on the date of this Agreement [the GATT] or... directly and mandatorily required to be imposed thereafter by the legislation in force in the importing territory [the Dominican Republic] on that date". Consequently,

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8. Conclusion

5.29 For the above reasons, Chile requests that the Panel, upon examining the consistency of the measures challenged by Honduras, take into account the context of the tax regime applied by the Dominican Republic to cigarettes.

B. CHINA

1. Introduction

5.30 In regard to consistency of the measures concerned with WTO obligations, China focuses its submission on the analytical approach established by WTO jurisprudence³⁰⁹ and provisions related to Article II:1, Article III, Article XV and Article XX(d).

5.31 Below China will proceed to address each of these issues involved in different measures separately.

2. Selective Consumption Tax and Survey of Average Retail Prices

5.32 According to the submission presented by the Dominican Republic, these two measures were replaced by new ones through Law 3-04 which amended Article 367 and 375 of the Tax Code³¹⁰ on 9 January 2004, the same date on which the Panel for the present dispute was established and the terms of reference of the Panel were fixed.³¹¹ China would like to briefly comment on the factors which the Panel may take into account in considering whether it should make findings regarding these two alleged "dead measures".

5.33 China notes that Panels differentiated their positions in past GATT/WTO cases with regard to the issue of whether a Panel should make findings for revoked measures. Several factors, including the timing of the amendment, revocation or termination of the measures challenged, the extent to which the measure was amended, and the relevance of revocation of the measure to the implementation stage of the dispute settlement process, have been taken into account by previous Panels.

3. The timing of the amendment, revocation, or termination of the measures challenged

5.34 China point outs that for the measures that had been withdrawn prior to the issuance of the Panel report, the Panel in *US – Wool Shirts and Blouses*, similar to the GATT Panels in *EEC – Dessert Apples* and *US – Canadi*

4. The extent to which the measure challenged has been changed

5.36 China notes that the Appellate Body in *Chile – Price Band System* chose to deal with the changes, after the establishment of the Panel, which amended the measure challenged "without changing its essence".³¹⁴

5.37 Similarly, in *Brazil – Aircraft* the Appellate Body ruled on changes and amendments to the measure challenged before the establishment of the Panel (and after consultation), which did not change the essence of the measure.³¹⁵

5. The relevance of any revocation of the challenged measure to the implementation stage of the dispute settlement process

5.38 In *Indonesia – Autos*, the complaint cha

7. Relationship between Article XV:9 and Article XV:2, and the obligation to consult with IMF pursuant to Article XV:2

5.43 The negotiating history of the GATT provided that paragraphs 2, 4 and 9 of Article XV of the GATT 1994 served to avoid overlapping jurisdiction between IMF and GATT, although the WTO/GATT jurisprudence left the issue of whether Article XV:9(a) of the GATT serves as an exception to a Member's GATT obligations unanswered.³¹⁸ China considers that interpretation of Article XV:9 cannot be isolated from other paragraphs of Article XV, particularly Article XV:2 and Article XV:4. As upheld by the Appellate Body in *US – Gasoline*, it is required by the general rule of interpretation in the Vienna Convention to give meaning and effect to all the terms of the treaty in order to avoid reducing whole clauses or paragraphs of a treaty to redundancy or inutility.³¹⁹

5.44 GATT jurisprudence has established the jurisdiction of the WTO forum over monetary measures with an effect on trade. The 1977 GATT Report on the Monetary Measures Applied by Italy (*Italian Measures*) addressed a monetary measure (requirement of deposit for payment abroad) that contributed to the stabilization of Italian currency and served for the establishment of a longer term economic stabilization policy. The measure was non-discriminatory in its nature and would be gradually phased out at that time. Although some GATT Contracting Parties recognized that the measure had been approved by the International Monetary Fund and by the European Communities, a working party with a term of reference restricted to Article XV was established for the examination of the trade effects of the measures which was a matter of direct concern to the GATT. The working party invited Italy to consider an early removal of foreign exchange measure and to replace this temporary measure by "comprehensive alternative measures to help restore equilibrium as indicated in the finding of the International Monetary Fund".³²⁰ Despite this precedent, the extent to which Article XV:2 may require Panels to consider as "dispositive specific determinations of the IMF" has not yet been well clarified in GATT/WTO disputes.³²¹ In *Greece – Import Taxes*, the Panel suggested the CONTRACTING PARTIES address an inquiry to the IMF with regard to the issues of whether the tax in question (a) was a multiple currency practice, and (b) whether or not it was in conformity with the Articles of Agreement of the International Monetary Fund. The staff of the IMF participated in the discussion.³²² In contrast, the Appellate Body in *Argentina – Textiles and Apparel*, did not rule against the Panel's declination to consult with the IMF.³²³ Similarly, the Panel in *India – Quantitative Restrictions* ruled that under Article 13.2 of the DSU a Panel enjoys discretion and significant authority as to whether or not to seek information from experts and from any other external source.

5.45 In China's view, the plain text of Article XV:2 provides that the WTO "shall accept" the IMF's Tj 38.t

with IMF Articles, while Article XV:4 refers to "exchange actions" that may frustrate the intent of the GATT provisions. GATT/WTO jurisprudence is not clear on whether these differences connote a certain logic subordinate relationship of these terms, particularly between "exchange controls or exchange restrictions" under Article XV:9 in one category, and "actions in exchange matters" under Article XV:2 and "exchange actions" under Article XV:4 in the another category. In other words, it might be arguable whether the former category is a subset of the latter category.

5.47 By reviewing the provisions of Article XV, China further notes that Article XV:9 and Article XV:2, although by no means identical, are largely similar and, to some extent, in parallel:

5.48 Article XV:9 provides, in pertinent part, that:

"Nothing...shall preclude...*exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund* or with that contracting party's special exchange arrangement with the [CONTRACTING PARTIES]"(underlining added)

5.49 Article XV: 2 provides, in relevant part, that:

"... In such consultation, the [CONTRACTING PARTIES]...shall accept the determination of the Fund as to whether *action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund, or with the terms of a special exchange arrangement between that contracting party and the [CONTRACTING PARTIES]*" (underlining added)

5.50 In view of the parallel terms of the language in the two provisions, and in the absence of any contrary indication in the context, China believes fulfilment of the requirements under Article XV:9(a) should correspond to satisfaction of requirements under Article XV:2. Further, taking into account the institutional allocation of expertise resulting from multilateral negotiations regarding trade and exchanges between the WTO and IMF, assuming *arguendo* that measures constituting "exchange controls or exchange restrictions" within the meaning of Article XV:9, is subset to the category of "actions in exchange matters" under Article XV:2, the Panel is obliged to consult with IMF with regard to the measure of the foreign exchange fee in this dispute pursuant to Article XV:2.

5.51 China considers that two issues, specifically, should be resolved through consultation with IMF with respect to (a) whether the imposition of the foreign exchange fee falls within the scope of "exchange matter

under Article VIII, Section 2, is whether it involves a direct governmental limitation on the availability or use of exchange as such".³²⁶

5.54 China notes that the GATT/WTO regime, however, unlike that of the IMF, has never formally decided on how to distinguish between trade and exchange controls.³²⁷

5.55 China hopes that the Panel in the present case could clarify the issue of whether the aforesaid IMF-endorsed criterion, on the basis of which the IMF distinguishes trade and exchange matters, can be directly applied to the determination of whether the imposition of the foreign exchange fee falls within the scope of "exchange controls or exchange res

products concerned are accorded "less favourable treatment" than that accorded to like domestic products. As upheld by the Appellate Body in *US – FSC* (Article 21.5 -EC),

under the individual paragraphs of Article XX on the one hand, and the burden of proof under the *chapeau* of Article XX on the other, and found that the burden of proof for the *chapeau* was a "heavier" one.³³⁷

5.68 In the light of the above principle, it is up to the Dominican Republic, who invokes Article XX(d) in the present dispute

11. Conclusion

5.74 As a third party to this dispute, China is not necessarily aware of the detailed contents and effects of several measures in question. In the light of the relevant WTO/GATT jurisprudence and the analytical approach with regard to the measures in question set forth above, China hopes the viewpoints and various issues it has raised may assist the Panel in its decision.

C. E

also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date". (Emphasis added)

5.82 At the same time, paragraph 1 of the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 states:

"In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, *the nature and level of any 'other duties or charges' levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994* against the tariff item to which they

5.88 In this connection, it should be noted that the addition made to the Dominican Republic's Schedule XXIII under "other duties or charges" refers only to '*lista de productos importados que pagan el Impuesto Selectivo en aduanas*' (list of imported products which pay the Selective Tax at customs), in which it indicates as the level of the charge an *ad valorem* rate determined as a percentage for each tariff item. This charge is, apparently, a selective consumption tax.

5.89 The two above points lead to the firm conclusion that despite its contentions to the contrary, the Dominican Republic's "transitional surcharge for economic stabilisation" is at no time covered by its entries in its Schedule of Concessions XXIII.

(b) Coverage of the measure as applied

5.90 In this second part of their analysis of the legal aspects of the "transitional surcharge", El Salvador and Nicaragua felt that it was extremely important to present their views on the coverage of goods falling within the scope of the measure at issue.

5.91 It was established above that the "transitional surcharge" is not covered by the Dominican Republic's entries in its Schedule of Concessions XXIII as it contends. Beyond that, however, the Dominican Republic has left a large void in its first written submission in its attempt to justify its transitional measure with respect to cigarettes only, and not with respect to the tariff universe to which the measure applies.

5.92 The Panel must examine the matter referred to it by Honduras which, with respect to the "transitional surcharge", can essentially be described as follows:

"The Dominican Republic levies a transitional surcharge for economic stabilisation in accordance with Decrees 646-03 and 693-03, a surcharge which currently amounts to 2 per cent of the c.i.f. value of the *imported goods*. Honduras considers that the surcharge constitutes a charge imposed on or in connection with importation inconsistent with Article II:1(a) and (b) of the GATT".³⁴⁴ (Emphasis added).

5.93 Thus, both Decree 646-2003 and Law 2-04 establish a transitional surcharge on the totality of goods in the tariff universe. Honduras has challenged the measure as such, without making any distinction in terms of a specific product. In this connection, the Appellate Body in the case *European Communities - Definitive Anti-Dumping Duties on Imports of Certain Steel Products from China* (WT/DS471) stated that the measure is inconsistent with Article II:1(a) and (b) of the GATT. (WT/DS471/AB/R, para. 14.25)

the tariff universe. Consequently, the measure is also in violation of the General Principle laid down in Article II:1(a).³⁴⁵

5.96 It is on the basis of these legal arguments that El Salvador and Nicaragua consider the "transitional surcharge" for economic stabilization of 2 per cent on the c.i.f. value of imports applied by the Dominican Republic to be totally inconsistent with the Dominican Republic's obligations under the GATT.

3. Foreign exchange fee of 10 per cent imposed on imports

5.97 The Dominican Republic maintains in force a measure which establishes a levy in the form of a "foreign exchange fee" imposed on the value of imports.

5.98 El Salvador and Nicaragua have examined at length the arguments submitted by the Dominican Republic to the effect that this measure constitutes an "exchange measure" in accordance with the Articles of Agreement of the International Monetary Fund, and is therefore duly permitted under Article XV:9(a) of the GATT.³⁴⁶

5.99 It should be borne in mind, however, that the measure at issue retains the following characteristics:

- The foreign exchange fee is applied upon importation into the Dominican market;
- The foreign exchange fee is applied to the value of imports;
- The fee is charged by the customs authorities.

5.100 These characteristics of the "foreign exchange fee" clearly point to a different conclusion: far from being an "exchange measure" associated with the inherent characteristics of exchange transactions, as the Dominican Republic contends, it is a duty or charge levied in addition to the ordinary customs duties.

5.101 Also, the Dominican Republic bears the burden of proof with respect to its claim that the "foreign exchange fee" is an exchange measure that is justified under Article XV:9(a). Indeed, El Salvador and Nicaragua note that the various elements of that claim remain to be proved.

5.102 This calls for a number of immediate comments on the statement made by the Dominican Republic in its first written submission that "... even if the Panel finds that the exchange fee is not an exchange measure justified by Article XV:9(a), the claim that it is inconsistent with Article II:1 would fail since the rate of the exchange fee is within the level of the ODCs recorded by the Dominican Republic in its Schedule".³⁴⁷

5.103 In this connection, El Salvador and Nicaragua revert to the remarks made with respect to the Dominican Republic's right to impose other duties or charges in the light of its entries in its Schedule of Concessions:

- (a) The validity of the "foreign exchange fee of 10 per cent" in relation to the Dominican Republic's Schedule XXIII

14 September 1994, and not for all of the products of the tariff universe. Here, as in the case of the transitional surcharge, the terms of reference given to the Panel by the DSB d

II:1(b) of the GATT, since the measure is a "duty or charge" levied unjustifiably in addition to the ordinary customs duties.

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Honduras argues that this fee is contrary to Article II:1(b) of the GATT because it exceeds the levels of "other duties and charges" as inscribed by the Dominican Republic in its schedule.³⁶⁰

affix the stamp in the Dominican Republic's territory is identical for importers and domestic manufacturers, therefore, does not exclude the possibility of *de facto* less favourable treatment.³⁶⁵

5.136 According to the Appellate Body in *Korea – Various Measures on Beef*, the relevant standard for a determination of "less favourable treatment" is whether the measure at issue accords "conditions of competition" that are less favourable for imports than for the like domestic goods.³⁶⁶

5.137 The European Communities would object to the Dominican Republic's attempt to narrow the obligation of national treatment in Article III:4 of the GATT by importing "so as to afford protection" into the criterion of "less favourable treatment". On the basis of "so as to afford protection to the domestic industry" in Article III:1 of the GATT, the Dominican Republic appears to advocate an additional requirement under Article III:4, which is that the measure has "protective application".³⁶⁷

5.138 Firstly, this attempt goes in the direction of advocating the "aims-and-effects" approach which has been explicitly rejected in the WTO jurisprudence.³⁶⁸ A responding party can therefore not defend itself against the allegation of an Article III violation by insisting that its measure pursues entirely legitimate policies and is not inherently and intentionally discriminatory.

5.139 Secondly, while the Dominican Republic is right that the Appellate Body has acknowledged that Article III:1 of the GATT informs all of Article III, including its paragraph 4³⁶⁹, this does not result in the additional requirement(s) for a violation of Article III:4 of the GATT as argued by the Dominican Republic. The Appellate Body has made it clear that the principle of Article III:1 of the GATT is already expressed in the requirement of "no less favourable treatment" in Article III:4 of the GATT. Where there is less favourable treatment of the group of like imports, there is automatically protection of the group of like domestic products:

"The term 'Article III:4' Tw (The term) Tj 45 o5'.25 0 TD -0.1605 Tc2103i.75 3.75 t

imported products, there is, conversely, 'protection' of the group of 'like' domestic products".³⁷⁰

5.140 Thus, there is no need for an additional finding of the existence of what the Dominican Republic calls "protective application".

5.141 For this reason, the Dominican Republic also cannot defend itself with the argument that the costs imposed by its tax stamp measure are minimal and therefore result in no discriminatory or protective effect.³⁷¹ Indeed, according to established jurisprudence even a minimal difference in taxes may contravene Article III:2, first sentence, of the GATT as this provision contains no *de minimis* exception.³⁷² In addition, Article III of the GATT protects expectations of equal competitive opportunities, not of trade volumes.³⁷³ This simultaneously shows the irrelevance of the Dominican Republic's argument that the volume of imports has actually increased despite the allegedly discriminatory trade practice.

5.142 Finally, the Dominican Republic's arguments regarding the need for effective enforcement of tax laws, the danger of forgery and tax evasion and the lack of reasonably available regulatory alternatives do not belong in the analysis of competitive conditions and thus of national treatment. In the event of an inconsistency with Article III of the GATT, such considerations would be relevant in the examination of a justification under Article XX:(d) of the GATT.

5.143 Regarding the analysis of the "conditions of competition" one would need to assess whether the measure imposes additional costs on imported products compared to those imposed on like domestic products. In contrast, additional costs which are not truly the result of the governmental measure, but of a free choice by the importer, would be irrelevant. In the latter case, the additional costs borne by imports as compared with the like domestic products would not be entailed by the governmental measure and they should, therefore, be ignored in the "less favourable treatment" analysis. The same is valid for those competitive disadvantages which are not the result of the

(b) Article XX:(d) of the GATT

5.146 Assuming that the "tax stamp requirement"

5.152 This being said, the European Communities does not contest the right of the Dominican Republic to choose its level of enforcement for its legitimate tax laws.³⁷⁸ However, as in the case *Korea – Various Measures on Beef*, this argument is not a "blank cheque" to the Member invoking Article XX(d) GATT. Instead, it is for the Panel to balance and weight all the arguments put forward by the party relying on this defence.

5. The Selective Consumption Tax

5.153 The Dominican Republic argues that the Panel should dismiss the claim because it is moot given the enactment of the Law 304 which was published on 14 January 2004³⁷⁹, that is after the establishment of the Panel, i.e. on 9 January 2004. Against this background, the European Communities considers that the Panel should conclude that the claim has become moot unless Honduras advances a special legal interest on why the Panel should still make a finding on this issue.

5.154 The European Communities is aware that the Panel's terms of reference form the jurisdictional basis for a case. For this reason, past Panels have been reluctant to dismiss a claim in case the underlying facts changed.³⁸⁰ That said, in the EC's view, it is important to take into account the rationale of the dispute settlement system. For instance, Article 3.2 of the DSU provides that this system "serves to preserve the rights and obligations of Members". Moreover, Article 3.3 of the DSU refers to "measures taken by another Member" and Article 3.7 of the DSU second sentence stipulates that "

Consumption Tax, the actual burden of which depends on the quantities sold, such that the bond is not commensurate with the tax payable.

5.158

E. GUATEMALA

1. Introduction

5.164 Guatemala stated that it would limit its comments to certain issues relating to the proper legal interpretation of various Articles of the GATT.

2. The stamp requirement for imported and domestic cigarettes

5.165 In paragraph 28 of its first written communication, the Dominican Republic states that:

"There is nothing discriminatory about the stamp requirement specified in Article 37 of Decree No. 79-03 of 4 February 2003 and Article 2 of Decree 130-02 of 11 February 2002".

5.166 Further, in Paragraph 37, the Dominican Republic maintains that:

"Accordingly to Article 37 of Decree 79-03, both the domestic producer and the importer of cigarettes are required to affix stamps in the presence and under the supervision of the DGII inspector".

5.167 Based on this reasoning, the Dominican Republic suggests that a Member may meet the requirement of Article III:4, by according to like products of any other Member, formally identical treatment to that it accords to its own like products.

5.168 Guatemala claims that the obligation of "treatment no less favourable" contained in Article III.4 is not, in essence, limited to *de jure* discrimination. Therefore, the term "treatment no less favourable" in Article III.4 of the GATT should be interpreted to include *de facto*, as well as *de jure*, discrimination.

5.169 More specifically, formally identical treatment shall be considered to be less favourable if it modifies the conditions of competition in the relevant market to the detriment of imported goods.

5.170 From that, and given the absence of *de jure* discrimination in the present case, the Panel should then turn to the question of whether the application of formally identical rules, nevertheless modified conditions of competition for importers.³⁸⁶

5.171 In its first written submission, Honduras claims that:

"... by requiring that the tax stamp of cigarette packages be affixed in the territory of the Dominican Republic, the Dominican Republic accords treatment less favourable to imported cigarettes than that accorded to domestic cigarettes, in a manner inconsistent with Article III.4 of the GATT."³⁸⁷

5.172 For imported cigarettes, the stamp can only be placed on the cellophane of each cigarette packet after it is imported into the Dominican Republic, but prior to its sale. In contrast, domestic producers can place the stamp in their own premises without any adjustment or cost.

5.173 This, as Honduras affirms, derives in additional steps and costs, which as a result, modify the conditions of competition in the relevant market for imported cigarettes.

³⁸⁶ Appellate Body Report, *Korea – Various Measures on Beef*, para. 137.

³⁸⁷ First written submission of Honduras, 16 March 2004, para. 69.

5.174 The cost of adjusting to this requirement linked with the fact that domestic producers do not have to undergo these additional steps, predominantly burdens importers, thus affecting the internal sale of imported cigarettes.

5.175 Therefore, the requirement to affix the stamp in the Dominican Republic discriminates against imported cigarettes by increasing the cost of imported cigarettes. This additional cost places imported goods in a disadvantageous competitive situation *vis à vis* the like domestic products.

5.176 Consequently, it can be concluded that the requirement to affix the stamp in the Dominican Republic modifies the conditions of competition for imported cigarettes in the Dominican Republic. This *de facto* discrimination reflects the less favourable treatment granted by Dominican Republic to imported cigarettes, thereby, violating Article III.4 of the GATT.

5.177 It is worthD -014 Tj 3 0 TDg3.2718 Twa4recognizmodif14 Tj 3no is uatio3 T4e..12u,gr6is uatio3

"... in order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article

GATT 1994 provides that such measures may be applied at the point of importation; application at the border does not alter the fact that the measure is an internal one.

5.193 The necessary consequence of Note *Ad* Article III is that under Article III:4, the border may be a locus of application for a Member administering laws, regulations, and requirements affecting the internal sale of imported and domestic goods. In this dispute, however, a question has arisen as to whether a measure results in the imported good being provided with treatment less favourable than that accorded to the like domestic product, simply because the measure is being applied in the territory of a Party – at the border. To put it another way: does Article III:4 in the context of this dispute require that a Member apply its measure in the territory of the exporting Member, rather than

"[T]here may be an amount of excess taxation that may well be more of a burden on imported products than on domestic 'directly competitive or substitutable products' but may nevertheless not be enough to justify a conclusion that such products are 'not similarly taxed' for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed 'not similarly taxed' in any given case."³⁹⁶

5.199 Likewise, it cannot be assumed that the Appellate Body's Article III:2, first sentence, analysis is applicable to Article III:4. To the contrary, the Appellate Body in the *Korea – Various Measures on Beef* dispute noted that a measure might produce "incidental effects" but that such effects might not have "decisive implications" for an examination of whether the measure is inconsistent with Article III:4. In that dispute, the Appellate Body examined the existence of a "dual retail system" in Korea: one for imported beef, and a second for domestic beef. The Appellate Body stated:

"[E]ven if we were to accept that the dual retail system 'encourages' the perception of consumers that imported and domestic beef are 'different', we do not think it has been demonstrated that such encouragement necessarily implies a competitive advantage for domestic beef. Circumstances like limitation of 'side-by-side' comparison and 'encouragement' of consumer perceptions of 'differences' may be simply incidental effects of the dual retail system without decisive implication of the issue of consistency with Article III:4."³⁹⁷

5.200 In short, the Appellate Body was reiterating that under Article III:4 like imported and domestic products may be treated differently so long as the different treatment does not result in less favourable treatment for imported products. Therefore, to the extent that the application of a measure at the border results in differential, "incidental effects", those incidental effects do not necessarily mean that an Article III:4 violation has occurred.

5.201 ~~III:4.861~~ a209 TDomin8 TDt0 65 0 TD 0 Tc1175 Tw TD99 mea34that an 72.0 Tprice wh Tde Tmir8

7.6 The Dominican Republic requests the Panel to dismiss all the claims made by Honduras in its submissions.

B. ORDER OF ANALYSIS

7.7 The Panel considers that Honduras has made claims under five separate measures in this dispute. The failure to publish the survey used to determine tax bases as prescribed in paragraph 2 of its panel request is not an independent measure, rather, it forms part of the rules and practices by which the Dominican Republic determines the Selective Consumption Tax base for imported cigarettes.

7.8 The Panel recalls the ruling of the Appellate Body in *Australia – Salmon*:

"This aim [of the dispute settlement system] is to resolve the matter at issue and to

2. Introduction

7.13 Honduras claims that this transitional surcharge measure is inconsistent with Article II:1(b) of the GATT 1994. It also points out the consequential violation of Article II:1(a) in the text of a footnote in its first written submission. In light of the arguments and debates made by the parties during the Panel proceedings, the Panel considers it necessary to address a series of issues logically linked to the claim of inconsistency with Article II:1(b) of the GATT 1994 raised by Honduras. These issues include: (i) which legal instrument constitutes the measure to be examined by the Panel; (ii) whether the transitional surcharge is an "other duty or charge" under Article II:1(b) of GATT 1994; (iii) whether the surcharge has been properly recorded in the Schedule of Concessions of the Dominican Republic and the nature of the recorded measure; (iv) whether the right to challenge the recording expired three years after the incorporation of the Uruguay Round Schedule; (v) whether the surcharge is inconsistent with Article II:1(b); (vi) whether the measure is limited to cigarette products; and (vii) whether the surcharge is inconsistent with Article II:1(a).

3. Which legal instrument constitutes the measure to be examined by the Panel

(a) Arguments of the parties

7.14 Honduras claimed that Decree 646-03 of 30 June 2003 prescribed a "transitional surcharge for economic stabilization". Article

"Article 1 A temporary surcharge of 2 per cent is hereby established on all goods imported into the Dominican Republic under the regime of customs clearance for consumption, included in the nomenclature of the Harmonized Commodity Description and Coding System.

Paragraph I The following shall be exempted from this surcharge: final importation of goods for personal use that are duty-free under the special regimes on: passenger luggage, disabled persons, Dominican personnel abroad and diplomatic representatives accredited to the Dominican Republic. Also exempt are final imports not subject to import duties, made by institutions in the public sector, diplomatic and consular missions and international organizations. The same exemption shall apply to final imports of samples and parcels exempt from tariff duties."

7.19 It is clear to the Panel that Law 2-04 does not change the essence of the measure. The exception list in Paragraph I to Article 1 of Law 2-04 concerns only imports relating to: (i) goods for personal use by passengers, disabled persons and diplomatic representatives; (ii) goods imported by public institutions and diplomatic missions; and (iii) goods imported as samples or parcels that are exempted from paying tariff duties. The substance of the transitional surcharge for economic stabilization, i.e. the 2 per cent charge on the c.i.f. value of the imported products, is unchanged in the new legal instrument Law 2-04. It is the Panel's understanding that Honduras is challenging the measure as it affects commercial imports into the Dominican Republic, rather than the measure as it affects non-commercial imports exempted from paying the surcharge by Paragraph I to Article 1 of Law 2-04. In this sense, the Panel is of the view that there is no difference between the measure as provided in Decree 646-03 and that as provided in Law 2-04 with regard to the claim of Honduras in this dispute.

7.20 Given that the amendment was made after the Panel was established, the question is whether the Panel has the authority to examine the measure as provided by the new legal instrument – Law 2-04. In this respect, the Panel recalls that a number of previous panels have examined measures amended either after the consultation stage of dispute settlement proceedings, such as in

4. Whether the transitional surcharge is an "other duty or charge" under Article II:1(b) of the GATT 1994

(a) Arguments of the parties

7.22 Honduras claims that the surcharge is imposed on, or in connection with, the importation of all goods due to the fact that it is levied on the *c.i.f.* value of all goods included in the Harmonized Commodity Description and Coding System and which fall under the regime of custom clearance for consumption as provided by the Decree.⁴⁰⁹ Honduras also argues that the obligation to pay the surcharge arises concurrently with the customs duty payable, and is thus an obligation separate from the obligation to pay the customs duty. Therefore, the surcharge is an "other duty or charge" within the meaning of Article II:1(b). Honduras indicates that for cigarette products, the bound rate of tariff duty for the Dominican Republic is 40 per cent, and the surcharge is imposed in addition to that duty.⁴¹⁰

7.23 The Dominican Republic explains that it does not contest the fact that the transitional surcharge is an ODC within the meaning of Article II:1(b). However, the Dominican Republic disagrees with the argument by Honduras that the Dominican Republic has not recorded the ODCs into its Schedule of Concessions.⁴¹¹

(b) Analysis by the Panel

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

7.25 The surcharge is based on the value of the imported products, rather than any service rendered in rees wi2ots, r7

7.27 The Dominican Republic responds that it did record ODCs applied to cigarettes as of 15 April 1994 in its Schedule.⁴¹³ On 14 September 1994, the Dominican Republic notified its addition of "other duties and charges" to its Schedule XXIII, which was circulated by the Preparatory Committee for the World Trade Organization to all Members in document G/SP/3 on 12 October 1994. In the circulated list, a rate of 30 per cent ODC was included for cigarette products under tariff heading 2402.⁴¹⁴

7.28 The Dominican Republic submits that its notification was filed with the WTO Secretariat in accordance with paragraph 7 of the Understanding, within six months of the date of the deposit of its original Schedule on 15 April 1994. It also indicates that there was a cover note

productos importados que pagan el Impuesto Selectivo en Aduanas", whereas the title of product list subject to the Selective Consumption Tax in 1994 according to chapter IV of Law 11-

6. Whether the right to challenge the existence of the measure and the nature of the measure in the recording expired three years after the incorporation of the Uruguay Round Schedule

(a) Introduction

7.41 ~~6.50~~ Measure

recorded are bound.

7.58 In this regard, the Panel also notes that the *travaux préparatoires* confirm that the intention behind paragraph 4 is to prevent the breaching of earlier bindings in recording the ODCs as applied on 15 April 1994, which was the newly agreed applicable date for the recording of ODCs. In other words, the intention of paragraph 4 was to ensure that the level of ODCs recorded on the newly agreed date of 15 April 1994 would not be higher than any previously bound level of ODCs. A Secretariat note on "Article II:1(b) OF THE GENERAL AGREEMENT" circulated during the process of negotiation explained:

"If it were felt desirable to achieve the fullest possible transparency and to minimize the technical complexity of the entries to be made in the Schedules, the Group might consider that for all bound items, whatever the date of their first incorporation into GATT Schedules, the applicable date should become the same. If it were decided that for example the date of the Uruguay Round Protocol should be the applicable date, all ODCs would be bound at the levels in force at the date of the Uruguay Round tariff protocol, *provided that these levels were not in themselves illegal*

7.65 The close relationship between a challenge to the existence and a challenge to the consistency in level, whereby the former challenge is logically one specific type of the latter, implies that both categories of challenges must be based on a comparison of the recorded ODC with the bound level (or existence) at the previous bound time, i.e. the time of the first incorporation of the item, which is also the time of the original binding of the item.

7.66 The ordinary meaning of the word "original" in the second sentence of paragraph 4 of the Understanding, read in its context means "first, earliest, early",⁴⁴⁴ or, "existing or belonging at or from the beginning or early stage, primary, initial, innate",⁴⁴⁵ all of which refer to the time *prior to* the time of the drafting of the Understanding in the Uruguay Round which is the time that the concession was first incorporated in previous rounds with respect to the tariff item concerned.

7.67 Therefore, the Panel finds that, the second sentence of paragraph 4 provides that the right to challenge the existence of the ODC at the time of *the original binding* of the item, i.e. *the time of the first incorporation of the item in a previous round*, and the right to challenge the consistency of the recorded level of the ODC with *the previous bound level*, that is, *the level bound at the time of the first incorporation of the item prior to the Uruguay Round*, expired three years after the entry into force of the WTO Agreement or three years after the deposit of the instrument incorporating the Schedule into the GATT 1994, whichever is later. For the Dominican Republic, the date of deposit of its instrument incorporating the Schedule into GATT 1994 is 7 February 1995.⁴⁴⁶ Therefore, after 7 February 1998, no Member could challenge the Dominican Republic's recording of ODCs on the ground of the non-existence of the ODC in previous bound time when a tariff item was first incorporated in its Schedule or could challenge the consistency of the level with the previous lower bound level.

7.68 However, paragraph 4 only deals with challenges regarding the consistency of the level of the recorded ODC with the level applied at the time of the first incorporation of the item prior to the Uruguay Round and the existence of the ODC at that time. The possibility of all other challenges is addressed under paragraph 5 of the Understanding:

"The recording of 'other duties or charges' in the Schedules is without prejudice to their consistency with rights and obligations under GATT 1994 *other than those affected by paragraph 4* (emphasis added). All Members retain their right to challenge, at any time, the consistency of any 'other duties or charges' with such obligations"

7.69 It is clear that paragraph 5 of the Understanding allows all types of challenges to be made based on all GATT articles, except those that fall under paragraph 4. One specific challenge made by Honduras is that *the recorded ODC did not exist as of 15 April 1994*, which, in the opinion of the Panel, is a challenge of *the existence* of the ODC *during the Uruguay Round*, rather than a challenge of existence of an ODC at the time of the original binding of the item, i.e. at the time of the first incorporation of the item prior to Uruguay Round. Therefore, it is not subject to the three-year limitation under the second sentence of paragraph 4 and the challenge is permitted by paragraph 5 of the Understanding.

7.70 The Panel recalls the fact that the surcharge has been applied since October 2003. It clearly did not exist as of 15 April 1994. The recording of a measure which did not exist as of 15 April 1994

⁴⁴⁴ *Concise Oxford Thesaurus*, Second Edition, 2002, p. 611.

⁴⁴⁵ *The New Shorter Oxford English Dictionary*, *supra* note 52, Vol. II, p. 2,022.

⁴⁴⁶ The "Notification of Acceptance" in document WT/Let/7 shows that the Dominican Republic deposited its acceptance of the Marrakesh Agreement with the Director-General of the WTO on 7 February 1995. This acceptance also serves as the instrument incorporating its Schedule of Concessions into GATT 1994.

is therefore not legally valid as it does not meet the obligation under paragraph 2 which requires that ODCs be recorded at the levels applied on 15 April 1994.

7.71 The Panel considers that the other specific challenge made by Honduras that *the nature of the recorded measure is not an ODC within the meaning of Article II:1(b)* is also clearly a challenge that falls outside of the scope of paragraph 4 and is therefore permitted by paragraph 5 of the Understanding.

7.72 In this regard, the Panel notes that paragraph 1 of the Understanding also provides: "... *the nature and level of any 'other duties or charges' levied on bound tariff items, ... shall be recorded in the Schedules of Concessions annexed to the GATT 1994 against the tariff item to which they apply.*" It is understood that such *recording does not change the legal character* of 'other duties or charges' (emphasis added)". Based on this paragraph, the Panel understands that the recording of the nature of the measure is a necessary part of the recorded content and it also constitutes an element

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surcharge, is less than 30 per cent, the transitional surcharge is consistent with Article II:1(b), second sentence.⁴⁵³ Consequently, in the view of the Dominican Republic, there is no inconsistency of the surcharge with Article II:1(a) either due to the fact that Honduras's claim of inconsistency of the surcharge with Article II:1(a) is derived from the inconsistency of the surcharge with Article II:1(b).⁴⁵⁴

7.82 Honduras submits that the Dominican Republic actually inscribed its internal tax as applied on 15 April 1994 into its Schedule. Honduras considers that the inscription of an internal tax into the Schedule has no legal effect.⁴⁵⁵ Honduras contends that the nature of the recorded "*Impuesto Selectivo*" is not the same as the surcharge measure currently applies. The "*Impuesto Selectivo*" is an internal tax while the transitional surcharge is a border measure on the importation of all products. Therefore, in the view of Honduras, the Dominican Republic had not properly recorded the transitional surcharge as an ODC in its Schedule.⁴⁵⁶ Honduras argues that the recording of an internal tax which falls under recording of an internac 0.18the surcharge with Article s S c h e d u l e .

3.82 r c h a r g e r w i t h c h a

of the Understanding;⁴⁶² (iii) both the challenge to the existence of the ODC on the date of 15 April 1994 and the challenge to the nature of the recorded ODC are permitted by paragraph 5 of the Understanding.⁴⁶³

7.86 The Panel therefore finds

purposes, what was notified by the Dominican Republic in document G/SP/3 is equivalent to "zero" in the Schedule. The Panel finds that the surcharge as an "other duty or charge" measure is applied in excess of the level "zero" pursuant to the Schedule. Therefore, the surcharge measure is inconsistent with Article II:1(b) of the GATT 1994.

7.90 The fact that the surcharge and foreign exchange fee are currently applied to products *outside* the scope of those selected products as listed in G/SP/3 notification constitutes an additional reason for the Panel to find that they are inconsistent with Article II:1(b) because for these products outside the scope of the notified list, nothing has been recorded in the Schedule, whether legally valid or not. Therefore, any amount of surcharge or foreign exchange fee is actually "in excess of" the level of "zero" pursuant to the Schedule of the Dominican Republic.

8. Whether the measure is limited to cigarette products

(a) Arguments of the parties

7.91 Honduras argued in its oral statement during the first substantive meeting of the Panel that the surcharge currently applied by the Dominican Republic is inconsistent with Article II:1(b) of the GATT 1994. One reason given by Honduras for such claim is that the surcharge is imposed also on other products not listed in the controversial addition of ODCs in the Schedule of Concessions in 1994.⁴⁶⁵

7.92 Rebutting this argument of Honduras, the Dominican Republic contends that the product coverage with respect to the surcharge and foreign exchange fee measures has been limited to cigarettes from the early stage of the proceedings.⁴⁶⁶ The Dominican Republic submits that Honduras claimed in its first written submission that the surcharge and the foreign exchange fee are inconsistent with Article II:1(b) as they apply to the bound item of cigarettes. The scope of the product coverage has therefore been confined to cigarettes.⁴⁶⁷ Expanding this scope of product coverage would, in the view of the Dominican Republic, affect the right of the Dominican Republic to defend itself and undermine the principles of due process, equity and good faith.⁴⁶⁸

7.93 Honduras argues however, that the text of the Panel request with regard to transitional surcharge has an "all encompassing nature" and that its claims of violation of Article II:1(b) and Article II:1(a) are made with respect to any imported good. The panel request has put the Dominican Republic and third parties on notice that the claims are made with respect to all imported goods. Therefore, Honduras considers that the transitional surcharge, as it applies to products other than cigarettes, is within the mandate of the Panel.⁴⁶⁹ Honduras submits that from the language in its request for the establishment of the Panel, the foreign exchange fee as it applies to products other than cigarettes is within the terms of reference of the Panel.⁴⁷⁰

(b) Analysis by the Panel

7.94 On the issue of whether the measure to be examined by the Panel is limited to the transitional surcharge as applied to cigarette products, i.e. excluding the examination of the application of the surcharge to other products, the Panel believes that it is necessary to analyse the text of the panel request to determine whether it is limited to the application of the surcharge to cigarette products.

⁴⁶⁵ First oral statement of Honduras, para. 14.

⁴⁶⁶ Second written submission of the Dominican Republic, 10 June 2004, para. 94; First oral statement of the Dominican Republic, para. 62.

⁴⁶⁷ Second written submission of the Dominican Republic, 10 June 2004, para. 95.

⁴⁶⁸ Second written submission of the Dominican Republic, 10 June 2004, paras. 95, 96 and 89.

⁴⁶⁹ Second written submission of Honduras, 10 June 2004, paras. 154-155.

⁴⁷⁰ *Ibid.*, paras. 189-190.

7.95 The request for the establishment of this panel provides:

"The Dominican Republic levies a transitional surcharge for economic stabilization in accordance with Decrees 646-03 and 693-03, a surcharge which currently amounts to 2 per cent of the c.i.f. value of the imported goods. Honduras considers that the surcharge constitutes a charge imposed on or in connection with importation inconsistent with Article II:1(a) and (b) of the GATT."

7.96 On the measure of foreign exchange fee, the panel request provides similar language:

"The Dominican Republic levies a foreign exchange fee in accordance with the Seventeenth Resolution of the Monetary Board dated 24 January 1991 as amended, *inter alia*, by... and the First Resolution of 22 October 2003. The fee is currently 10 per cent 'calculated on the value of the imports'. Honduras considers that this fee constitutes a charge imposed on or in connection with importation which does not meet the requirements laid down in Article II:1(a) and (b) of the GATT. Honduras also considers that the fee constitutes an exchange action frustrating the intent of the provisions of the GATT and that it is therefore inconsistent with Article XV:4 of the GATT."

7.97 It is clear to the Panel that the request describes the transitional surcharge for economic stabilization measure and the foreign exchange fee measure in a general manner without mentioning product coverage. The claim that Honduras made in respect of surcharge is that "the surcharge constitutes a charge ... inconsistent with Article II:1(a) and (b) of the GATT". The claim with respect to the foreign exchange fee is that "this fee constitutes a charge ... which does not meet the requirements laid down in Article II:1(a) and (b)". There is no specific indication of product coverage in the panel request with respect to these two measures.

7.98 The Dominican Republic argues that the product coverage with respect to the surcharge and

7.100 Such conclusion is further supported by the written replies to a Panel question by the third parties El Salvador and Nicaragua. Both of them argue that the panel request has put third parties on notice that the scope of products with regard to these two measures is not confined to cigarettes⁴⁷³

7.101 Even assuming that Honduras did focus its arguments more on cigarette products in its first written submission in arguing the inconsistency of the surcharge and foreign exchange fee measures, the fact that it made additional argument regarding other products not excluded by its Panel request during the first substantive meeting of the Panel, would have given the Dominican Republic sufficient opportunities to respond to it in its second written submission or during the second substantive meeting of the Panel. The Panel does not see how the opportunity to respond to such argument is limited in the proceedings. Therefore, the Panel considers that it has not been presented with a convincing case that a due process issue would arise if the Panel does not exclude from its consideration new arguments made by Honduras concerning other products at the first substantive meeting.

7.102 On the importance of the title of the dispute to the determination of the mandate of this Panel, the Panel is of the view that it is the panel request, rather than the title of the dispute that defines the terms of reference of the Panel. In fact, in some cases, the title of a dispute does not make any reference to the name of product at all.⁴⁷⁴ In other cases, the title contains the names of certain products, but not all those products addressed in the dispute. In

D. THE LEVYING OF THE FOREIGN EXCHANGE FEE

1. **The measure at issue**

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

"4 The definition of ODCs falling under the purview of Article II:1(b) can only be done by exclusion –i.e. by reference to those categories of ODC not covered by it. It would be impossible, and logically fallacious, to draw up an exhaustive list of ODCs which do fall under the purview of Article II:1(b), since it is always possible for governments to invent new charges. Indeed, an attempt to provide an exhaustive list would create the false impression that charges omitted from it, or newly invented, were exempt from the II:1(b) obligation."⁴⁸⁸

7.115 The foreign exchange fee is imposed on imported products only and it is not an ordinary customs duty. It is computed on the value of imports, not on the cost of the services rendered by the customs authorities. Consequently, it is not a fee or charge that falls under Article VIII of the GATT. It is obviously not an anti-dumping or countervailing duty. Therefore, it is a border measure in the nature of an ODC within the meaning of Article II:1(b).

7.116 On the issue of whether the foreign exchange fee as an ODC has been recorded in the Schedules of Concessions of the Dominican Republic, the Panel notes that the parties made essentially the same arguments as they did on the issue of whether the surcharge measure has been recorded in the Schedule. The Panel therefore considers that the same analysis the Panel made with respect to the recording of the surcharge measure in paragraphs 7.37 to 7.40 also applies to the recording of the foreign exchange although the Panel notes that the foreign exchange fee did exist at the level of 1.5 per cent as of 15 April 1994.

7.117 Therefore, the Panel's overall factual assessment with respect to the recording of the foreign exchange fee measure is that the foreign exchange fee was applied at 1.5 per cent in 1994, but it was not recorded in the Schedule. What the Dominican Republic notified in document G/SP/3 was basically the products list and the *ad valorem* Selective Consumption Tax rates as applied to these imported products under Law 11-92 in force in 1994. It is clear that in fact these products were only subject to the Selective Consumption Tax, not to an equal amount of additional "other duties and charges" back in 1994.

7.118 The Panel has found in paragraph 7.40 that the Dominican Republic has actually recorded in its Schedule the Selective Consumption Tax as it applied to imported products as of 15 April 1994. The fact that the Selective Consumption Tax applied both to imported and domestic products makes it clear that it is in the nature of an internal tax. Article II:2(a) and Article II:1(b) make a distinction between an internal tax that is subject to Article III and an ODC that is subject to a bound requirement with the consequence that the two are mutually exclusive. If a measure is in the nature of an internal tax, it is not an ODC. If a measure is in the nature of an ODC, it is not an internal tax. For these reasons, the Panel finds that the Dominican Republic has not established that the nature of the measure recorded in the Schedule of the Dominican Republic is an ODC measure within the meaning of Article II:1(b) that could be invoked to justify the current ODC measure, the foreign exchange fee.

7.119 The Panel also considers that Honduras's challenge to the nature of the recorded measure is not prohibited by paragraphs 4 and 5 of the Understanding or by the fact of absence of invocation of the Understanding in its Panel request based on the same analysis as developed by the Panel in paragraphs 7.67, 7.71 and 7.78.

7.120 The Panel recalls that the foreign exchange fee is applied to all imported products, well beyond the selective products list in the G/SP/3 notification. As the Panel found in paragraph 7.103,

⁴⁸⁸ See "Article II:1(b) of the General Agreement, Additional Note by the Secretariat", *supra* note 441.

the foreign exchange fee as applied to products outside the scope of the products listed in the G/SP/3 notification, is within the Panel's terms of reference.

7.121 The Panel concludes for the reasons set out above, that there was no legally valid recording of any ODC measure as required by the Understanding in the Schedule of the Dominican Republic. For all legal and practical purposes, what was notified by the Dominican Republic in document G/SP/3 is equivalent to "zero" in the Schedule. The Panel finds that the foreign exchange fee is therefore applied in excess of the level of "zero" pursuant to the Schedule of the Dominican Republic and therefore is inconsistent with Article II:1(b) of the GATT 1994.

7.122 The Panel also considers that the application of foreign exchange fee to products other than those products listed in the G/SP/3 notification is in excess of the level of "zero" or "none" pursuant to the Schedule of the Dominican Republic, since nothing was recorded for these products, either as an ODC or otherwise.

4. Whether the exchange fee is an "exchange restriction" under Article XV:9 (a) of the GATT 1994

(a) Arguments of the parties

7.123 The Dominican Republic argues that the foreign exchange fee is an exchange measure justified by Article XV:9(a) of the GATT 1994. The Dominican Republic considers that Article XV:9(a) is an exception to other provisions of the GATT, including Article II. In its view, Members are entitled to use exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund.⁴⁸⁹ are(justified by

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not to foreigners. 25. Under the Ordinance, only Czech citizens and public residents of the Czech Republic are eligible to apply for citizenship.

claim in accordance with the provisions of the Czech Constitution.

7.141 The Panel also recalls a similar situation in *Argentina – Textiles*, where an *ad valorem* statistical tax was imposed allegedly for fiscal performance purposes so as to obtain IMF financing to deal with a financial crisis. That panel in that instance did not consult with the IMF. The Appellate Body considered that that panel had good reason for not consulting the IMF because the statistical tax was not one of the "problems concerning monetary reserves, balances of payments or foreign exchange arrangements". However, it nevertheless stated that "it might perhaps have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF in this case".⁵⁰⁶

7.142 Bearing these considerations in mind, the Panel requested information on 17 May 2004 from the IMF on the following two issues: (i) how the foreign exchange fee is being implemented by the Dominican Republic; (ii) whether the foreign exchange fee as currently applied by the Dominican Republic is an "exchange control" or "exchange restriction" under the Articles of Agreement of the IMF.

7.143 On the first issue, the IMF General Counsel replied that:

"(a) The 'exchange commission' is levied under the legal authority of the Banco Central de la República Dominicana (BCRD). Since its introduction in January 1991, the commission has undergone a number of changes in the way that it is levied. Initially, the commission was payable on sales of foreign exchange and was calculated as a percentage of the selling rate.

(b) Since August 2002, however, pursuant to the Agreement between the BCRD and the Directorate General for Customs (DGC) of August 22, 2002, the commission has been collected in its entirety by the DGC. Moreover, although the commission is still referred to as an "exchange commission" (because it is levied on the basis of the legal authority vested in the BCRD to charge a commission on sales of foreign exchange), the commission is no longer payable on sales of foreign exchange. Rather, it is payable as a condition for the importation of goods, and the amount of the commission is now calculated exclusively on the CIF valuation of the imported goods as determined by the DGC (Article 1 of the Agreement between the BCRD and the DGC). By Notice of Resolution No. 1 of the Monetary Board of October 22, 2003, the rate of the commission was increased to ten per cent in October 2003."⁵⁰⁷

7.144 On these con 6.75 2elwu.75voardion was pa7qur, '

measure as it is currently applied by the Dominican Republic does not constitute an "exchange restriction" within the meaning of Article

such approval by the IMF is further confirmed by the WTO Secretariat on 5 May 2004 in response to a letter from Honduras requesting the information.⁵¹³

7.149 Honduras points out that the IMF Press Release No. 04/23 of February 2004 states that "the Executive Board approved the Dominican Republic's request to waive the non-oy1-

7.154 For these reasons, the Panel finds that the IMF waiver decision does not constitute a legal basis for the application of the foreign exchange fee measure and the Dominican Republic has not demonstrated that the foreign exchange fee is applied "in accordance with" the Articles of Agreement of the IMF.

6. Whether the measure is justified under Article XV:9(a) of the GATT 1994

7.155 The Panel considers that Article XV:9(a) as an exception provision has to be invoked and proved by the Dominican Republic to justify the inconsistency of the foreign exchange fee measure with the second sentence of Article II:1(b). As the Panel has already found that the measure does not constitute an "exchange restriction" within the meaning of Article XV:9(a) of the GATT 1994 and that the Dominican Republic has not demonstrated that it is "in accordance with" the Articles of Agreement of the IMF, the Panel concludes that the foreign exchange fee is inconsistent with Article II:1(b) and can not be justified under Article XV:9(a) of the GATT 1994.

E. OBLIGATION THAT STAMPS BE AFFIXED TO CIGARETTE PACKETS IN THE TERRITORY OF THE DOMINICAN REPUBLIC (THE TAX STAMP REQUIREMENT)

1. The measure at issue

7.156 Under Article 37 of the Decree 79-03 of 4 February 2003,⁵¹⁷ and under Decree 130-02 of 11 February 2002,⁵¹⁸ the Dominican Republic requires that a stamp be affixed to all cigarette packets in the territory of the Dominican Republic and under the supervision of the local tax authorities. This requirement applies both to domestic and imported cigarettes.

General of Internal Taxes, which may review and inspect the ledger where deemed appropriate. For this purpose, each producer shall maintain the following control of stamps received:

- a) He shall apply to the DGII to purchase stamps and, after approval, shall pay the amount of the stamps with a certified cheque.
 - b) When the certified cheque is paid, the DGII shall issue a receipt of payment, which shall be recorded sequentially in the official ledger.
2. Control of the production process (transfer of finished product to

are the result of the technology used by the importer. In its view, the importer could avoid unpacking cigarettes from cartons before affixing stamps, if it packaged individual cigarette packets into boxes.

7.175 The Dominican Republic expresses its opinion that, even assuming that the cost estimates provided by Honduras are correct, and assuming further that they cannot be reduced by reasonable means, the effect that the tax stamp requirement has on importers is negligible. Based on Honduras's own estimates, it calculates that the annual cost of complying with the tax stamp requirement for the Honduran firm exporting cigarettes into the Dominican Republic would be US\$65,641. This importer is part of the second largest tobacco company in the world with 15 per cent of the world market. The world sales of this tobacco company were over \$37 billion in 2003. In the Dominican Republic's opinion, the measure is commercially irrelevant and lacks any protective effect, as demonstrated by the fact that imports by the Honduran firm into the Dominican Republic increased by more than 80 per cent in value in 2003, compared with the previous year.

7.176 Honduras rebuts the latter arguments by identifying the specific steps that both domestic producers and importers take in their production and packaging processes, and signalling the specific additional steps that in its view importers have to adopt as a direct result of the tax stamp requirement. Honduras has also produced a statement from the private exporter of cigarettes into the Dominican Republic, who claims that the wrapping is needed to avoid packets deteriorating during the manufacturing process and when the cartons are opened in the country of destination in order to affix the tax stamps. The exporter also claims that, without the wrapping, the packets would be exposed to

could also be packaged in a similar manner to domestic cigarettes, by unwrapping and rewrapping each individual packet, but this would entail substantial costs and investment.

(ii) *Formally equal treatment*

7.180 Both parties agree that the tax stamp requirement – i.e. the requirement that a tax stamp must be affixed on cigarette packets in the territory of the Dominican Republic and under the supervision of Dominican Republic tax authorities – applies to both domestic and imported cigarettes and is, as such, a formally identical requirement.

7.181 The Panel notes, however, that in the view of the complaining party, this formal equality itself results in less favourable treatment being accorded to imported cigarettes as compared to domestic cigarettes, since tax stamps may be affixed on packets of domestic cigarettes as part of the production process, while in the case of imported cigarettes an additional process has to be undertaken, which entails added costs.

7.182 The Panel agrees that the relevant test for whether a measure is consistent with Article III:4 of the GATT is not whether the measure accords a treatment which is formally the same for both imported and like domestic products, but rather whether it accords a treatment for imported products which is not less favourable than the one granted to like domestic products. In fact, as noted by a previous panel, there are cases in which formally equal rules may accord a treatment for imported products which is less favourable than the one granted to like domestic products:

"[T]here may be cases where the application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable ..."⁵³⁸

7.183 The Panel thus considers that the fact that the tax stamp requirement is applied equally – i.e. in a formally identical manner – to domestic and imported cigarettes does not automatically make it compatible with Article III:4. The Panel then needs to look at whether that formally equal measure results in a treatment that is less favourable for imported cigarettes.

(iii) *Additional steps*

7.184 The Panel considers that there is evidence that there are some steps performed by importers, specifically associated with compliance with the tax stamp requirement, which are not necessary for domestic producers, i.e. those related to unpacking and repacking of boxes in order to affix the stamps. Domestic producers of cigarettes are able to affix tax stamps as part of their production process. They are thus relieved of having to unwrap cigarette packages in order to affix stamps and of later having to rewrap those packages.⁵³⁹ TD -0.122 Tw (7.184) Tj also.1041 TD /F5i (Thesticsfi there ae.) f

justification. The Panel is thus satisfied by the evidence that cigarettes could not be exported either loose or in unwrapped packets, without having the quality of the product altered. As a result, the affixation of tax stamps on individual packets in the territory of the Dominican Republic would require, in the case of imported cigarettes, that cigarette packages be unwrapped before the stamps are affixed, and later rewrapped.

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7.186 For the preceding reasons, the Panel considers that Honduras has presented a *prima facie* case that the tax stamp requirement imposes on importers of cigarettes the burden of performing additional steps to those performed by domestic producers of the like products. The Dominican Republic has not shown that the additional steps undertaken by the importer are either avoidable, or the result of the technology used by importers. Rather, in the Panel's view, they are related to the tax stamp requirement itself.

(iv) *Inherent differences in normal conditions of competition between imported and domestic products*

7.192 Similarly, the Panel is not persuaded by the argument concerning the increase of exports of cigarettes from Honduras to the Dominican Republic. Even if imports have increased, that fact does not *per se* exclude the possibility that conditions of competition between imported and domestic products in a particular market could still be affected. Arguably, imports could have increased even further, had the imported products not received a treatment that was less favourable than the one accorded to like domestic products.

(vi) *Aesthetic presentation of the products*

7.193 The Dominican Republic has not disputed Honduras's argument that placing the stamp on imported cigarettes over the cellophane on each individual packet aesthetically detracts from the overall presentation of the final product.⁵⁴⁰ Honduras has provided physical evidence of packets of imported cigarettes after the affixation of the stamp in the Dominican Republic, as well as evidence of packets of domestic cigarettes, in order to highlight how, in its view, from an aesthetic standpoint, domestic cigarettes look better packaged than imported cigarettes.⁵⁴¹

7.194 The Panel is satisfied with the evidence that from an aesthetic point of view, the tax stamp requirement results in imported cigarette packets having a less smooth presentation than like domestic cigarettes. The Panel is of the view that, other conditions being equal, a consumer may prefer a product that is more attractively packaged over one that is less attractively packaged. While the importer could surely engage in additional processes to produce a cigarette packet that is similarly presented to the like domestic product, this would in turn entail further additional costs and the less favourable treatment for imported products would thus still exist.

(vii) *Less favourable treatment*

7.195 In order to determine whether the requirement that tax stamps be affixed only in the territory of the Dominican Republic and under the supervision of tax authorities accords less favourable treatment to imported products than to like domestic products, the Panel must first determine whether the requirement that tax stamps be affixed only in the territory of the Dominican Republic and under the supervision of tax authorities accords less favourable treatment to imported products than to like domestic products.

cigarettes than that accorded to the like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994.

(viii) *Protective application*

7.199 The Dominican Republic claims that Article III:1 has a particular contextual significance in interpreting Article III:4, so the Panel must consider whether the tax stamp requirement has a protective application, i.e. whether it is applied so as to afford protection to domestic producers. In its view, it is up to Honduras to provide evidence to demonstrate that the measure has protective application and Honduras has not submitted evidence to establish that the tax stamp requirement is applied so as to afford protection to domestic producers of cigarettes. The Dominican Republic considers that an examination of the design, architecture, and revealing structure of the requirement to affix a stamp in the territory of the Dominican Republic quickly reveals that the measure is not applied so as to afford protection to domestic producers.

7.200 ~~Under Article III:1, a measure that is not applied so as to afford protection to domestic producers of cigarettes is not inconsistent with Article III:4 of the GATT 1994.~~

The tax stamp would serve as a mark to alert the Dominican Republic tax authorities that the applicable taxes have been collected and would ensure that cigarettes continue to enter the Dominican

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: [...]

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;"

7.206 As the Appellate Body has explained, the analysis of a measure under one of the paragraphs of Article XX is "two-tiered":

"In order that the justifying protection of Article ~~WT/DS302~~ ^{WT/DS302} 2393 Tj 60 401n a m16lmeasmgraphs

7.217 In light of the available information, the Panel does not disagree with the Dominican Republic's argument that tax stamps may be a useful instrument to monitor tax collection on cigarettes and, conversely, to avoid tax evasion. Indeed, as expressed by both parties, several countries have tax stamp regulations applicable to products such as matches, alcoholic beverages and tobacco products. As the Dominican Republic has noted, goods subject to tax stamp requirements tend to be mass-consumed products, that are susceptible to being smuggled. These products tend to be subject to high levels of taxes, which make them an important source of governmental revenue, but also make them more prone to smuggling.

7.218 Even admitting that tax stamps can generally be used to monitor tax collection, the specific tax stamp requirement in place in the Dominican Republic would still need to be justified. As mentioned, under the Dominican Republic's tax stamp requirement, tax stamps must be affixed in the

"In our Report in *Korea – Beef*, we addressed the issue of 'necessity' under Article

7.231 In light of the preceding considerations, and since the tax stamp requirement has not been found to be a "necessary" measure to secure compliance with the Dominican Republic's tax laws and regulations, the Panel does not need to analyse the elements contained in the *chapeau* of Article XX of the GATT 1994, i.e. whether the different treatment constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail", or a "disguised restriction on international trade."

7.232 In conclusion, the Panel considers that the Dominican Republic has failed to establish that the tax stamp requirement is justified under Article XX(d) of the GATT 1994.

4. Conclusion

7.233 For the reasons indicated above, the Panel's overall conclusion with respect to the requirement that a tax stamp be affixed to all cigarette packets in the territory of the Dominican Republic and

X(d) of the GATT 1994.

rather than a restriction on importation, it should find that it is inconsistent with Article III:4 of the GATT, because it modifies the conditions of competition between imported and domestic cigarettes.

7.239 The Dominican Republic responds that the bond requirement is outside of the scope of Article XI:1 of the GATT, since it is neither a restriction nor a prohibition on the importation of cigarettes. In its opinion, the bond requirement is an internal measure that applies equally to imported and domestic cigarettes, rather than a measure on the importation of cigarettes. The Dominican Republic additionally claims that the bond requirement is also outside of the scope of Article III:4 of the GATT, because it does not affect the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported cigarettes. Should the Panel consider that the bond requirement affects the internal sale, offering for sale, purchase, transportation, distribution or use of cigarettes, the Dominican Republic argues that it is nevertheless not inconsistent with Article III:4, because it does not accord less favourable treatment to imported cigarettes than that accorded to like domestic products. Finally, the Dominican Republic argues that, should the Panel find that the bond requirement is inconsistent with either Article XI:1 or Article III:4 of the GATT, it should also consider that it is justified by the general exception provided in Article XX(d) of the GATT, because it is necessary to secure compliance with Dominican Republic tax laws and regulations which are not inconsistent with the provisions of the GATT and it is consistent with the *chapeau* of Article XX.

7.240 Honduras rebuts the Dominican Republic's defence under Article XX(d) of the GATT. In its view, the Dominican Republic has not discharged its burden of establishing that the bond requirement is justified under Article XX(d), since it has not proven that the requirement is consistent with the provisions of the GATT, nor has it proven that the bond requirement is a measure to secure compliance with the Tax Code, including the Selective Consumption Tax, the ITBIS and the Income Tax. Finally, Honduras claims that the Dominican Republic has not proven that the bond requirement is necessary to secure compliance with the Selective Consumption Tax.

3. Whether the bond requirement is an import restriction inconsistent with Article XI:1 of the GATT 1994

(a) Introduction

7.241 Honduras has made alternative claims against the bond requirement under Article XI:1 and Article III:4 of the GATT. Since the latter claim is only relevant in the event that the Panel finds that the measure is not an import restriction, the Panel will begin by considering Honduras's claim under Article XI:1.

(b) Arguments of the parties

7.242 Honduras claims that the bond requirement is a restriction on the importation of cigarettes into the Dominican Republic that is inconsistent with Article XI:1 of the GATT 1994. Honduras argues that the measure falls under Article XI:1 of the GATT, rather than under Article III:4, based on two factors. First, in its opinion the bond requirement is related to "the opportunities for importation itself, i.e. entering the market". The bond is required for both domestic and imported cigarettes prior to their entry into the domestic market. In Honduras's view, the bond requirement is a condition for the importation of cigarettes, that is, importation would not be allowed unless the bond requirement were complied with. It therefore operates as a "restriction" within the meaning of Article XI:1 of the GATT. Second, Honduras considers that the bond requirement falls under Article XI:1 of the GATT, because the Dominican Republic has acknowledged that it does not affect the internal sale, offering for sale, or distribution of cigarettes and is therefore not subject to Article III:4.

7.243 The Dominican Republic responds that the bond requirement is outside of the scope of Article XI:1 of the GATT, since it is neither a restriction nor a prohibition on the importation of cigarettes. According to the Dominican Republic, Honduras's argument that the bond requirement is

within the scope of Article XI:1 is based on an incorrect assertion that the bond requirement is a "condition" for the importation of cigarettes into the Dominican Republic that applies "prior" to their importation. The Dominican Republic argues that, under its domestic law, compliance with the bond requirement is legally irrelevant to the clearance of imports at customs. There is no law or regulation in the Dominican Republic that states that the bond must be provided as a condition of, or prior to, the importation of cigarettes. Article 14 of Decree 79-03, which extends the bond requirement under Article 376 of the Dominican Republic Tax Code to importers of alcoholic beverages and tobacco products, does not state that the bond requirement is a condition for importation of such products, but only provides that importers and domestic producers of cigarettes alike must post a bond. However, Article 40 of Decree 79-

7.248 Article XI:1 of the GATT covers prohibitions and restrictions, other than duties, taxes or other charges, on the importation or the exportation of products. A previous WTO panel recalled some of the GATT/WTO precedents on Article XI:1 and declared that:

"[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' [Footnote omitted] The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation'."⁵⁵⁸

7.249 Although Article XI:1 of the GATT covers prohibitions and restrictions imposed on the importation and exportation of products, Honduras has clarified that its claim is that the bond requirement is a restriction on the importation of cigarettes. The Panel will thus seek to determine whether the bond requirement falls within the scope of Article XI:1 of the GATT, by looking at whether the measure is a restriction on the importation of cigarettes.

(d) The bond requirement as a restriction on importation

7.250 Honduras bases its argument that the bond requirement is a "restriction" within the meaning of Article XI:1 of the GATT in the assertion that the measure operates as a pre-condition for the importation of cigarettes.

7.251 In support of its claim, Honduras has quoted the statement of a previous panel, to the effect that:

"The question of whether this form of measure [in the particular case, a trade balancing condition which did not set an absolute numerical limit on the amount of imports that could be made, but limited the value of imports that could be made to the value of exports that the signatory intended to make] can appropriately be described as a restriction on importation turns on the issue of whether

condition placed on importation, but a condition that is limiting, i.e. that has a

7.258 Most importantly, the Panel is not persuaded that the bond requirement is a restriction "on the importation" of cigarettes. Article XI:1 of the GATT does not cover any restriction, but only those restrictions that are instituted or maintained by any Member "on the importation" (or exportation) of

7.263 Furthermore, the Panel does not consider that a requirement that creates costs which are not

7.268 Honduras additionally argues that the bond requirement also accords less favourable treatment to importers in the context of the liability and payment for the Selective Consumption Tax. For both imported and domestic cigarettes, the bond requirement would be an accessory obligation related to a principal obligation – the payment of the Selective Consumption Tax. The Selective Consumption Tax on imported cigarettes is collected in its entirety upon importation. However, the Selective Consumption Tax on domestic cigarettes may be paid up to the twentieth day of the month following that in which the sale is made. Therefore, for domestic producers, there is a tax liability the non-payment of which the bond properly secures. However, for imported cigarettes, since the Selective Consumption Tax accrues and is immediately paid upon importation, there is no similar tax liability. Furthermore, domestic producers can collect the Selective Consumption Tax in advance as part of the purchase price paid by buyers. This 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.

7.269 Finally, Honduras claims that the required bond has been set at a fixed amount of RD\$5million that must be posted by each importer and domestic producer. There is no direct relationship between the amount required to be guaranteed (i.e. the fixed amount of the bond) and the actual amount giving rise to the Selective Consumption Tax which is dependent upon variable factors such as monthly volumes of sales and variations in the retail selling price according to market factors. The two amounts are not commensurate.

7.270 The Dominican Republic responds that the bond requirement is an internal measure that applies equally to both imported and domestic products, but is nevertheless outside the scope of Article III:4 because it does not affect the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported cigarettes. Importers of cigarettes are not precluded by the bond requirement from clearing the cigarettes through customs, selling or offering them for sale, transporting them, or distributing them within the territory of the Dominican Republic, nor are consumers in any way precluded by the bond requirement from buying or using the imported cigarettes. The Dominican Republic adds that, even assuming that the bond requirement does affect the internal sale, offering for sale, purchase, transportation, distribution, or use of imported cigarettes, it would not be inconsistent with Article III:4 since it does not accord to imported cigarettes treatment "less favourable than that accorded to like products of national origin". The Dominican Republic adds that, even assuming that the bond requirement does affect the internal sale, offering for sale, purchase, transportation, distribution, or use of imported cigarettes, it would nevertheless not be contrary to Article III:4 since it does not accord to imported cigarettes treatment "less favourable than that accorded to like products of national origin", because it is applied equally to domestic and imported cigarettes and does not modify the conditions of competition in the domestic market to the detriment of imported products

"For a violation of Article III:4 to be established, three elements must be satisfied: that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products..."⁵⁶⁵

(c) Like product determination

7.273 As mentioned before,⁵⁶⁶ the Dominican Republic has admitted that "[t]here is no

7.277 The Panel acknowledges that Honduras has presented alternative claims against the bond requirement and that it has expressly asked that the arguments it has presented under Article XI:1, should not qualify its alternative claim under Article III:4. The Panel sees no reason to disregard that request and will therefore not take into account at this point Honduras's statement that the bond requirement does not affect the internal sale, offering for sale, purchase, transportation, distribution, or use of cigarettes, and therefore is not subject to Article III:4.

7.278 As mentioned before, and with respect to whether the bond requirement affects the internal sale, offering for sale, purchase, transportation, distribution, or use of cigarettes, the Panel notes that, as stated by the Appellate Body, the ordinary meaning of the word "affecting" implies a measure that has "an effect on" and thus indicates a broad scope of application.⁵⁶⁸ In light of the broad scope of application of the expression "affecting", under Article III:4 of the GATT it would not be necessary to prove that the bond requirement precludes importers from clearing cigarettes through customs, selling or offering them for sale, transporting them, or distributing them within the territory of the Dominican Republic. Nor would it be necessary to prove that the bond requirement precludes consumers from buying or using imported cigarettes. It would be enough to demonstrate that the measure has "an effect on" the internal sale, offering for sale, purchase, transportation, distribution, or use of cigarettes.

7.279 The Panel notes that, under Article 14 of Decree 79-03 of 4 February 2003, both importers and local manufacturers of tobacco products shall post a bond with the Directorate General of Internal Taxes. Under the evidence provided by the Dominican Republic, an importer or a local manufacturer of tobacco products who did not comply with the bond requirement, or any other formal obligation, would be subject to the application of sanctions such as fines. Any person wishing to engage in the internal sale, offering for sale and purchase of cigarettes in the domestic market of the Dominican Republic, as manufacturer or importer, would thus have to comply with the bond requirement or else run the risk of being the subject of internal sanctions.

7.280 In light of the previous factors, and of the broad scope of application of the expression "affecting" contained in Article III:4 of the GATT, the Panel considers that the bond requirement can be considered as an internal regulation that "affects" the internal sale, offering for sale and purchase of cigarettes in the domestic market of the Dominican Republic within the meaning of Article III:4 of the GATT.

(e) Less favourable treatment

(i) *The disincentive against importing cigarettes*

7.281 Honduras argues that the less favourable treatment results from the modification of the conditions of competition between imported and domestic cigarettes. The bond requirement would adversely modify the incentives for a local buyer who wishes to purchase imported cigarettes for sale. In its opinion, a company that sells cigarettes in the Dominican Republic has two options, either to buy from a domestic producer or to import. If that company were to purchase from a domestic producer, it would not have to post a bond. However, if that company were to import cigarettes, it would have to post a bond and thus incur additional costs. Therefore, there would be a built-in disincentive against importing cigarettes, as compared to buying from domestic producers.

7.282 The Panel is not persuaded by this argument, because Honduras is comparing operations at different commercial levels. According to the available information, the cigarette market in the Dominican Republic is dominated by a reduced number of suppliers, either domestic producers or importers. Three firms (two domestic producers and one importer) represented almost 100 per cent of the local market of cigarettes. Furthermore, the local importer of Honduran cigarettes in the Dominican Republic, *British American Tobacco República Dominicana*, is related with the

⁵⁶⁸ See *supra* Paragraph 7.169. Appellate Body Report, *EC – Bananas III*, para. 220.

manufacturer. In the light of that evidence, in the example presented by Honduras, a more correct description would be that a local company that intends to sell cigarettes in the Dominican Republic would have two options, either to buy from a domestic producer or to buy from the importer. In neither case would it need to post a bond, since the posting of a bond is only required from manufacturers and importers. Alternatively, any new entrant in the market to supply cigarettes in the Dominican Republic, either as producer or as importer, would have to post a bond in an equivalent manner.

7.283 For the reasons expressed above, the Panel is not convinced by Honduras's argument that, for any local buyer who wishes to purchase cigarettes for sale, the bond requirement creates a disincentive against importing cigarettes, as compared to buying them from domestic producers.

"Article 21. LIMITATION PERIOD. The following are subject to limitation after a period of three years:

- (a) Actions by the Tax Authority to require sworn statements, question those made, demand tax payment and carry out *ex officio* estimates;
- (b) Actions for breach of this Code or the tax laws; and
- (c) Actions against the Tax Authority for recovery of taxes paid.

PARAGRAPH.-

Consumption Tax. In support of its argument, the Dominican Republic has presented a copy of a written declaration to that effect from its Director General of Internal Taxes.⁵⁶⁹

7.292 In view of the preceding elements, the Panel finds that the evidence available does not support Honduras's assertion that there is no liability that the bond requirement would serve to secure. While the importers may pay in full at the moment of importation their obligations under the ea8t921tiv

effect, other than the assertion that the per unit cost of the bond would be higher for imported than for domestic cigarettes.

7.298 The Panel recalls that the Appellate Body has declared that:

"The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. ... Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. ... Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products."⁵⁷⁰

7.299 The Panel notes that, under the domestic regulations, the required bond must be issued by an insurance company or banking institution accredited in the Dominican Republic. The effective cost that the bond has on domestic producers and importers is thus the fee charged by the financial institution that issues the bond. According 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\$1,873⁵⁷¹). When divided by the annual imports of cigarettes made by that same company, the cost of the bond would be equivalent to RD\$0.9 (or approximately 2 cents of a US dollar) per thousand cigarettes. That annual value is equivalent to 0.2 per cent of the value of cigarette imports made by the importer in the year 2003.⁵⁷² The Panel also notes that the cost of complying with the bond requirement has been diminishing for the importing company in the recent years, since its imports have increased while the bond amount has remained the same. Had the importer posted a bond in the years 2001 and 2002 for the same cost, the cost of that bond would have represented 0.64 per cent and 0.41 per cent, respectively, of the value of cigarette imports made by the importer in those two years.

7.300 By definition, any expense that is fixed (i.e. not related to volumes of production) may lead to different costs per unit among supplier firms. As 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.

7.301 In light of the preceding arguments, the Panel considers that Honduras has not presented evidence to support its argument that the different cost per unit generated by complying with the bond requirement has a detrimental impact on the competitive conditions for imported products in relation to domestic products in the Dominican Republic cigarette market.

(iv) *Payment of the Selective Consumption Tax*

7.302 Honduras also argues that the bond requirement accords less favourable treatment to imported products as a result of the timing for the payment of the Selective Consumption Tax. Honduras states that, with respect to imported cigarettes, the Selective Consumption Tax is collected in its entirety 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. Both domestic producers and importers collect the Selective Consumption Tax from consumers at the time of the sale. This would accord to domestic producers the opportunity to earn interest income on the money they receive as payment of the Selective Consumption Tax for the period between the time of the purchase and the time they have to

⁵⁷⁰ Appellate Body Report, *Japan – Alcoholic Beverages II*, p.16.

⁵⁷¹ Exchange rate between the Dominican Republic Peso and the United States Dollar, as of 31 July 2004.

⁵⁷² Comments by Honduras on the Replies of the Dominican Republic to question No. 109 addressed by the Panel, 21 July 2004, para. 1.

remit that amount to the tax authorities. Importers, on the other hand, would have the added financial cost or opportunity cost of having to advance the money for payment of the tax.

7.303 The Dominican Republic responds that Honduras is challenging the timing of the payment of the Selective Consumption Tax, rather than the bond requirement itself. The difference in the timing would not explain how the bond *per se* affects the conditions of competition of importers. In the opinion of the Dominican Republic, the difference in the timing of the payment of the Selective Consumption Tax is not tied to or contingent on the bond and it is not within the terms of reference of the Panel. Moreover, the fact that domestic producers pay the Selective Consumption Tax after the sale of the cigarettes, while importers pay it at the time of importation, would not render the tax inconsistent with Article III of the GATT, since Note *Ad Article III* clarifies that Members may collect or enforce internal taxes or measures in the case of imported products at the time or point of importation.

7.304 According to the evidence presented by the parties, Article 369 of the Dominican Republic Tax Code provides that "[i]n the case of imported goods, the [Selective Consumption Tax] shall be assessed and paid concurrently with the corresponding customs duties...". With regard to domestic products, however, Article 368 of the Tax Code provides that "In the case of transfers and provision of services the tax shall be assessed and paid monthly... For the purposes of these articles, taxpayers shall submit a sworn statement of transfers and provision of services carried out in the preceding month... and shall simultaneously pay the tax. The submission of the sworn statement and the payment of the tax shall be effected within the time-limit laid down for the assessment and payment of the tax on the transfer of industrialized goods and services." Paragraph (c) of Article 353 of the Tax Code deals with the sworn statements and declares that "[t]he statement shall be filed in the course of the first twenty (20) days of each month, even if there is no tax to pay".

7.305 Since domestic producers can collect the Selective Consumption Tax as of the time of the sale of the packet of cigarettes, this accords them the opportunity to earn interest income on the money they receive as payment of the Selective Consumption Tax for the period, if any, between the time of the purchase and the time they have to remit that amount to the tax authorities. However, importers would have to assume the opportunity cost or financial cost of having to advance the money for payment of the tax.

7.306 The Panel recalls that, in its request for the establishment of the Panel, Honduras described its claim against the bond requirement in the following manner:

"The Dominican Republic requires importers of cigarettes to post a bond pursuant to Article 14 of the Regulations. This requirement and the laws, regulations and practices implementing this requirement entail costs and administrative burdens hindering the importation of cigarettes and are therefore in the view of Honduras inconsistent with Article II:1(a) and (b) and Article XI:1 of the GATT, or - if they were deemed to be internal measures - inconsistent with Article III:2 and Article III:4 of the GATT."

7.307 Whether 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, in the opinion of the Panel, 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.

7.308 The claim on the bond requirement is part of the terms of reference of the Panel. There is, however, 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. The Panel therefore concludes that Honduras's claim regarding the different costs for domestic producers and importers arising from the time of payment of the

cigarettes. In its opinion, if the bond were necessary to secure compliance with the Selective Consumption Tax, then presumably, it should be applied to all products subject to the tax. It adds that, if all imported products have to pay the Selective Consumption Tax upon importation at the border, there is no justification why the bond requirement on imported cigarettes is necessary to secure compliance with a Selective Consumption Tax that has already been paid.

(b) Article XX(d) of the GATT 1994

7.314 According to paragraph (d) and the *chapeau* of Article XX of the GATT:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any coning(6 0 -12 al tradedEyraryare not : [...]0 TD 9D 0 Tc 0.1875 Tw () Tj

survey on which the retail sale price was determined, the tax base would be the price of the nearest like product in the local market; or (iii) Under Article I of General Rule 02-96 issued by the Directorate General of Internal Taxes of the Dominican Republic, the tax base would be the retail price, determined by increasing the list price (excluding cash and trade discounts, grants and the like) by 20 per cent.

7.319 According to Honduras, in practice, the tax for domestic cigarettes was based on the average

determination of the tax base for cigarettes, contained in Article 367(b) of the Dominican Republic Tax Code. On the other hand, Honduras also claims that in practice the Dominican Republic authorities have taxed lower-priced imported cigarettes at a rate higher than the one which corresponded according to their actual selling price, which has meant that certain imported cigarettes have been taxed at a higher rate than the like domestic products which were sold for the same retail selling price as the imported products. This latter claim is directed to the administration of the tax laws.

7.324 The Dominican Republic replies that Honduras's claims are moot, since they are based on an outdated version of Article 367 of the Tax Code of the Dominican Republic. Law 3-04, published on 14 January 2004, amended Articles 367 and 375 of the Tax Code and established a specific and identical tax base and tax rate for the Selective Consumption Tax on imported and domestic cigarettes – i.e. RD\$0.48 per cigarette. Thus, under the current Article 367 of the Tax Code, the retail price of cigarettes is no longer relevant for determining the tax base of the Selective Consumption Tax. Rather, the tax base is now determined on the basis of the number of cigarette packets transferred or imported. Also, the "nearest similar product in the domestic market" plays no role in the determination of the tax base. The Panel should thus abstain from making findings or issuing recommendations to the WTO Dispute Settlement Body, regarding laws and practices of the Dominican Republic that have been withdrawn because a recommendation in these circumstances would constitute a legal error and would be devoid of purpose, because there is no evidence that the measures are still in place or have lingering effects, because there is no evidence that the Dominican Republic will reintroduce the withdrawn measures, and because the measures were revoked before the Panel began its adjudication process.

7.325 Honduras replies in turn that, when the Panel was established, the provisions that constitute the basis for Honduras's claims were in force. The Panel is competent, and indeed has the legal obligation, to examine the measures existing as of that date, since the "matter" before a panel is determined by its terms of reference. Honduras claims that it has made a *prima facie* case, which the Dominican Republic has not rebutted. In its opinion, the Dominican Republic has acknowledged that, for determining the nearest similar product to imported cigarettes, it used criteria other than the retail selling prices. These criteria were not stated in any of the regulations governing the Selective Consumption Tax.

7.326 The Dominican Republic explains that the reason why imported *Viceroy* cigarettes were taxed at a higher rate than domestic *Líder* cigarettes during 2003, is because its tax authorities determined that the nearest similar cigarettes to the imported *Viceroy* in the domestic market were *Marlboro*, and not *Líder*. The Dominican Republic authorities considered that the pricing policies of the importer could not, by themselves, be relied on to determine the nearest similar product in the domestic market and therefore used other factors, including the declared customs value of the imported cigarettes. This determination was based on the customs value officially declared by the importer of *Viceroy* during the year 2002 and part of 2003. According to the declared customs values, the average prices of *Viceroy* in the first eight months of 2003 were higher than the average prices for cigarettes of the brand name *Belmont* and *Kent* by 10 per cent and 5.8 per cent, respectively. In the year 2002, according to the declared customs value of the same importer, the average price of *Viceroy* cigarettes was 15.8 per cent and 9.1 per cent higher than the average retail prices for *Belmont* and *Kent*, respectively. The Dominican Republic argues that, given the disparity and inconsistency in the information provided by the importer, the tax authorities determined that the nearest similar product in the domestic market for *Viceroy* cigarettes was *Marlboro*. In its opinion, the pricing policy for *Viceroy* cigarettes constitutes an anti-competitive practice on the part of the importer, which could be subject to an anti-dumping investigation.

(b) Analysis by the Panel

7.327 Under the first sentence of Article III:2 of the GATT:

cigarettes are a function of their quality and therefore the higher-priced *Viceroy* cigarettes were not similar to *Líder*. In the words of the Dominican Republic, "[t]he declared customs value of the imported cigarettes was... a factor used by the authorities of the Dominican Republic to compare the domestic and the imported cigarettes and determine which was the most similar product to the imported cigarettes in the domestic market..."⁵⁷⁶

7.333 The Panel agrees with the Dominican Republic that quality is an important factor in the determination of the likeness of products. However, it does not think that values declared by importers for customs purposes can be the only factor used in order to determine the quality of a product. The Dominican Republic admits that the imported *Viceroy* cigarettes had the same retail selling price as the domestic *Líder* cigarettes. The Panel believes that, if prices of a product are to be considered as a function of their quality, then the actual price of the product in the marketplace should be in principle more relevant than the value declared in customs.

7.334 The Dominican Republic has argued that the pricing policies of the importer were "inconsistent and incongruous", but it has not presented any evidence of reasons why the retail selling price of *Viceroy* cigarettes should have been disregarded for the determination of the likeness of the product, other than the fact that the price did not match with the value declared in customs. There is no evidence either to support the Dominican Republic's argument that the pricing policy for *Viceroy* cigarettes is an anti-competitive practice on the part of the importer.

7.335 In light of the above, the Panel does not find that the possible discrepancy between the retail selling price information and the declared customs value for *Viceroy* cigarettes is *per se* a factor that indicates that the retail selling price is irrelevant as a factor to determine the likeness of those imported cigarettes to the domestic products.

7.336 In conclusion, the Panel finds that imported cigarettes can generally be considered as like products to domestic Dominican Republic cigarettes within the meaning of the first sentence of Article III:2 of the GATT. When an

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the Dominican Republic legislation, before Law 3-04 entered into force, to find whether that legislation subjected imported cigarettes to a Selective Consumption Tax in excess of that applied to like domestic products.

7.346 The Panel recalls that the Appellate Body has established a strict standard for the term "in excess of" under Article III:2, first sentence:

"The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are 'in excess of' those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of 'excess' is too much. The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard."

7.347 Before Law 3-04, the Selective Consumption Tax on cigarettes in the Dominican Republic was imposed on an *ad valorem* basis. In an *ad valorem* system, the payable tax at any given time is a function of the tax rate and of the tax base. Honduras has not presented a claim against the rate at which the Selective Consumption Tax was charged on cigarettes. Instead, Honduras claims that, under the rules in force before Law 3-04, the Dominican Republic determined the tax base for cigarettes in a manner that resulted in certain imported cigarettes being taxed at a rate higher than the one that corresponded according to their actual selling price.

7.348 As mentioned⁵⁸², under the Dominican Republic legislation, there were three different rules under which the tax base for cigarettes could be determined by the authorities, for the purpose of applying the Selective Consumption Tax. The general rule was contained in Article 367(b) of the Dominican Republic Customs Code, which provided that the tax base for imported cigarettes was to be determined on the basis of the actual selling price of the cigarettes in the Dominican Republic. However, for domestic cigarettes, the tax base was determined on the basis of the manufacturer's selling price. For cigarettes imported from the Dominican Republic, the tax base was determined on the basis of the manufacturer's selling price in the Dominican Republic.

As mentioned in paragraph 7.348, the Dominican Republic's tax base for cigarettes was determined on the basis of the manufacturer's selling price in the Dominican Republic.

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7.351 As regards the legislation, the Panel finds that only Article 367(b) of the Dominican Republic Tax Code created any distinction in the treatment between domestic and imported cigarettes. That treatment, however, did not lead *per se* to imported cigarettes being subject to internal taxes in excess of those applied to like domestic cigarettes. It only meant that, while the tax base for domestic cigarettes would be the retail selling price obtained from the average-price surveys, the tax base for imported cigarettes would be determined on the basis of the retail price for the nearest similar product (closest substitute) on the domestic market. There is no reason to presume that the determination of the nearest similar product would lead to imported cigarettes being charged a tax in excess to that applied to domestic cigarettes.

7.352 Furthermore, the Panel assumes that the rules contained in the Dominican Republic Tax Code would have been interpreted in the light of the implementing regulations, such as those contained in the Decree 79-03 - Regulation on the Implementation of Section IV of the Dominican Republic Tax Code and in General Rule 02-

H. ADMINISTRATION OF PROVISIONS GOVERNING THE SELECTIVE CONSUMPTION TAX, IN PARTICULAR WITH RESPECT TO DETERMINATION OF THE "NEAREST SIMILAR PRODUCT ON THE DOMESTIC MARKET"

1. The conduct at issue

7.365 As explained above, the Dominican Republic levies a Selective Consumption Tax on certain products, such as tobacco cigarettes. By the date of establishment of the Panel, and before the Dominican Republic Tax Code was amended through 1c through 1c through 1c through 5b, the NEAREST SIMILAR PROD

domestic market". Honduras submits that there is no adequate reason for the Dominican Republic to have disregarded the actual retail selling price of domestic *Líder* cigarettes when determining the tax base for imported *Viceroy* cigarettes. As stated above, both *Viceroy* and *Líder* have the same retail selling price. Honduras concludes that the failure to establish and apply transparent and generally applicable criteria for determining the value of imported cigarettes, in particular the failure to establish and apply such criteria for the identification of the "nearest similar" product in the domestic market, constitutes an unreasonable administration of the provisions governing the Selective Consumption Tax and is inconsistent with Article X:3(a) of the GATT.

7.371 The Dominican Republic replies that Honduras's claim is moot, since it is based on an outdated version of Article 367 of the Tax Code of the Dominican Republic. Law 3-04, published on 14 January 2004, amended Articles 367 and 375 of the Tax Code and established a specific and identical tax base and tax rate for the Selective Consumption Tax on imported and domestic cigarettes – i.e. RD\$0.48 per cigarette. The determination of the "nearest similar product" is no longer relevant for determining the tax base of the Selective Consumption Tax. Rather, the tax base is now determined on the basis of the number of cigarette packets transferred or imported. The Panel should abstain from making findings or issuing recommendations to the WTO Dispute Settlement Body, regarding laws and practices of the Dominican Republic that have been withdrawn, because a recommendation in these circumstances would constitute a legal error and would be devoid of purpose, because there is no evidence that the measures are still in place or have lingering effects, because the measures were revoked before the Panel began its adjudication process and because there is no evidence that the Dominican Republic will reintroduce the withdrawn measures.

(b) Analysis by the Panel

7.372 Under Article X:3(a) of the GATT 1994:

"Each [Member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.373 In turn, the "laws, regulations, decisions and rulings" described in paragraph 1 of Article X are as follows:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, Article 5 of RRD (1994) 2/5875, w/1000 - 0.1T 1257 A 132def thT iny, taxes oand (Arti
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(c) Laws, regulations, decisions and rulings described in Article X:1 of the GATT

7.376 The relevant provisions as regard the claim raised by Honduras are those contained in Article 367(b) of the Dominican Republic Tax Code, in Article 3 of the Decree 79-03 and in Article I of General Rule 02-96. All of these provisions relate to the application of the Selective Consumption Tax.

7.377 The Panel finds that these provisions can be considered to be covered by the description contained in Article X:1 of the GATT. They are indeed: (a) laws or regulations, (b) made effective by the Dominican Republic, and, (c) pertaining to rates of taxes.

(d) Reasonable administration

7.378 Honduras's claim centres on an alleged omissive conduct on the part of the Dominican Republic, constituted by its failure to comply with a positive obligation, that of administering its laws and regulations, of the kind described in Article X:1, in a uniform, impartial and reasonable manner.

7.379 The Panel agrees that a Member may act in a manner inconsistent with its obligations under the covered WTO agreements, not only by adopting a particular positive conduct, but also by failing to adopt a conduct, i.e. by an omission, when the relevant rule imposes an obligation to adopt a specific action.

7.380 The Dominican Republic has admitted that, before the approval of Law 3-04, there were three different provisions under which the tax base for cigarettes could have been determined, for the purpose of applying the Selective Consumption Tax, namely: Article 367(b) of the Tax Code, Article 3 of the Decree 79-03 and Article I of General Rule 02-96.⁵⁸⁵ Each one of these provisions contained a different methodology for the determination of the tax base.

7.381 Despite the existence of these three different provisions, the Dominican Republic has declared that, in practice, the methodology used prior to Law 3-04, to determine the tax base for the Selective Consumption Tax on domestic cigarettes, followed General Rule 2-96.⁵⁸⁶ Under General Rule 2-96, the tax base should have been, for both imported and domestic cigarettes, the retail price determined by increasing the list price (excluding cash and trade discounts, grants and the like) by 20 per cent. General Rule 2-96 made no distinction between imported and domestic cigarettes. The Selective Consumption Tax on both imported and domestic cigarettes would be based on their respective retail selling price. General Rule did not contemplate the possibility of using a "nearest similar product" in the domestic market, in order to determine the tax base on imported cigarettes.

7.382 However, the available evidence and the Dominican Republic's own admission is that its authorities used a different methodology in order to determine the tax base for imported cigarettes. According to the Dominican Republic, "[t]he amount of the Selective Consumption Tax per cigarette packet that was applied to the imported product was equal to the amount of the tax that applied to the domestic cigarette".⁵⁸⁷ The Dominican Republic thus admits that it used a "nearest similar product" in the domestic market in order to determine the tax base for imported cigarettes. While both Article 367(b) of the Tax Code and Article 3 of the Decree 79-03 would allow for the use of a "nearest similar product", the Dominican Republic has not argued that it relied on either of these provisions. Indeed, the methodologies contained in both Article 367(b) of the Tax Code and Article 3 of the Decree 79-03 were based on 0 25 0 TD -0.28n1 TD 0 on

the unbridled inflation unleashed by the macroeconomic crisis experienced by the Dominican Republic in recent years".⁵⁸⁸

7.383 Article X:3(a) of the GATT, Members must administer the provisions described in Article X:1 "in a uniform, impartial and reasonable manner". Honduras's claim is that the Dominican

7.388

(b) Analysis of the Panel

7.399 Under Article X:1 of the GATT 1994:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them."

7.400 As mentioned before, the Appellate Body has clarified that Article X deals with "the *publication* and *administration* of 'laws, regulations, judicial decisions and administrative rulings of general application', rather than [with] the *substantive content* of such measures".⁵⁹⁴

7.401 In order to analyse the claim presented by Honduras under Article X:3(a) of the GATT, the Panel would have to determine: (a) whether the average-price surveys of cigarettes conducted by the Dominican Republic Central Bank are part of the "laws, regulations, judicial decisions and administrative rulings of general application" of the kind described in Article X:1 of the GATT; and, if so, (b) whether the Dominican Republic did not promptly publish those surveys in such a manner as to enable governments and traders to become acquainted with them.

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base had been set. The Central Bank average-price surveys would be a part of the administrative ruling. Indeed, an essential part, since under the Dominican Republic legislation, the tax base for cigarettes would be obtained through the surveys.

7.407 In order to become acquainted with the process of establi

(e) Recommendations regarding the conduct at issue

7.415 As it has concluded that the Dominican Republic failed to publish the information related to the Central Bank average-price surveys of cigarettes, the Panel will consider if it should make any recommendations to the WTO Dispute Settlement Body regarding whether the Dominican Republic should bring its conduct in conformity with its obligations under the GATT 1994.

7.416 In this regard, the Panel notes that this claim is also based on the situation that existed in the Dominican Republic before Law 3-04 amended Articles 367 and 375 of the Dominican Republic Tax Code. As a result of the amendments, the *ad valorem* system previously in force for the application of the Selective Consumption Tax was replaced by a specific and identical tax base and tax rate on imported and domestic cigarettes.

7.417 The conduct contested by Honduras relates to the determination of the tax base for imported cigarettes and was only relevant when the Selective Consumption Tax was charged on an *ad valorem* basis. Indeed, the amendments incorporated by the Dominican Republic in its Tax Code change the essence of the measure challenged by Honduras through this claim, too. Under the new legislation, the Selective Consumption Tax on cigarettes is not levied on an *ad valorem* basis, but on a specific amount (RD\$0.48 per cigarette), without distinguishing between imported and domestic cigarettes. The Central Bank average-price surveys of cigarettes would become irrelevant under the new law, as the means to determine the tax base for the application of the tax on cigarettes.

7.418 In conclusion, the Panel clarifies that its findings in relation with the publication of the information related to the Central Bank average-price surveys of cigarettes refer to the situation that existed before the Dominican Republic Tax Code was amended by Law 3-04 of January 2004.

7.419 Since the conduct, as analysed by the Panel, no longer persists, the Panel does not find it appropriate to recommend to the WTO Dispute Settlement Body that it make any request to the Dominican Republic in this regard.

3. Conclusion

7.420 In conclusion, the Panel finds that the Dominican Republic failed to publish promptly, and in such a manner as to enable governments and traders to become acquainted with it, the information related to the Central Bank average-price surveys of cigarettes. This conduct was inconsistent with the Dominican Republic's obligations under Article X:1 of the GATT 1994.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 The Panel concludes as follows:

- (a) The Dominican Republic has recorded its Selective Consumption Tax measure into its Schedule but it has not established that such

(b) The transitional surcharge for economic stabilization applied by the Dominican Republic is an "other duty or charge" and such surcharge is inconsistent with the provisions of Article II:1(b) of the GATT 1994;⁶⁰⁰

(c) The foreign exchange fee applied by the Dominican Republic is an "other duty or charge" and such fee is inconsistent with Article 1994the

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b) T the

market", in a manner that was unreasonable and therefore inconsistent with Article X:3(a) of the GATT 1994;⁶⁰⁷

- (d) Before Law 3-04 entered in force in January 2004, the Dominican Republic failed to publish the information related to the Central Bank average-price surveys of cigarettes, in a manner inconsistent with Article X:1 of the GATT 1994.⁶⁰⁸

With relation to the conclusions in the preceding paragraph, the Panel abstains from making any recommendations to the Dispute Settlement Body, since the measures are no longer in force.

⁶⁰⁷ See paras. 7.388 and 7.394.

⁶⁰⁸ See para. 7.420.

ANNEX A

REQUEST FOR THE ESTABLISHMENT OF A PANEL

**WORLD TRADE
ORGANIZATION**

WT/DS302/5
9 December 2003

(03-6517)

2. The Dominican Republic does not publish the surveys conducted by the Central Bank that are to be used according to Article 367 of the Tax Code and Article 3 of the Regulations to determine the value of cigarettes for the purpose of applying the Selective Consumption Tax. Honduras considers that the failure to publish the surveys is inconsistent with Article X:1 of the GATT.

3.

ANNEX B
WORKING PROCEDURES

10. In the interest of full transparency, the presentations, rebuttals and statements referred to in paragraphs 5 to 7 shall be made in the presence of the parties. Moreover, each party's written submissions, including responses to questions put by the Panel, comments on the descriptive part of the report and comments on the interim report, shall be made available to the other party or parties.

11. The parties' and third parties' replies to questions, and the parties' comments on each other's replies to questions will be attached to the Panel report as annexes.

12. The parties and third parties shall provide the Panel with an executive summary of the facts and arguments as presented to the Panel in their written submissions and oral presentations within 10 days following the delivery to the Panel of the written version of the relevant submission. The executive summaries of the written submissions to be provided by each party should not exceed 10 pages in length each and the executive summaries of the oral presentations should not exceed 5 pages in length each. The summary to be provided by each third party shall summarize their written submission and oral presentation, and should not exceed 5 pages in length. The executive summaries shall not in any way serve as a substitute for the submissions of the parties in the Panel's examination of the case. However, the Panel may incorporate the executive summaries provided by the parties and third parties in the arguments section of its report, subject to any modifications deemed appropriate by the Panel.

13. A party shall submit any request for a preliminary ruling not later than its first submission to the Panel. If the complaining party requests such a ruling, the respondent shall submit its response to the request in its first submission. If the respondent requests such a ruling, the complaining party shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure may be granted by the Panel upon a showing of good cause.

14. Parties shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal submissions or answers to questions. Exceptions to this procedure may be granted by the Panel upon a showing of good cause. In such cases, the other party shall be accorded a period of time for comment, as appropriate.

15. To facilitate the maintenance of the record of the dispute, and to maximize the clarity of submissions, in particular the references to exhibits submitted by parties, it is suggested that parties sequentially number their exhibits throughout the course of the dispute. For example, exhibits submitted by the Dominican Republic could be numbered DOM-1, DOM-2, etc. If the last exhibit0 -fwpR

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18. The following procedures, regarding the service of documents, shall apply:

- (a) Each party and third party shall serve its submissions directly on all other parties, including the third parties, and confirm that it has done so at the time it provides its submission to the Panel.
- (b) The parties and the third parties shall deliver their written submissions by 5:30 p.m., local Geneva time, on the deadline dates established by the Panel, unless a different time is set by the Panel.
- (c) The parties and third parties shall provide the Panel with 10 paper copies of all their submissions, including their replies to questions, written version of oral statements and their executive summaries. All these copies shall be filed with Mr. Ferdinand Ferranco at the WTO Secretariat (Office 3154, Telephone 022 739 5683).
- (d) At the time they provide paper copies of their submissions, the parties and third parties shall also provide the Panel with an electronic copy of all their submissions on a diskette to be delivered to Mr. Ferdinand Ferranco or as an e-mail attachment in a format compatible with that used by the Panel to be sent to the Secretariat (e-mail: DSRegistry@wto.org, with a copy to Mr. Jorge Castro (e-mail: jorge.castro@wto.org), Mrs. Xuewei Feng (email: xuewei.feng@wto.org), and Mrs. Tessa Bridgman (tessa.bridgman@wto.org).
- (e) Parties and third parties shall provide the Panel with written versions of their oral statements by noon, local Geneva time, of the first working day following the date of the statements.
- (f) Each party shall serve the executive summaries mentioned in paragraph 12 directly on the other party and confirm to the Secretariat that it has done so. Subparagraphs mail attsa383 Tc 1.75Tw (Tessa Bridgman (tessa.bridubmno0.13c copypply (SecretTj 25 0 w (0 TD - by 1262 Tcand D -0.02o3c cop881stitut1 Tc offici Tw (steliver1526man@wto.o0aragrapD -0.02of-) i



value of the imported goods (rather than the amount of foreign exchange sold to an importer for the payment of goods). As such, it does not constitute a multiple currency practice or an exchange restriction notwithstanding its label or the fact that the commission is charged on the basis of the legal authority vested in the BCRD to charge an exchange commission on sales of foreign exchange. For the same reasons, it is not an exchange control measure.

In light of the above, the Fund has determined that the exchange commission is not an exchange measure. Therefore, the issue of its consistency with the Fund's Article s for purposes of Paragraph 8 of the Cooperation Agreement does not arise.

Very truly yours,

François Gianviti
General Counsel
