WORLD TRADE ORGANIZATION

WT/DS56/AB/R 27 March 1998

(98-0000)

Appellate Body

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

AB-1998-1

Report of the Appellate Body

WORLD TRADE ORGANIZATION APPELLATE BODY

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

AB-1998-1

Present:

Argentina, Appellant United States, Appellee El-Naggar, Presiding Member

Feliciano, Member

Matsushita, Member

European Communities, Third Participant

I. Introduction: Statement of the Appeal

1. Argentina appeals from certain issues of law covered and legal interpretations developed in the Panel Report, Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items¹ (the "Panel Report"). The Panel was established to consider a complaint by the United States against Argentina concerning certain measures maintained by Argentina affecting imports of textiles, apparel, footwear and other items, in particular, measures imposing specific duties on various textile, apparel or footwear items allegedly in excess of the bound rate of 35 per cent ad valorem provided in Argentina's Schedule LXIV² and measures imposing a statistical tax of 3 per cent ad valorem on imports from all sources other than MERCOSUR countries. The relevant factual aspects of Argentina's import regime for textiles, apparel and footwear are described in the Panel Report, in particular, at paragraphs 2.1 to 2.21.

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

¹WT/DS56/R. 25 November 1997.

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

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parallel, Argentina maintained a regime of Minimum Specific Import Duties $("DIEM")^3$ as from 1993 in respect of textiles, clothing and footwear through a series of resolutions and decrees commencing with Resolution No. 811/93 of 29 July 1993

The Panel made the following recommendation:

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

4. On 21 January 1998, Argentina notified the Dispute Settlement Body¹² (the "DSB") of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), and filled a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the Working Procedures for Appellate Review. On 2 February 1998, Argentina filed an appellant's submission.¹³ On 16 February 1998, the United States filed an appellee's submission pursuant to Rule 22 of the Working Procedures for Appellate Review. That same day, the European Communities filed a third participant's submission pursuant to Rule 24 of the Working Procedures for Appellate Review. The oral hearing, provided for in Rule 27 of the Working Procedures for Appellate Review, was held on 23 February 1998. At the oral hearing, the participants and the third participant presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

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

¹²WT/DS56/8, 21 January 1998.

¹¹Panel Report, para. 7.2.

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

- 6. With respect to the Panel's finding in paragraph 6.32 of the Panel Report concerning Article II of the GATT 1994, Argentina submits that the Panel erred in law in interpreting the obligation set out in Article II:1(a) and II:1(b) of the GATT 1994 and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994 as prohibiting a Member from applying a type of duty other than that which is bound, without taking into account whether the level of protection ensuing from the application of that duty is, or is not, higher than the bound level of protection.
- According to Argentina, an international legal obligation may be derived only from a formal source creating international law. As regards the WTO, the only obligations by which Members are bound are those which flow from the Marrakesh Agreement Establishing the World Trade Organization¹⁴ (the "WTO Agreement") and instruments agreed upon under its provisions, as well as amendments under Article X and authoritative interpretations under Article IX. There have been no amendments under Article X nor any authoritative interpretations under Article IX. The relevant provision in the WTO Agreement is Article II of the GATT 1994 and the Understanding on the Interpretation of Article II:1(b) of the GATT 1994.
- 8. Argentina asserts that Article II of the GATT 1994 must be interpreted in conformity with Articles 31 and 32 of the Vienna Convention on the Law of Treaties¹⁵ (the "Vienna Convention"). The correct interpretation of Article II of the GATT 1994 should be based on the actual text of Article II, in particular paragraphs 1(a) and 1(b), and on the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, as well as on GATT practice. The texts of Article II:1(a) and II:1(b) should be read in conjunction with each other. Article II:1(a) lays down a general obligation, and Article II:1(b) defines the scope of that obligation.
- 9. In Argentina's view, the Panel goes beyond the GATT 1994 in giving an "extensive" interpretation of the scope of the obligation, thereby adding requirements that are not provided for in the GATT 1994 itself. The commitment to accord "treatment no less favourable" does not automatically imply an obligation to apply a "specific type of duty". To assimilate the interpretation of the "duty set forth and provided in the Schedule" with the notion of "bound only ad valorem" and to infer that changing this results in "less favourable" treatment not only finds no support in the text of the provisions, but is also not supported by the Understanding on the Interpretation of Article II:1(b) of the GATT 1994. The object and purpose of Article II:1(a) and (b) can only be to accord treatment

¹⁴Done at Marrakesh, Morocco, 15 April 1994.

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

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

- 10. It is further argued by Argentina that in Article II of the GATT 1994, the bound duty represents a ceiling on the level of protection; the legal obligation deriving from this Article is not to exceed the said ceiling or bound maximum level of protection; and Members are free to choose the form or type of duty applied provided the maximum level of protection of the said binding is not exceeded. Thus, a difference in the form of duty applied does not necessarily constitute a violation of the bound level.
- 11. Argentina submits that the Panel has sourced the alleged obligation to apply a type of duty identical to that recorded in the National Schedule in "past GATT practice" and not in a rule or provision contained in Article II of the GATT 1994 or the Understanding on the Interpretation of Article II:1(b) of the GATT 1994. The Panel erred in law in interpreting the "legal history and experience" as mandatory "practice", and this subsequently led to the error of placing it on the same footing as "other decisions of the CONTRACTING PARTIES of the GATT 1947". The Panel can only have arrived at its conclusion that there is an obligation beyond the literal meaning of the text by means of interpretation. In terms of "uniformity", "undisputed nature", "repetition" and "continuity", Argentina stresses that "GATT practice" is deficient. Certain GATT working party reports and panel reports, including those cited by the Panel, are contradictory precedents which, in certain cases, lead to an interpretation different from that adopted by the Panel itself.
- 12. Argentina submits that the Panel concluded that Argentina had violated Article II by applying the DIEM after examining only 124¹⁷ tariff lines out of 940 tariff lines relevant to this dispute. The Panel, therefore, erred in law in considering that Argentina infringed its obligations under Article II of the GATT 1994 in all cases in which it applied the DIEM.
- 13. We are also asked to reverse the Panel's finding in paragraph 6.80 of the Panel Report that the statistical tax of 3 per cent ad valorem is in violation of Article VIII:1(a) of the GATT 1994. The Panel is said to have erred in failing to take into account Argentina's obligations to the International Monetary Fund (the "IMF") in its interpretation of Article VIII of the GATT 1994. Argentina

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

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

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

- 14. It is also submitted by Argentina that the Panel disregarded its duty under Article 11 of the DSU by not making an objective assessment of the matter before it. Paragraph 5.3 of the Panel Report ignores an obvious fact and appears to contradict all the reasons given by the Panel regarding burden of proof when dealing with the matter of the DIEM. The Panel's conclusion that the statistical tax was inconsistent with Article VIII of the GATT 1994 does not meet the requirement laid down in Article 12.7 of the DSU that a panel report shall set out "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes." The Panel's failure to accede to the request by the United States to consult the IMF regarding the existence of this obligation led to another error in law because the Panel, in effect, ignored relevant opinions that could have helped to form a more complete judgement.
- 15. In Argentina's view, the Panel also erred in law by excluding from its consideration subsequent legislative developments -- namely, the Agreement Between the International Monetary Fund and the World Trade Organization (the "Agreement Between the IMF and the WTO") drawn up on the basis of the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking (the "Declaration on Coherence") -- and by reaching its conclusion on the statistical tax solely on the basis of Article VIII of the GATT 1994. Argentina argues that the interpretation of the Agreement Between the IMF and the WTO is covered by the DSU as it is a legislative development in the terms of Article V.1 of the WTO Agreement, and the WTO Agreement is included in Appendix

- 16. Argentina states that the Panel has placed Article VIII of the GATT 1994 in a "legal limbo", isolated from related agreements and other relevant rules and principles of public international law. The Panel undertook only a partial analysis of the arguments put forward by Argentina, disregarded subsequent legislative developments, and did not take into account previous practice. Referring to the Director-General's Report on implementation of the agreements between the WTO and the IMF and the World Bank¹⁹ and the discussions on this Report at the General Council meeting of 10 December 1997, Argentina argues that the Panel should have considered the need to ensure that the decisions adopted by these bodies are mutually supportive in the context of the provisions endorsed in the Declaration on Coherence.
- 17. It is further claimed by Argentina that the Panel did not comply with its obligation under Article 11 of the DSU on two counts. First, the Panel accepted certain evidence submitted by the United States to the Panel on 21 July 1997, two days before the second meeting of the parties (ten days after the expiry of the time-limit for submitting the respective rebuttals). Argentina states that it objected to the admission of such evidence into the record and drew attention to the impossibility of responding to the evidence within the two-week period granted by the Panel. This evidence related to transactions carried out using the manual customs clearance system and not the MARIA computerized system. The names of the importers, customs identification numbers and, sometimes, the description of the items imported were deleted, thereby making it impossible to verify any of the information submitted within the period granted by the Panel. For Argentina, the Panel's position is difficult to reconcile with "due process", considering that the submission of evidence after the timelimit has expired alters the balance of rights and obligations during examination of the case and, combined with the impossibility of rebuttal within a tight time-limit, disadvantages one party, in this case Argentina. Second, the Panel failed to fulfil its obligation to render an objective assessment of the matter by not acceding to the request of both parties to the dispute to seek information and consult with the IMF so as to obtain its opinion on specific aspects of the statistical tax. The DSU gives panels different tools to fulfil the obligation under Article 11, and one of these is the right to "seek information" provided in Article 13 of the DSU. The Panel did not make use of this means, which would have allowed it to verify the information provided by the parties, which information could have altered the Panel's conclusion regarding the statistical tax. Argentina further argues that the Panel failed to fulfil a general obligation governing procedure in any international dispute, namely to

elucidate a fact or investigate an objective claim that both parties to the dispute have expressed as a concern, in order to establish the truth regarding the point raised.

B. Arguments by the United States - Appellee

- 18. The United States endorses the findings and conclusions of the Panel in paragraph 6.32 and argues that the Panel correctly concluded, on the basis of the evidence before it, that the application of the DIEM violated Article II of the GATT 1994. The United States also endorses paragraph 6.80 of the Panel Report and argues that the Panel acted consistently with Article 11 of the DSU.
- 19. With respect to Article II of the GATT 1994, the United States believes that the Panel correctly found that Argentina's specific duties are inconsistent with its ad valorem binding, and that the Panel's interpretation of Article II is consistent with principles of public international law, previous decisions of the Appellate Body and prior GATT practice, and gives full meaning to the text of this provision.
- 20. The United States contends that one of the fundamental objectives of the GATT 1994, expressed in the preamble, is to achieve "the substantial reduction of tariffs". To ensure that tariff concessions, once made, have the full force and effect intended, Article II provides that duty rates identified in a WTO Member's Schedule are maximum limits that may not be exceeded. This is made clear in Article II:1(b) of the GATT 1994. Article II:1(a) goes further; it obligates WTO Members to provide the quality of "treatment" provided for in its Schedule. Paragraphs (a) and (b) of Article II:1 together guarantee WTO Members that their exports will not be subjected to duties greater than the amount established in relevant Schedules. They also guarantee that WTO Members will not be able to manipulate the administration of duties so as to collect excessive tariffs. In this way, Article II ensures the security and predictability of tariff concessions.
- 21. A basic submission of the United States is that Argentina's DIEM afford "treatment less favourable" in violation of Article II because they impair the value of the concessions Argentina made during the Uruguay Round. The DIEM necessarily have the potential to exceed Argentina's bound rate of 35 percent ad valorem for some covered items in the future, in view of the fundamental difference between Tw (fciani a.2 essio* -the DSment efftial) Tj 0 -1e theT*70lawthi

- According to the United States, Argentina incorrectly equates the restriction against imposing duties in excess of a bound rate under Article II:1(b) with the broader requirement of Article II:1(a) to afford WTO Members "treatment no less favourable" in respect of goods bound in a Schedule. If Argentina's view were to be accepted, the "treatment no less favourable" requirement of Article II:1(a) would mean nothing more than a commitment to refrain from imposing duties in excess of a bound rate. In the view of the United States, such a reading would reduce Article II:1(a) to "redundancy or inutility" contrary to the Appellate Body's statements in United States Standards for Reformulated and Conventional Gasoline.²⁰ In advancing its interpretation of its Schedule, Argentina essentially seeks to achieve what other WTO Members were required to negotiate for during the Uruguay Round.
- 23. In contrast, the Panel's interpretation gives effect to all relevant parts of the GATT 1994. It gives effect not only to Article II:1(b) -- i.e., by determining that Argentina's specific duties, as applied, exceed Argentina's bound rate -- but also to Article II:1(a), by acknowledging that the inevitable potential to exceed the bound rate inherent in Argentina's tariff regime affords less favourable treatment to low-price future imports. It also preserves the value of Schedules of other WTO Members that reserved the right to apply both ad valorem and specific duties. The Panel's decision thus assures the "security and predictability" that Article 3.2 of the DSU demands. The Panel gave proper weight to prior GATT practice. In the view of the United States, the principles established in a number of GATT decisions clearly support the Panel's decision.
- 24. The United States contends that the Panel correctly concluded that Argentina failed to meet its burden of rebutting the presumption raised by the United States that all of Argentina's specific duties on textiles and apparel violate Article II of the GATT 1994 and that Argentina should conform the measures imposing them to the requirements of Article II.
- 25. The United States sees no merit in Argentina's argument that the Panel did not adequately consider its contention that the IMF requires Argentina to levy the statistical tax and that this purported requirement establishes an exception to the prohibition contained in Article VIII of the GATT 1994. Argentina failed to establish that the IMF ever imposed or approved such a requirement, and this failure to present the requisite evidence cannot be remedied by Argentina on

VIII, which prohibits the "taxation of imports ... for fiscal purposes." This prohibition is unqualified. Argentina's statistical tax is not an exchange action and is thus outside the scope of Article XV of the GATT 1994. The Agreement between the IMF and the WTO does not address, and does not affect, the substantive obligations of Members under the WTO Agreement, or the extent to which the IMF may authorize an exchange control action that is inconsistent with a provision of the GATT 1994. Furthermore, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund (the "Declaration on the Relationship of the WTO with the IMF") does not establish any exception to Article VIII of the GATT 1994. The same is true for the Declaration on Coherence.

- 26. With respect to Article 11 of the DSU, the United States submits that the real question Argentina raises is not whether the Panel has failed to discharge its duty under Article 11, but whether the Panel abused its discretion in accepting the additional examples from the United States by causing such significant prejudice as to deny Argentina fundamental fairness or due process. The United States believes that the Panel did not abuse its discretion in admitting such additional examples which were submitted as part of a claim within the Panel's terms of reference and as part of the natural process of progressively clarifying the parties' positions. Furthermore, Argentina did not demonstrate that it has suffered prejudice from the Panel's acceptance of the evidence in question. At any rate, exclusion of the evidence Argentina now challenges would not alter the outcome of the dispute.
- 27. The United States also contends that the Panel did not abuse its discretion in not consulting with the IMF. Given that Argentina did not have plausible arguments on the law or facts, the Panel was under no obligation to inquire with the IMF. Furthermore, panels have considerable discretion in determining how they would proceed, and the WTO has not established guidelines regarding factual discovery.
 - C. Arguments by the European Communities Third Participant
- 28. With respect to Article II of the GATT 1994, the European Communities submits that it was not necessary, in order to resolve the case before it, for the Panel to have made the finding in paragraph 6.32 of the Panel Report and that violation of Article II of the GATT 1994 exists in respect of all import transactions where duties are imposed which exceed the binding. Argentina's admitted methodology used to establish the DIEM leads to duties in excess of the bindings for all products priced below the "representative price". With respect to Argentina's statistical tax, the European Communities endorses the Panel's finding in paragraph 6.80 of the Panel Report. The European

Communities also makes certain comments with respect to Argentina's claims under Article 11 of the DSU.

- 29. In coming to the conclusion that the Argentine system of DIEM must violate Article II of the GATT 1994 in all cases, the Panel acknowledged that the wording of Article II does not explicitly address the question of whether there is an obligation to use the particular type of duty referred to in the Schedule. The Panel relied instead on past GATT practice. In the view of the European Communities, GATT practice is only relevant for the purpose of interpreting WTO obligations and cannot constitute a source of obligations in itself. The Panel appears to have treated the past GATT practice to which it refers as a source of law. The past practice referred to by the Panel, according to the European Communities, is far from persuasive.
- 30. The European Communities believes that the Panel should have taken the wording and context of Article II of the GATT 1994 as its starting point. Article II:1(a) may fulfil a role similar to that of Article III:1. Article II:1(a) "articulates a general principle" which "informs" the rest of Article II. The relevant obligation in Article II:1(a) and II:1(b) is to give treatment "no less favourable" than that provided for in the Schedule and to exempt products of other contracting parties from duties "in excess of those" in the Schedule. The Schedules set out the rates of duty and a duty type. The reference to a type of duty can be explained by the fact that it is necessary to establish a basis for calculation of the amount of duty which can be imposed in each case and not as a commitment to impose duties in that form only.
- 31. The European Communities contends that no provision of Article II contains obligations relating to the type as opposed to the amount of the duty. Accordingly, the Schedules only bind the amount of the duty which may be imposed in any case, not the type of duty. The European Communities knows of no case where a Member has reserved, in its Schedule, the right to impose a different type of duty even though an overall limit on the amount of duty payable under the other type of duty would not be exceeded. Even if it were considered that the type of duty was also bound independently of the binding of the amount, it would still be necessary to show that the change in the type of duty led to "treatment less favourable" than that resulting from the type of duty referred to in the Schedule.

- 32. Paragraph 6.31 of the Panel Report suggests that a change in the type of duty "undermines the stability and predictability of Members' Schedules." The European Communities does not consider that this is a matter covered by Article II of the GATT 1994. Another possible basis for a conclusion that the change in the type of the duty leads to "treatment less favourable" than that resulting from the type of duty provided for in the Schedule is suggested in paragraphs 6.46 and 6.47 of the Panel Report. The European Communities does not believe that change in competitive relationships is a correct test to apply in this case. The wording of Article II:1(a) of the GATT 1994 makes it clear that the obligation not to exceed the tariff binding applies to each individual import transaction and that it is not possible for a Member to compensate higher duties on some transactions, or on some tariff lines, with lower duties elsewhere.
- 33. In respect of the statistical tax, the European Communities agrees with Argentina that it is not sufficient for the Panel to state that "there is no evidence that Argentina was requested by the International Monetary Fund ("IMF") to impose an import tax that would violate the provisions of the WTO Agreement" in order to conclude that there can be no question of conflicting obligations. An obligation can also arise if Argentina made the commitment without it having been requested. However, the only document on which Argentina relies, in arguing that it is under an obligation to the IMF to maintain a 3 per cent statistical tax, is the Memorandum on Economic Policy. In the view of the European Communities, this is a unilateral communication to the IMF, not an agreement, which mentions only a 3 per cent temporary import surcharge on certain imports. That this document did not create an obligation to maintain the 3 per cent statistical tax is also indicated by the fact that Argentina reduced the tax to 0.5 per cent and replaced it with a general increase in tariffs of 3 per cent.
- 34. The European Communities agrees with the Panel that Argentina's argument that it was under

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

- 36. If Argentina were to seek to justify the 3 per cent statistical tax/import surcharge as a balance of payments measure, it would need to invoke Articles XII and XVIII of the GATT 1994 and notify the Committee on Balance-of-Payments Restrictions under Articles XII:4 or XVIII:12 of the GATT 1994. There is no indication that any of this has been done and there is, therefore, no basis to review the Panel's finding that the measure is inconsistent with Article VIII of the GATT 1994.
- 37. With regard to Article 11 of the DSU, the European Communities contends that it was not necessary for the Panel to have evidence based on invoices that duties exceeding the bound levels were imposed. The European Communities stresses the importance of respecting the principles of due process in panel proceedings, but does not consider it necessary or appropriate to comment on the submission and use of the evidence submitted by the United States prior to the second meeting of the Panel. Article 13 of the DSU entitles a panel to seek information from any body, including the IMF, if it considers this necessary. There was no need for the Panel to seek the opinion of the IMF on the existence of an obligation toward it by Argentina to maintain the 3 per cent statistical duty since that would not have been relevant for deciding whether or not there was a violation of Article VIII of the GATT 1994.
- III. Issues Raised in this Appeal
- 38. The appellant, Argentina, raises the following issues in this appeal:
 - (a) Whether the application by a Member of a type of duty other than the type provided for in that Member's Schedule is, in itself, inconsistent with Article II of the GATT 1994;

- (b) Whether the Panel erred in concluding that Argentina had acted inconsistently with its obligations under Article II of the GATT 1994 "in all cases" in which Argentina applied the DIEM;
- (c) Whether the Panel erred in its application of Article VIII of the GATT 1994 to the 3 per cent ad valorem statistical tax by not taking into account commitments that Argentina states it made to the IMF; and
- (d) Whether the Panel acted inconsistently with Article 11 of the DSU in: (i) admitting certain evidence submitted by the United States two days prior to the second substantive meeting of the Panel with the parties, and granting Argentina only two weeks to respond; and (ii) not seeking information from, and consulting with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax imposed by Argentina.
- IV. Interpretation of Article II of the GATT 1994
 - A. The Type of Duty
- 39. Article II:1 of the GATT 1994 states, in pertinent part:
 - (a) Each Member shall accord to the commerce of the other Members treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
 - (b) The products described in Part I of the Schedule relating to any Member, which are the products of territories of other Members, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.
- 40. With respect to Article II, the Panel found, inter alia:
 - 6.31 We note that the past GATT practice is clear: a situation whereby a contracting party applies one type of duties while its Schedule refers to bindings of another type of duties constitutes a

violation of Article II of GATT, without any obligation for the complaining party to submit further evidence that such variance leads to an effective breach of bindings. ... As a guarantee for predictability and to ensure the full respect of the negotiations under Article II, GATT practice has generally required that once a Member has indicated the type(s) of duties in specifying its bound rate, it must apply such type(s) of duties. Accordingly, faced with such a variance in the type [of] duties applied by Argentina from that

not base its finding on a textual analysis of either paragraph (a) or (b) of Article II:1 of the GATT 1994. It observes that "[t]he wording of Article II does not seem to address explicitly whether WTO Members have an obligation to use a particular type of duty" and then asserts that "the wording of Article II must be interpreted in the light of past GATT practice ...". The Panel relies heavily on what it characterizes as "past GATT practice", without undertaking any analysis of the ordinary meaning of the terms of Article II in their context and in the light of the object and purpose of the GATT 1994, in accordance with the general rules of treaty interpretation set out in Article 31 of the Vienna Convention. After citing three working party reports²⁶, the adopted report of the Panel on Newsprint²⁷ and the unadopted panel report in EEC - Import Regime for Bananas²⁸ ("Bananas II"), the Panel declared that "... the past GATT practice is clear: a situation whereby a contracting party applies one type of duties while its Schedule refers to bindings of another type of duties constitutes a violation of Article II of GATT ...". ²⁹

43. We are not persuaded that "the past GATT practice is clear". The three working party reports cited by the Panel did not arise in the context of dispute settlement cases brought pursuant to Article XXIII of the GATT 1947, unlike some working party reports in GATT history that resulted from complaints made under Article XXIII.³⁰ We also note that these three working party reports did not result in the CONTRACTING PARTIES giving a ruling or making recommendations, pursuant to Article XXIII:2 of the GATT 1994, on whether a variance in the type of duty applied by a contracting party from the type of duty provided for in its Schedule constituted an infringement of Article II:1 of the GATT 1947.

facts, deal with the application by a contracting party of a specific duty rather than an ad valorem duty provided for in its Schedule. Finally, the Panel relied extensively on the unadopted panel report in Bananas II. In our Report in Japan - Taxes on Alcoholic Beverages , we agreed with that panel that "unadopted panel reports have no legal status in the GATT or WTO system ...'", although we believe that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant'". In the case before us, the Panel's use of the Bananas II panel report appears to have gone beyond deriving "useful guidance" from the reasoning employed in that unadopted panel report. The Panel, in fact, relies upon the Bananas II panel report.

is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision.

- A tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule. The principal obligation in the first sentence of Article II:1(b), as we have noted above, requires a Member to refrain from imposing ordinary customs duties in excess of those provided for in that Member's Schedule. However, the text of Article II:1(b), first sentence, does not address whether applying a type of duty different from the type provided for in a Member's Schedule is inconsistent, in itself, with that provision.
- 47. In accordance with the general rules of treaty interpretation set out in Article 31 of the Vienna Convention, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members "treatment no less favourable than that provided for" in its Schedule. It is evident to us that the application of customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes "less favourable" treatment under the provisions of Article II:1(a). A basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members.
- 48. We turn next to examine whether, by applying the DIEM instead of the ad valorem duties provided for in its Schedule, Argentina has acted inconsistently with Article II:1(b), first sentence, of the GATT 1994.
- 49. As we understand it, the Argentine methodology of determining the DIEM is, first, to identify a representative international price for each relevant tariff category of textile and apparel products. Once this representative international price has been established, Argentina then multiplies that price by the bound rate of 35 per cent, or by the actually applied rate of less than 35 per cent³⁴, to arrive at

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

the DIEM for the products in that category. Customs officials are directed, in a specific transaction, to collect the higher of the two values: the applied ad valorem rate or the DIEM.³⁵

- 50. To grasp the meaning and implications of the Argentine system, it is important to keep in mind that for any specific duty, there is an ad valorem equivalent deduced from the ratio of the absolute amount collected to the price of the imported product. Thus, the ad valorem equivalent of a specific duty varies with the variation in the price of imports. It is higher for low-priced products than for high-priced products. To illustrate, a specific duty of \$10 collected on all imported products in a certain tariff category, is equivalent to 10 per cent ad valorem if the price of the imported product is \$100; however, it is equivalent to 20 per cent ad valorem if the price is only \$50.
- 51. Thus, under the Argentine system, whenever the amount of the specific duty is determined by applying the bound rate of 35 per cent to the representative international price in a certain tariff category, the ad valorem equivalent of the specific duty is greater than 35 per cent for all imports at prices below the representative international price; it is less than 35 per cent for all imports at prices above the representative international price. Therefore, collecting the higher of the two values means applying the bound tariff rate of 35 per cent ad valorem to the range of prices above the representative international price, and applying the minimum specific import duty with an ad valorem equivalent of more than 35 per cent to the range of prices below the representative international price.
- 52. In cases where the amount of the DIEM is determined by applying a rate of less than 35 per cent -- for example, 20 per cent -- to the representative international price in a certain tariff category, the result would be as follows. For the range of prices above the representative international price, the ad valorem equivalent of the specific duty would be less than 20 per cent. With respect to the range of prices below the representative international price, a distinction should be made between two zones. As to a certain zone of prices immediately below the representative international price, the ad valorem equivalent of the specific duty would be greater than 20 per cent but less than 35 per cent. However, for products at prices below that zone, the ad valorem equivalent of the specific duty would be greater than 35 per cent.

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

³⁶See Panel Report, para. 3.125.

- 53. In the light of this analysis, we may generalize that under the Argentine system, whether the amount of the DIEM is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, there will remain the possibility of a price that is sufficiently low to produce an ad valorem equivalent of the DIEM that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any DIEM, no matter what ad valorem rate is used as the multiplier of the representative international price, the possibility remains that there is a "break-even" price below which the ad valorem equivalent of the customs duty collected is in excess of the bound ad valorem rate of 35 per cent.
- 54. We note that it is possible, under certain circumstances, for a Member to design a legislative "ceiling" or "cap" on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the ad valorem equivalents of the duties actually applied would not exceed the ad valorem duties provided for in the Member's Schedule. However, no such "ceiling" exists in this case. The measures at issue here, as we have already noted, specifically and expressly require Argentine customs officials to collect the greater of the ad valorem or the specific duties applicable, with no upper limit on the level of the ad valorem equivalent of the specific duty that may be imposed. Before the Panel, Argentina argued that its domestic challenge procedure (recurso de impugnación), in combination with the precedence and direct effect of international treaty obligations in the Argentine national legal system, operated as an effective legislative "ceiling" to ensure that a duty in excess of the bound rate of 35 per cent ad valorem could never actually be imposed. The Panel did not accept this argument³⁷, and Argentina has not appealed from that finding of the Panel. In this case, therefore, there is no effective legislative "ceiling" in the Argentine system which ensures that duties in excess of the bound rate of 35 per cent ad valorem will not be applied.

- 56. We modify the Panel's findings in paragraphs 6.31 and 6.32 of the Panel Report accordingly.
 - B. Violation of Article II "In All Cases"
- Argentina claims that the Panel erred in finding that it had infringed its obligations under Article II of the GATT 1994 "in all cases" in which it applied the DIEM. Argentina argues that the United States submitted evidence with respect to only 118 out of the approximately 940 relevant tariff categories in the Nomenclatura Común MERCOSUR ("N.C.M."). Argentina further asserts that, had evidence in respect of the remaining tariff categories been examined, it would have shown that the application of the DIEM, on average over all tariff categories, had not exceeded the maximum level of binding in Argentina's Schedule. On another ground, Argentina appeals the Panel's late admission into evidence of certain invoices and customs documents submitted by the United States relating to specific import transactions in six additional tariff categories. We examine this separate ground of appeal in Part VI of this Report.

58. The Panel concluded that:

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

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

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

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

⁴¹Panel Report, para. 6.65.

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

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

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

61.

Panel also noted that Argentina had not submitted "any affirmative evidence to the contrary". 46 Argentina, in other words, did not successfully overcome the prima facie case established by the United States. We cannot find any error of law in the findings of the Panel based on the evidence submitted by the United States on average calculations relating to 118 tariff categories out of approximately 940 tariff categories for textile and apparel products.

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

- 63. For these reasons, we find no legal basis on which to reverse the Panel's findings in paragraph 6.65 of the Panel Report.
- V. The Statistical Tax and Argentina's Stated Commitments to the IMF
- At the time the Panel proceeding commenced, there was in effect in Argentina an ad valorem tax of 3 per cent on imports, without a minimum or a maximum charge, which was called a "statistical tax" and was described as designed to cover the cost of providing a statistical service intended to provide a reliable data base for foreign trade operators. In respect of this statistical tax, the Panel found as follows:

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

Argentina does not appeal the Panel's finding that the statistical tax is inconsistent with the substantive requirements of Article VIII of the GATT 1994. Rather, Argentina submits that the Panel erred in law in failing to take into account Argentina's obligations to the IMF in the Panel's interpretation of Article VIII. Argentina refers to the Memorandum on Economic Policy⁵¹, that forms part of the panel record in this case, as a "Memorandum of Understanding" between Argentina and the IMF. Argentina states that this "Memorandum of Understanding" is a "simplified agreement" which includes an "undertaking" or an "obligation" on its part to collect a specified amount in the form of a statistical tax.⁵² This obligation is said to be set out or reflected in the statement on page 7 of the Memorandum on Economic Policy that the fiscal measures to be adopted by Argentina include "... increases in import duties, including a temporary 3 per cent surcharge on imports".⁵³

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

⁵⁰Panel Report, para. 6.80

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

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

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

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

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

the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund and the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking that suggests that we should change our approach.⁵⁹ (emphasis added)

- 69. Implicit in the above statement is the Panel's belief that Argentina had not successfully shown that it was required under an agreement with the IMF to impose the statistical tax. ⁶⁰ Indeed, the Panel does not appear to have been convinced that Argentina had a legally binding agreement with the IMF at all. From the panel record in this case, it does not appear possible to determine the precise legal nature of this Memorandum on Economic Policy, nor the extent to which commitments undertaken by Argentina in this Memorandum constitute legally binding obligations. We note that page 7 of the Memorandum on Economic Policy refers to "a temporary 3 percent surcharge on imports", which is not necessarily the same thing as the 3 per cent statistical tax levied on imports. Argentina did not show an irreconcilable conflict between the provisions of its "Memorandum of Understanding" with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel's implicit finding that Argentina failed to demonstrate that it had a legally binding commitment to the IMF that would somehow supersede Argentina's obligations under Article VIII of the GATT 1994.
- 70. We also agree with the Panel that there is nothing in the Agreement Between the IMF and the WTO, the

- 71. In furtherance of the WTO's mandate to "cooperate, as appropriate" with the IMF, the Agreement Between the IMF and the WTO was concluded in 1996. This Agreement provides for specific means of administrative cooperation between the two organizations. It provides for consultations and the exchange of information between the WTO Secretariat and the staff of the IMF in certain specified circumstances, and grants to each organization observer status in certain of the other's meetings.
- 72. The Agreement Between the IMF and the WTO, however, does not modify, add to or diminish

Organization to Achieving Greater Coherence in Global Economic Policymaking¹⁶³ that modifies Argentina's obligations under Article VIII of the GATT 1994. We also agree with the Panel that there is "... no exception in the WTO Agreement that would excuse Argentina's compliance with the requirements of Article VIII of GATT.¹⁶⁴ There does not appear to be anything in the WTO Agreement or in the other legal instruments cited by Argentina that would relieve a Member from its obligations under Article VIII of the GATT 1994. For these reasons, we uphold the Panel's findings in paragraphs 6.79 and 6.80 of the Panel Report.

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

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

prohibit" submission of additional evidence after the first substantive meeting of a panel with the parties. It is also true, however, that the Working Procedures in Appendix 3 do contemplate two distinguishable stages in a proceeding before a panel. Paragraphs 4 and 5 of the Working Procedures address the first stage in the following terms:

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

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

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

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

80. As noted above, however, the Working Procedures in their present form do not constrain panels with hard and fast rules on deadlines for submitting evidence. The Panel could have refused to admit the additional documentary evidence of the United States as unseasonably submitted. The Panel chose, instead, to admit that evidence, at the same time allowing Argentina two weeks to respond to it. Argentina drew attention to the difficulties it would face in tracing and verifying the manually processed customs documents and in responding to them, since identifying names, customs identification numbers and, in some cases, descriptions of the products had been blacked out. The Panel could well have granted Argentina more than two weeks to respond to the additional evidence. However, there is no indication in the panel record that Argentina explicitly requested from the Panel, at that time or at any later time, a longer period within which to respond to the additional

documentary evidence of the United States. Argentina also did not submit any countering documents or comments in respect of any of the additional documents of the United States.

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

B. Consultation with the IMF

- 82. Argentina also argues that the Panel failed to make "an objective assessment of the matter", as required by Article 11 of the DSU, by not acceding to the request of the parties to seek information from, and consult with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax. ⁶⁹ The DSU gives panels different means or instruments for complying with Article 11; among these is the right to "seek information and technical advice" provided in Article 13 of the DSU. Argentina maintains that the Panel did not make use of this right, which would have allowed it to verify the information provided by the parties, and which might have altered the Panel's findings regarding the statistical tax. ⁷⁰
- 83. During the panel proceedings, the United States argued that Argentina had not demonstrated that the imposition of a 3 per cent statistical tax was required, or even requested, by the IMF, and invited the Panel to consult with the IMF to ascertain whether it had asked Argentina to impose the tax.⁷¹ In its appellant's submission, Argentina states that it too requested "consultations" with the IMF by the Panel.⁷²
- 84. The only provision of the WTO Agreement that requires consultations with the IMF is Article XV:2 of the GATT 1994. This provision requires the WTO to consult with the IMF when dealing with "problems concerning monetary reserves, balances of payments or foreign exchange arrangements".⁷³ However, this case does not relate to these matters. Article 13.1 of the DSU gives a

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

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

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

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

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

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

- As in the WTO Agreement, there are no provisions in the Agreement Between the IMF and the WTO that require a panel to consult with the IMF in a case such as this. Under paragraph 8 of this latter Agreement, in a case involving "exchange measures within the Fund's jurisdiction", the IMF "shall inform in writing the relevant WTO body (including dispute settlement panels) ... whether such measures are consistent with the Articles of Agreement of the Fund." This case does not, however, involve "exchange measures within the Fund's jurisdiction". Paragraph 8 also provides that the IMF "may communicate its views in writing on matters of mutual interest to the [WTO] or any of its organs or bodies (excluding the WTO's dispute settlement panels) ..." (emphasis added). Evidently, the IMF has not been authorized to provide its views to a WTO dispute settlement panel on matters not relating to exchange measures within its jurisdiction, unless it is requested to do so by a panel under Article 13 of the DSU.
- 86. In this case, we find that the Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF. While it might perhaps have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF in this case, we believe that the Panel did not abuse its discretion by not seeking information or an opinion from the IMF. For these reasons, we find that the Panel did not violate Article 11 of the DSU by not seeking information from, and consulting with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax imposed by Argentina.

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

VII. Findings and Conclusions

- 87. For the reasons set out in this Report, the Appellate Body:
 - (a) modifies the Panel's findings in paragraphs 6.31 and 6.32 of the Panel Report by concluding that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule. In this case, Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the DIEM regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent ad valorem in Argentina's Schedule;
 - (b) concludes that the Panel did not err in finding that Argentina had acted inconsistently with its obligations under Article II of the GATT 1994 "in all cases" in which Argentina applied the DIEM, and, therefore, upholds the findings of the Panel in paragraph 6.65 of the Panel Report;
 - (c) upholds the findings of the Panel in paragraphs 6.79 and 6.80 of the Panel Report; and
 - (d) concludes that the Panel did not violate Article 11 of the DSU in: (i) admitting certain evidence submitted by the United States two days prior to the second substantive meeting of the Panel with the parties, and granting Argentina two weeks to respond; and (ii) not seeking information from, and consulting with, the IMF so as to obtain its opinion on specific aspects of the matter concerning the statistical tax imposed by Argentina.

Signed in the original at Geneva this 11th day of March 1998 by:					
Said El-Naggar					
Presiding Member					

Florentino Feliciano

Mitsuo Matsushita

Member

Member