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TURKEY – RESTRICTIONS ON IMPORTS OF TEXTILE AND CLOTHING PRODUCTS

Report of the Panel

The report of the Panel on Turkey – Restrictions on Imports of Textile and Clothing Products is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 31 May 1999, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

TABLE OF CONTENTS

I. INTRODUCTION

1.1 On 21 March 1996, India requested consultations with Turkey pursuant to Article 4.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 ("GATT") regarding the unilateral imposition of quantitative restrictions ("QRs") by Turkey on imports of a broad range of textile and clothing products from India as from 1 January 1996 (WT/DS34/1).

1.2 India and Turkey did not enter into consultations, due to disagreement on the appropriateness of participation of the European Communities in such consultations, and consequently the dispute could not be resolved at that stage. The Dispute Settlement Body ("DSB") was informed accordingly on 24 April 1996.[1]

1.3 In a communication dated 2 February 1998, India requested the DSB to establish a panel to examine the matter in the light of GATT and the Agreement on Textiles and Clothing ("ATC"), in accordance with Article 6.2 of the DSU (WT/DS34/2). In its communication, India claimed that the restrictions imposed by Turkey were inconsistent with Turkey's obligations under Articles XI and XIII of GATT and were not justified by Article XXIV of GATT, which did not authorize the imposition of discriminatory QRs, and that the restrictions were inconsistent with Turkey's obligations under Article 2 of the ATC. India also claimed that the restrictions appeared to nullify or impair benefits accruing to it directly or indirectly under GATT and the ATC.

1.4 On 13 March 1998, the DSB established a panel pursuant to the request of India, with the following standard terms of reference (Article 7.1 of the DSU):[2]

> "To examine, in the light of the relevant provisions of the covered agreements cited by India in document WT/DS34/2, the matter referred to the DSB by India in that document and to make such findings as will assist the DSB in making recommendations or in giving the rulings provided for in those agreements."

1.5 On 11 June 1998, the parties to the dispute agreed on the following composition of the Panel (WT/DS34/3):

Chairman:	Ambassador Wade Armstrong
Members:	Dr. Luzius Wasescha
	Prof. Robert Hudec

1.6 Following the resignation of Prof. Robert Hudec, the parties to the dispute agreed to appoint a new member to the Panel, on 21 July 1998. Accordingly, the composition of the Panel was as follows (WT/DS34/4):

Chairman:	Ambassador Wade Armstrong
Members:	Dr. Luzius Wasescha
	Mr. Johannes Human

1.7 Hong Kong, China; Japan; the Philippines; Thailand; and the United States reserved their third-party rights in accordance with Article 10 of the DSU.

1.8 On 14 August 1998, Turkey requested preliminary rulings by the Panel on a number of issues. On 28 August 1998, the Panel invited India, as well as the third parties, to present their views on the points raised by Turkey. India submitted written comments on the issues; Japan, the Philippines and

[1] WT/DSB/M/15, pp. 3-5.
[2] WT/DSB/M/43, p. 6.

the United States, as third parties, also submitted written communications. The Panel met on 19 September 1998 with Turkey and India on this matter, and issued its ruling on 25 September 1998.

1.9 The Panel received the first written submissions from the parties on 21 August 1998 (India) and on 18 September 1998 (Turkey). Written submissions were also received from Hong Kong, China; Japan; the Philippines; and Thailand, as third parties.

1.10 The first substantive meeting of the Panel with the parties took place on 5-6 October 1998 and the Panel met with third parties on 6 October 1998.

1.11 On 28 October 1998, the Panel addressed a letter to the European Communities, seeking certain relevant factual and legal information under Article 13.2 of the DSU. The European Communities answered in writing the specific questions raised by the Panel on 13 November 1998.

1.12 On 19 November 1998, the Panel received the second written submissions from the parties, with whom it met again on 25 November 1998.

1.12 In a communication dated 20 January 1999, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months. The reasons for that delay are stated in document WT/DS34/5.

1.13 The Panel issued its interim report to the parties on 3 March 1999. On 12 March 1999, both parties submitted written requests for the Panel to review precise aspects of the interim report; no further meeting with the Panel was requested.

1.14 The Panel submitted its final report to the parties on 26 March 1999.

II. FACTUAL ASPECTS

2.1 This section addresses the factual aspects of the dispute in a sequential order, in which the QRs at issue are described in paragraphs 2.39 to 2.41 below. In view of the nature of the dispute, this section outlines first the factual context in which the dispute is addressed.

A. REGIONAL TRADE AGREEMENTS IN THE GATT/WTO FRAMEWORK

2.2 The relationship between the most-favoured-nation ("MFN") principle and Article XXIV of the GATT, which deals with free-trade areas and customs unions, has not always been harmonious. In 1947, their coexistence in the framework of international trade relations had been viewed as ultimately positive, reflecting the perception that genuine customs unions and free-trade areas were congruent with the MFN principle and directed towards the same objective, i.e. multilaterally-agreed trade liberalization.[3]

2.3 As a matter of fact, trade liberalization under the GATT paralleled a process of increasing economic integration among contracting parties: from 1948 to end-1994, 107 regional trade agreements ("RTAs") were notified to the GATT under Article XXIV.[4]

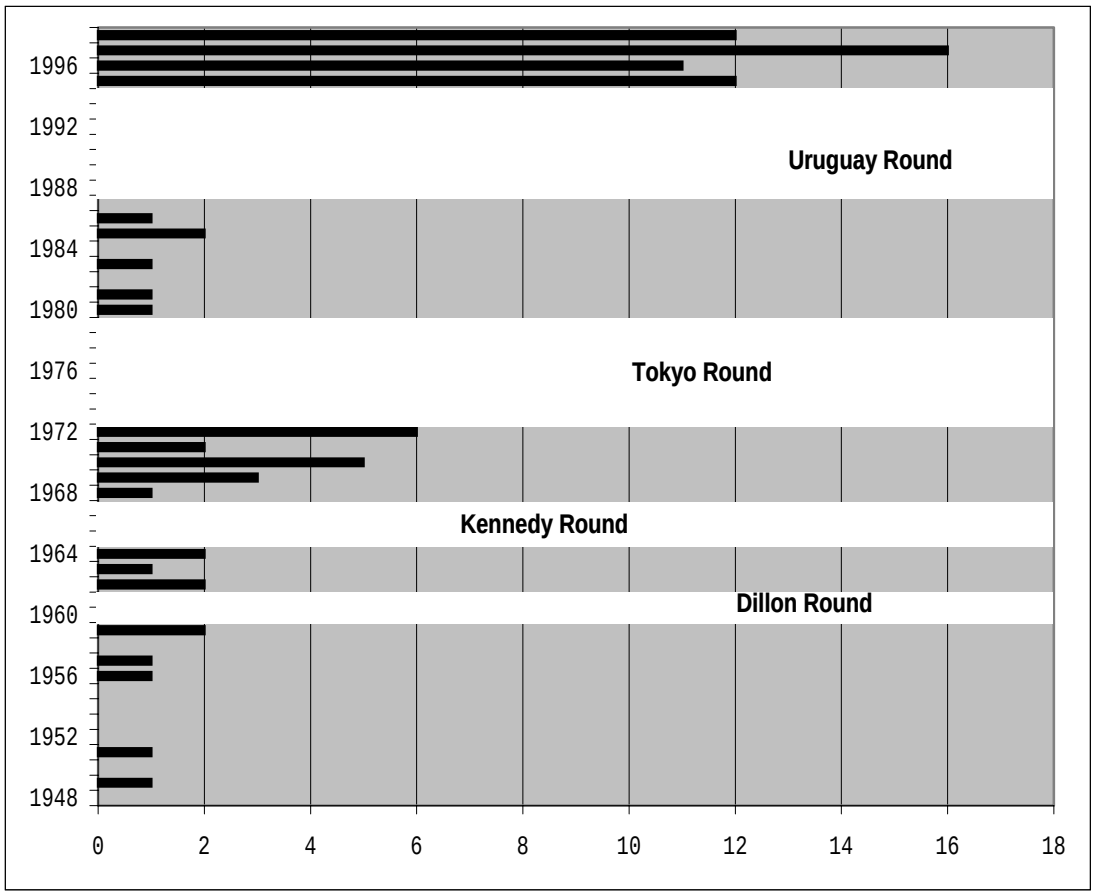
[3] Customs unions and free-trade areas were viewed as trade-creating instruments (susceptible to expand trade both among the parties and between these and third parties), but there were also concerns about their possible trade-distorting effects.

[4] Of these, only 36 remain today in force, reflecting in most cases the evolution over time of the RTAs themselves, as they were superseded by more modern agreements between the same signatories (usually going deeper in integration), or by their consolidation into wider groupings.

2.4 Before 1957, the GATT contracting parties dealt with only three such agreements, covering a small fraction of their aggregate trade (see Figure II.1), on which compatibility with Article XXIV was temporarily waived and which were maintained under surveillance.[5] Article XXIV provisions confronted their first real applicability test with the notification of the Treaty of Rome in 1957, which concerned the integration of major players in the international scene. From then on, the examination of RTAs notified to the GATT did not lead to clear-cut assessments of full consistency with the rules, except in one instance.[6] Frictions between GATT contracting parties arising in the context of the formation of customs unions or free-trade areas were dealt with pragmatically.[7]

2.5 The perception that RTAs could contribute to the expansion of world trade was reiterated during the Uruguay Round, when negotiators re-visited certain aspects of Article XXIV, in an endeavour to clarify some of its provisions.[8]

Figure II.1 – Number of RTAs notified to the GATT/WTO under Article XXIV



2.6 During the course of the Uruguay Round, there was an increase in the number of new RTAs notified to the GATT. The conclusion of the Round and the establishment of the WTO did not put to

[5] See in this respect: *Report on the Customs Union between South Africa and Southern Rhodesia* (BISD II/176) and corresponding *Decisions* (BISD II/29, and 3S/47); *Decision on the Free-Trade Area Treaty between Nicaragua and El Salvador* (BISD II/30); and *Decision on Participation of Nicaragua in Central American Free-Trade Area* (BISD 5S/29).

[6] This was the case of the Customs Union between the Czech Republic and the Slovak Republic (see *Working Party Report*, GATT document L/7501, dated 4 October 1994).

[7] See, for example, BISD 7S, p. 69 *et seq.*.

[8] The result of such negotiations is embodied in the Understanding on the Interpretation of Article XXIV of GATT 1994.

rest the appeal of regional integration. Since 1 January 1995, a further 60 new RTAs have been notified under Article XXIV of GATT, most of which are presently in force.[9]

2.7 The WTO General Council established, on 6 February 1996, the Committee on Regional Trade Agreements ("CRTA"),[10] with the mandate of, inter alia, examining all RTAs notified to the Council for Trade in Goods ("CTG") under Article XXIV.[11] The CRTA is likewise entrusted with the examination of those RTAs notified under the 1979 Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries and under Article V of the General Agreement on Trade in Services ("GATS"),[12] and referred to it by the Committee on Trade and Development ("CTD") and the Council for Trade in Services ("CTS"), respectively. The mandate of the CRTA also includes the consideration of "the systemic implications of [RTAs] and regional initiatives for the multilateral trading system and the relationship between them".[13]

2.8 Later in 1996, the WTO Membership expressed its views on RTAs and the role of the CRTA in paragraph 7 of the Singapore Ministerial Declaration, as follows:

> "We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system. In this context, we note the importance of existing regional arrangements involving developing and least-developed countries. The expansion and extent of regional trade agreements make it important to analyse whether the system of WTO rights and obligations as it relates to regional trade agreements needs to be further clarified. We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules. In this regard, we welcome the establishment and endorse the work of the new Committee on Regional Trade Agreements. We shall continue to work through progressive liberalization in the WTO as we are committed in the WTO Agreement and Decisions adopted at Marrakesh, and in so doing facilitate mutually supportive processes of global and regional trade liberalization."[14]

2.9 The CRTA 1998 Report to the General Council is self-explanatory on the results so far achieved in its work.[15] Paragraph 6 of the Report, with respect to the examination of the agreements, reads:

> "In 1998, the Committee endeavoured to accelerate the examination of agreements which had already commenced, as well as to handle new agreements referred to it. The Committee has currently under its purview a total of 62 RTAs. To date, the examination of 54 RTAs have been referred to the Committee by the CTG, seven by the CTS and one by the CTD. Draft reports on the examination of 28 agreements are currently under consideration; for 13 other agreements, reports are being drafted or factual examinations are well engaged, while the first round of examination for the remaining 21 RTAs is scheduled for either the Committee's twentieth session or early in 1999 … Thus far, no report has been adopted."

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[9] The negotiation of RTAs among countries geographically distant has also become an increasingly frequent feature in the 1990s.

[10] WT/L/127.

[11] The CRTA is in charge of the examinations which were previously performed by separate working groups, one per agreement.

[12] These provisions also govern regional integration within the WTO.

[13] WT/L/127, para.1(d).

[14] WT/MIN(96)/DEC, para. 7.

[15] WT/REG/7.

As concluding remarks, paragraph 15 of the CRTA 1998 Report states as follows:

> "… Despite its heavy workload and delays in the submission of certain relevant material, the Committee also made progress in examining RTAs. The need to move forward in the process of examination pursuant to WTO rules was recognized; however, progress in this regard was slowed, *inter alia*, by a lack of consensus on the interpretation of certain elements of those rules relating to RTAs. On systemic issues, the Committee held discussions on some important topics and identified different approaches to these subjects; the need to move forward in the discussion of systemic issues was also recognized."

B. TURKEY'S TRADE RELATIONS WITH THE EUROPEAN COMMUNITIES

1. Association between Turkey and the European Communities, and the GATT/WTO process[16]

2.10 On 12 September 1963, Turkey and the Council and member States of the then European Economic Community ("EEC") signed the *Ankara Agreement*,[17] which entered into force on 1 December 1964. The Ankara Agreement formed the basis of the Association (in the sense of Article 228 of the Treaty of Rome) between Turkey and the European Communities envisaging that its objectives would be reached through a customs union which would be established in three progressive stages: preparatory, transitional and final. Article 28 of the Ankara Agreement also left open "the possibility of the accession" of Turkey to the EEC. The Ankara Agreement itself contained the modalities of the preparatory stage of the Association.

2.11 The terms and conditions for the implementation of the transitional stage were defined in the 1970 *Additional Protocol* to the Ankara Agreement and in the 1971 *Interim Agreement*.[18] The provisions of the Interim Agreement entered into force on 1 September 1971 and the Additional Protocol entered into force on 1 January 1973. These texts provided for an extended transitional period running over 22 years and foresaw the establishment of a customs union by the end of 1995. The Additional Protocol provided for an asymmetrical liberalization of intra-trade, because of the disparity in levels of development between the parties: the European Communities were to abolish all duties and QRs on imports of industrial products from Turkey as from September 1971, while Turkey was to do so over the transitional period, according to a timetable.[19] The Protocol also contained provisions designed to ensure the alignment of Turkey on EC policies in many areas (commercial policy, standards, competition, state aids, trade in services, etc.).

2.12 *Supplementary Protocols* to the Ankara Agreement (and Interim Agreement) were also concluded in 1973 between Turkey and the European Communities, containing adaptation and transition measures following the accession to the European Communities of Denmark, Ireland and the United Kingdom.[20]

2.13 Starting in 1973, Turkey embarked in the gradual alignment of its customs duties to the EC Common Customs Tariff ("CCT"), as scheduled. The implementation of Turkey's obligations arising out of its Association with the European Communities was interrupted during a number of years, due *inter alia* to the crisis in which the Turkish economy was engulfed following the oil shocks of 1973 and 1979. In 1987, when Turkey requested accession to the European Communities, completion of

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[16] The official titles of the agreements have changed over time The European Communities is a WTO Member.

[17] GATT document L/2155/Add.1.

[18] GATT document L/3554.

[19] Other agreements concluded at the time by the EC with Mediterranean countries contained similar provisions.

[20] GATT document L/3980.

the customs union was seen as part of a package of measures designed to help Turkey prepare for membership. In 1988, Turkey resumed the reduction of its customs duties and alignment on the CCT.

2.14 The Ankara Agreement and the subsequent instruments concluded in the context of the Association between Turkey and the European Communities during the 1970s were notified to the GATT Contracting Parties under Article XXIV:7 of GATT 1947. The GATT entrusted three separate working parties with the task of examining the different agreements in light of those provisions. Reports of these working parties were adopted by the GATT Council:

(i) Report of the Working Party on the Ankara Agreement, adopted on 25 March 1965 (BISD 13S/59-64);

(ii) Report of the Working Party on the Additional Protocol, adopted on 25 October 1972 (BISD 19S/102-109); and

(iii) Report of the Working Party on the Supplementary Protocols, adopted on 21 October 1974 (BISD 21S/108-112).

2.15 As agreed at a meeting of the Turkey-EC Association Council ("Association Council") held in November 1992,[21] negotiations were initiated between the two parties on the modalities for the completion of the customs union, i.e. for the final phase of the Association. These negotiations were conducted from 1993 to 1995.

2.16 On 6 March 1995, the Association Council took *Decision 1/95*, to enter into force on 1 January 1996.[22] Decision 1/95 set out the modalities for the final phase of the Association between Turkey and the European Communities. In addition to the elimination of customs duties and alignment on the CCT, it contained provisions for the harmonisation of Turkey's policies and practices in all areas covered by the Association where this was deemed necessary "for the proper functioning of the Customs Union". In accordance with Article 65 of Decision 1/95 the parties were to consider, before entry into force, whether those harmonisation provisions (in particular those contained in Article 12) had been fulfilled. Once this requirement was considered satisfied, at a meeting of the Association Council on 30 October 1995, Decision 1/95 was submitted to the European Parliament for its approval and subsequently formally adopted by the Association Council on 22 December 1995. On 22 December 1995, the Association Council also adopted Decision 2/95, in pursuance of Article 15 of Decision 1/95. Decision 2/95 defined the coverage of products for temporary exception from Turkey's application of the CCT in respect of third countries, and fixed the timetable for their alignment to the CCT (from 1 January 1996 to 1 January 2001).

2.17 The entry into force of "the final phase of the Customs Union" between Turkey and the European Communities was notified to the WTO on 22 December 1995, under Article XXIV of GATT.[23] The texts of Decision 1/95 and Decision 2/95 were distributed to Members on 13 February 1996.[24] On 29 January 1996, the CTG adopted standard terms of reference for the examination of the "Customs Union between Turkey and the European Community"[25] ("Turkey-EC customs union"), and referred such examination to the CRTA.[26]

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[21] The Association Council was created by the Ankara Agreement, as the only decision-making body of the Turkey-EC Association.

[22] Decision 1/95 is reproduced in WT/REG22/1.

[23] WT/REG22/N/1.

[24] WT/REG22/1 and WT/REG22/2, respectively.

[25] The terms of reference for the examination are contained in WT/REG22/4. In this Panel report we shall refer to the Turkey-EC customs union without any assessment of the WTO nature of this Article XXIV type of arrangement.

[26] G/C/M/8.

2.18 Turkey and the European Coal and Steel Community ("ECSC") signed an Agreement on 25 July 1996, which entered into force on 1 August 1996.[27] In their joint communication to the WTO, the parties stated that the Agreement was "intended as the complement to the Customs Union in respect of products covered by the European Coal and Steel Community and as a transitional arrangement in respect of such products until … the year 2002".[28]

2.19 On 30 October 1996, Turkey and the European Communities submitted preliminary information to the WTO on "the final phase of the Customs Union", in accordance with the Standard Format for Information on Regional Trade Agreements.[29] In a joint communication dated 24 November 1997,[30] Turkey and the European Communities provided, "[t]o assist Members in the examination of the Customs Union, … details of the quantitative limits applied by Turkey in respect of imports of certain textile and clothing products from certain WTO Members", including the levels of such quantitative limits for 1997.[31] The CRTA met twice to examine, in the light of the relevant provisions of GATT, the Turkey-EC customs union: on 23 October 1996 and on 1 October 1997.[32] Additional written questions from Members were also replied to by the parties.[33] To date, the CRTA has not yet finalized its examination.

2.20 Turkey and the European Communities transmitted copies of their communications to the CRTA, in relation to the quantitative limits applied by Turkey, and to the Textiles Monitoring Body ("TMB"), for information pursuant to Article 3.3 of the ATC.[34] The TMB took note of the information supplied at its meetings held on 11-12 December 1997. and 26-27 May 1998.[35] To date Turkey has notified to the TMB its lists for the first and second stage of integration and advance integration for a product which will be subject to the third stage of integration.[36]

2. Synopsis of recent developments in Turkey-EC trade[37]

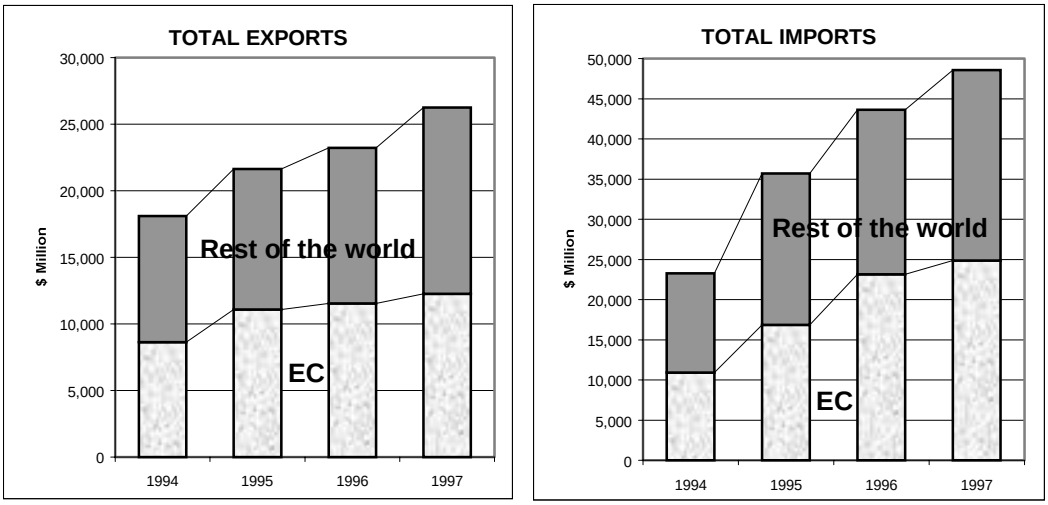
2.21 The European Communities[38] has traditionally constituted the major single market for Turkish goods and Turkey's major supplier, accounting for around 50 per cent of both Turkey's exports and imports. Exports to the European Communities in 1996 and 1997 expanded at a slower rate than those destined to the rest of the world. Imports from the European Communities increased 37 per cent in 1996 but rose by only 7 per cent in the next year; by contrast, Turkey's imports from the rest of the world grew 9 per cent in 1996 and by 16 per cent in 1997. (See Figure II.2.)

2.22 In 1997, Turkey's total exports, by broad product categories,[39] were comprised of agricultural products (17 per cent), textiles (10 percent), clothing (27 per cent) and other industrial products (45 per cent). At a more detailed level, main export groups included: edible fruits and nuts (5 per cent), iron and steel (8 per cent) and electrical machinery and equipment (6 per cent). As much as 95 per cent of Turkish total imports in 1997 were made up of industrial products, including 7 per cent

[27] WT/REG22/1/Add.1.
[28] WT/REG22/N/1/Add.1.
[29] WT/REG22/5.
[30] WT/REG22/7.
[31] A similar communication was circulated to Members on 28 July 1998, containing the levels of the quantitative limits in 1998 (Document WT/REG22/8).
[32] See WT/REG22/M/1 and WT/REG22/M/2 (Notes on the meetings).
[33] WT/REG22/6 and WT/REG22/6/Add.1.
[34] G/TMB/N/308 and G/TMB/N/338.
[35] See G/TMB/R/38 and G/TMB/R/43, respectively.
[36] From the point of view of the TMB, Turkey's status is mixed. While it applies restrictions on imports from certain developing countries, in line with its obligations towards the EC, its own exports to the United States and Canada remain under restraint.
[37] Based on trade statistics provided by the Government of Turkey.
[38] Throughout this section, trade figures relate to the EC-15.
[39] The broad product categories are here defined as follows: agricultural products (Turkish tariff chapters 1 to 23); textiles (50 to 60); clothing (61 to 63); other industrial products (24 to 49 and 64 to 97).

accounted for by imports of textiles and clothing. Major sub-groups among the imported industrial products included: fuels, machinery and chemicals.

Figure II.2 – Turkey's total exports and imports from the European Communities and the rest of the world, 1994-1997



2.23 By broad product categories, the evolution of Turkey's exports to the European Communities during the period 1994-1997 showed some distinct features, when compared to the corresponding developments in Turkey's exports to non-EC countries. For agricultural products, exports to non-EC countries tended to increase (albeit moderately) over practically the whole period, while exports to the European Communities showed increases only in 1995 and 1997. For textiles and clothing, the growth of exports to the European Communities was steady during the period; exports of these products to non-EC countries rose in 1995 and, after virtually stagnating in 1996, increased again in 1997. Exports of other industrial products to the European Communities, after a sharp increase in 1995, slowed down considerably, while those to non-EC countries were steadily up throughout the period, to a level in 1997 46 per cent higher than in 1994. (See Table II.1.)

Table II.1: Turkey's exports to the European Communities and to other countries, by broad product categories, 1994-1997

	Exports to the EC				**Exports to other countries**			
	1994	**1995**	**1996**	**1997**	**1994**	**1995**	**1996**	**1997**
	($ million)				($ million)			
Agricultural products	1,572	1,841	1,729	1,901	2,060	2,132	2,284	2,643
Textiles and clothing	4,150	5,353	5,665	5,933	2,285	2,967	3,031	3,886
Other industrial products	2,913	3,885	4,154	4,413	5,126	5,460	6,360	7,468
Total exports	**8,634**	**11,078**	**11,549**	**12,248**	**9,471**	**10,558**	**11,676**	**13,997**
	(Percentages)				(Percentages)			
Share of "textiles and clothing" in total exports	*48.1*	*48.3*	*49.1*	*48.4*	*24.1*	*28.1*	*26.0*	*27.7*

Source: Government of Turkey.

2.24 By broad product categories, imports into Turkey of agricultural products from the European Communities declined in both 1996 and 1997, while those from other countries continued to grow, albeit at a slower pace. Imports of textiles and clothing from the European Communities more than trebled between 1994 and 1997; those from other countries recovered from the decline in 1996, to reach in 1997 a level 75 per cent higher than in 1994. (See Table II.2.)

Table II.2: Turkey's imports from the European Communities and from other countries, by broad product categories, 1994-1997

	Imports from the EC				Imports from other countries			
	1994	**1995**	**1996**	**1997**	**1994**	**1995**	**1996**	**1997**
	($ million)				($ million)			
Agricultural products	457	1,031	959	755	810	1,591	1,903	1,809
Textiles and clothing	501	828	1,392	1,617	1,136	1,853	1,590	1,994
Other industrial products	10,172	15,216	21,002	22,713	10,409	15,403	16,995	19,912
Total imports	**10,915**	**16,861**	**23,138**	**24,870**	**12,355**	**18,847**	**20,489**	**23,715**
	(Percentages)				(Percentages)			
Share of "textiles and clothing" in total imports	*4.6*	*4.9*	*6.0*	*6.5*	*9.2*	*9.8*	*7.8*	*8.4*

Source: Government of Turkey.

C. QUANTITATIVE LIMITS IN RESPECT OF TURKEY'S IMPORTS OF CERTAIN TEXTILE AND CLOTHING PRODUCTS

1. Historical background

2.25 The gradual removal of QRs in major developed countries during the 1950s, in the wake of general liberalization efforts pursued in the GATT, brought about substantial increases in textiles and clothing imports into major developed countries originating in low-cost countries. To alleviate the difficulties caused to their producers, some importing countries convinced exporters of cotton textiles to conclude voluntary export restraint agreements. In an attempt to find a multilateral solution to the problem, in 1960 the GATT CONTRACTING PARTIES recognized the phenomenon of market disruption, thus setting the ground for selective safeguard action in the area of textile and clothing products (as a departure from the requirements of Article XIX of GATT 1947).

2.26 Thereafter, discriminatory restraints took the form of the 1961 Short-Term Arrangement Regarding International Trade in Cotton Textiles, followed in 1962 by the Long-Term Cotton Textiles Arrangement (1962-1973). The Arrangement Regarding International Trade in Textiles or Multifibre Arrangement ("MFA") entered into force in 1974, extending the coverage of the restrictions on textiles and clothing from cotton products, to include wool and man-made fibre products (and, from 1986, certain vegetable fibre products).[40]

2.27 During its 21 years of existence, from 1974 to 1994, the MFA underwent numerous operational changes and adaptations. The restraints under the MFA developed into a complex network of restrictions, bilaterally negotiated (or imposed in the case of unilateral actions) at short intervals, often every year or so. In the last year of its existence, the MFA had 44 participants, six of which (Canada, Norway, the United States and the European Communities, *plus* Austria and Finland,) applied restraints. Such restraints were used almost exclusively to protect their markets against imports of textiles and clothing from developing countries and, to a lesser extent, from former state-trading countries, also MFA members.

2.28 After more than three decades of special and increasingly complicated regimes governing international trade in textile and clothing products, seven years of negotiations during the Uruguay Round resulted in the ATC. Through the transitional process embodied in the ATC, by 1 January 2005 the extensive and complex system of bilateral restraints will come to an end and importing countries will no longer be able to discriminate between exporters in applying safeguard measures.

[40] Operationally, the MFA (like the cotton arrangements) provided rules for the imposition of restraints, either through bilateral agreements or, in cases of market disruption or threat thereof, through unilateral action. Importing countries were also required, with certain exceptions, to allow for an annual growth rate in the restraints.

2.29 Turkey became a member of the MFA, as an exporting country, in 1981. Since 1979, Turkish textile and clothing products were subjected to restraints in the EC market under the provisions of Article 60 of the Additional Protocol to the Ankara Agreement.[41]

2.30 On 31 December 1994, one day before the ATC came into force, Turkey did not maintain QRs on imports of textile and clothing products. Its exports of certain textile and clothing products were at that time under restraint in the European Communities and other countries' markets under the MFA.

2. Recent background

2.31 In accordance with Article 13 of Decision 1/95, as of 1 January 1996, the customs duties applied by Turkey to the industrial goods imported from third countries were harmonized with the CCT and the previous Mass Housing Fund levy of some 20 per cent, collected from industrial goods, was abolished. With respect to imports of textile and clothing products, the MFN tariffs applied by Turkey were thereby reduced from roughly 10 per cent for textiles and 14 per cent for clothing in 1994 (*plus* the Mass Housing Fund levy) to 9 per cent in 1996.[42]

2.32 Decision 1/95 included specific provisions with respect to trade in textiles and clothing, in particular in Article 12, supplemented by related statements by both parties. Such provisions called for Turkey's adoption of the relevant EC regulations concerning imports of textiles and clothing, in particular Council Regulation 3030/93, which provided for the bilateral agreements with supplier countries to be implemented by a set of EC quantitative limits on certain imports and for a system of import surveillance.

2.33 Two Decrees issued by Turkey's Council of Ministers laid down the basis for the alignment of Turkish commercial policy in textiles and clothing to that of the European Communities: Decree No. 95/6815 on *Surveillance and Safeguard Measures for Imports of Certain Textiles Products*, with respect to products from countries with which Turkey concluded bilateral agreements, and Decree No. 95/6816, concerning the *Surveillance and Safeguard Measures for Imports of Textile Products Originating in Certain Countries not Covered by Bilateral Agreements, Protocols and other Arrangements*, both of which were dated 30 April 1995 and published in the Turkish *Official Gazette* on 1 June 1995. Both Decrees were published with the respective Regulations for their application, under the authority of the Under-Secretariat for Foreign Trade, the Turkish responsible body for determination and calculation of the quota levels on imports of textile and clothing products.

2.34 Early in 1995, in its endeavour to complete Decision 1/95 requirements for the "completion of the Customs Union", Turkey sent proposals to the relevant countries (i.e. those whose imports of textiles and clothing were under restraint in the EC market), including India, to reach agreements for the management and distribution of quotas under a double checking system. A standard formula was proposed for calculating the levels of QRs on textile and clothing products to be introduced by Turkey vis-à-vis all third countries concerned.

2.35 On 31 July 1995, Turkey forwarded to the Indian authorities a draft Memorandum of Understanding on trade in the categories of textile and clothing products on which Turkey intended to introduce QRs. India was invited to enter into negotiations with Turkey, with the participation of the European Communities, to conclude, prior to the completion of the Customs Union, an arrangement covering trade in those products which would be similar to the one already existing between India and the European Communities. India maintained that the intended restrictions were in contravention of Turkey's multilateral obligations and declined to enter into discussions on the conditions proposed by Turkey.

[41] Notified to the Textiles Surveillance Body under Article 7 of the MFA.
[42] The average level of protection of those imports in Turkey was 37 per cent in 1993.

2.36 Agreements providing for restraints similar to those of the European Communities were negotiated by Turkey with 24 countries (WTO Members and non-Members). As provided for in Article 12 of Decision 1/95, the EC Commission cooperated with the Turkish authorities in the preparation of negotiating positions and generally participated in the negotiations themselves. As from 1 January 1996, unilateral restrictions or surveillance regimes were applied to imports originating in another 28 countries (WTO Members and non-Members), including India, with which Turkey could not reach agreement. These restrictions only affected products whose export to the European Communities was also under restraint.

2.37 The quantitative limits established by Turkey for 1996 were allocated on a quarterly basis, through Communiqués published in the *Official Gazette* on 19 December 1995, 13 March, 13 June and 25 September 1996. Quantitative limits for 1997 were allocated on a half-year basis, through Communiqués published in the *Official Gazette* on 7 December 1996 and 12 June 1997. Quantitative limits for the year 1998 were allocated through a Communiqué published in the *Official Gazette* on 18 December 1997.

3. Quantitative limits imposed on certain Turkey's imports of textile and clothing products from India

2.38 Turkey applies QRs, as of 1 January 1996, on imports from India of 19 categories of textile and clothing products. (See the Annex to this report, Appendix 1, for a list of the categories and description of products.)

2.39 In the case of India, the formula used by Turkey to fix the level of the QRs corresponded to either (i) the arithmetical average of imports into Turkey from India for the category of products during the period 1992-1994; or (ii) an amount based on total EC imports for the category of products in question multiplied by the percentage of the basket exit threshold laid down in the bilateral agreement between the European Communities and India in force in 1994, multiplied by the percentage share of Turkish GDP in EC-15 total GDP (i.e. 2.5 per cent), whichever was the higher. To this amount the corresponding growth rates in force in quota years 1994 and 1995 had been added to arrive at a level for 1996. The specific criteria retained for the calculation of the quantitative limits on imports of textile and clothing products into Turkey from India were as follows:

(i) average of Turkish imports in 1992-1994, for calculations on product categories 1, 2, 2a, 3a, and 23; and

(ii) option based on GDP, for calculations on product categories 6, 9, 20, 24 and 29 (because there were no imports into Turkey during 1992-1994); and on product categories 3, 4, 5, 7, 8, 15, 26, 27 and 39 (because its outcome was higher than the alternative calculation based on imports).

2.40 Actual quantitative limits established for 1996-1998 on textile and clothing products imported from India can be found in the Annex to this report, Appendix 2.

4. Statistical analysis of Turkey's imports of textile and clothing products under restraint

(a) Imports of 61 textile and clothing product categories under restraint

2.41 Table II.3 below is based on (i) information provided to the CRTA on the QRs applied by Turkey on imports of certain textile and clothing products from 25 WTO Members (WT/REG22/7) and (ii) import statistics made available by Turkey to the Panel. The data shown below therefore correspond to imports into Turkey of textile and clothing products in the 61 categories identified in the Annex to the document cited under (i) above as being restricted by Turkey for at least one WTO

Member in 1997.[43] The statistics in Table II.3 distinguish imports into Turkey from the EC-15 and those originating in other countries (including India).

Table II.3: Turkey's imports of 61 textile and clothing product categories under restraint, from the EC-15 and other countries, 1994-1997

Origin	Import values				Shares			
	1994	1995	1996	1997	1994	1995	1996	1997
	($ million)				(Percentages)			
EC-15	181	326	646	747	25	25	45	47
Other countries	556	960	802	853	75	75	55	53
Imports from all origins	**736**	**1,286**	**1,448**	**1,600**	**100**	**100**	**100**	**100**

Source: WT/REG22/7 and Government of Turkey.

2.42 For the 61 categories of textiles and clothing under restraint, Turkey's imports from all non-EC countries (including India) accounted for 4.5 and 5 per cent of its total imports from those countries in 1994 and 1995, respectively, (i.e. prior to the introduction of the restraints) and for less than 4 per cent of the corresponding totals in 1996 and 1997. The share of imports of those same product categories in Turkey's total imports from the EC-15 increased from 1.7 per cent in 1994 to 3 per cent in 1997.[44]

(b) Imports of the 19 textile and clothing product categories under restraint for India

2.43 Statistics provided by India show that the value of its exports to Turkey of the 19 product categories under restriction dropped in 1996 and continued to decline in the following year, albeit less markedly; in 1995, exports under those categories had virtually trebled over their level in 1994. Such fluctuations were mainly due to variations in exports of restricted textile products to Turkey. A different behaviour is observed in India's exports to Turkey of other – unrestricted – products during the period 1994-1997: their share in India's total exports of textiles and clothing to Turkey has increased throughout the period, from 32 per cent in 1994 to 87 per cent in 1997. (See Table II.4, and more detailed statistics in the Annex to this report, Appendix 3a.)

Table II.4: India's exports of textiles and clothing to Turkey, 1994-1997

		Export values				Annual change		
		1994	1995	1996	1997	95/94	96/95	97/96
		($ thousand)				(Percentages)		
Textiles	Restricted products	13,960	41,840	21,700	19,570	200	-48	-10
Clothing	Restricted products	252	396	104	297	57	-74	186
Textiles and clothing	**All products**	**20,842**	**94,636**	**69,022**	**147,271**	**354**	**-27**	**113**
	Restricted products	14,212	42,236	21,804	19,867	197	-48	-9
	Other products	6,630	52,400	47,218	127,404	690	-10	170

Source: Government of India.

2.44 Data derived from trade statistics supplied by Turkey on its imports from India of the restricted 19 product categories in 1994 to 1997 differ in magnitude or movement from those provided by India.[45] Nevertheless, they point at similar overall trends, both with respect to imports of product

[43] These product categories are the following: 1-10, 12-24, 26-29, 31-33, 35-37, 39, 46, 50, 61, 67, 68, 70, 72-74, 76-78, 83, 86, 90, 91, 97, 100, 110, 111, 117 and 118.

[44] Shares calculated on the basis of data in Tables II.2 and II.3.

[45] For the restricted product categories, differences are mainly concentrated in textiles. Since differences in trade dollar values are also found in volume terms, and most often pointing in the same direction, the impact of divergent unit values can hardly be the sole explanatory factor. Such differences may derive, not only from the usual time lags of international trade statistics, but also from computation methods. In particular, differences in the data relative to the restrictive product categories could thus be linked to the existence of

categories under restraint and with respect to imports of other textile and clothing products. (See Table II.5, and more detailed statistics in the Annex to this report, Appendix 3b.)

Table II.5: Turkey's imports of textiles and clothing from India, 1994-1997

		Import values				Annual change		
		1994	1995	1996	1997	95/94	96/95	97/96
		($ thousand)				(Percentages)		
Textiles	Restricted products	12,949	45,530	31,651	30,528	252	-30	-4
Clothing	Restricted products	133	153	352	131	15	130	-63
Textiles and clothing	**All products**	**32,457**	**104,678**	**93,992**	**137,343**	**223**	**-10**	**46**
	Restricted products	13,082	45,683	32,003	30,659	249	-30	-4
	Other products	19,375	58,995	61,989	106,684	204	5	72

Source: Government of Turkey.

2.45 In Table II.6, based on Turkish statistics, Turkey's imports of the 19 product categories under restraint for India and of other textile and clothing products are broken down by selected origins, for the 1994-1997 period. Imports from all origins into Turkey of the 19 product categories under restraint for India accounted in both 1994 and 1995 for 24 per cent of Turkey's total imports of textiles and clothing, this share declining to 19 per cent in 1997.

2.46 Turkey's imports of the 19 categories of textiles and clothing under restraint for India from all non-EC countries (including India) accounted for less than 3 per cent of Turkey's imports of all products (including textiles and clothing) from those countries in both 1994 and 1995, and for less than 2 per cent of the corresponding totals in 1996 and 1997. The share of imports of the same 19 product categories in Turkey's imports of all products (including textiles and clothing) from the EC-15 doubled from 0.5 per cent in 1994 to 1.1 per cent in 1997.[46]

Table II.6: Turkey's imports of the 19 textile and clothing product categories under restraint for India, by selected origins, 1994-1997

Origin	Import values				Shares			
	1994	1995	1996	1997	1994	1995	1996	1997
	($ million)				(Percentages)			
EC-15	56	101	237	280	14	16	37	41
Other countries	336	548	400	406	86	84	63	59
of which: India	*13*	*46*	*32*	*31*	*3*	*7*	*5*	*5*
Imports from all origins	**392**	**649**	**637**	**686**	**100**	**100**	**100**	**100**

Source: Government of Turkey.

various stages in the process of export/import licensing, which may serve as a source of the statistics. It is however to be noted that India's export data on unrestricted product categories are also largely at variance with the corresponding import data provided by Turkey.

[46] Shares calculated on the basis of data in Tables II.2 and II.6.

III. PRELIMINARY POINTS[47]

A. ISSUES

3.1 Following the establishment and composition of the Panel, **Turkey** submitted on 14 August 1998 that some points needed to be addressed by the Panel ahead of any examination of the substance of the complaint brought by India. Turkey claimed that:

(i) the request for the establishment of the panel was insufficiently precise in terms of the measures at issue and the product coverage of such measures; by omitting to make clear reference to the measures complained of and their precise product coverage, India had frustrated Turkey's rights of defense;

(ii) the failure by India to direct the complaint to the European Communities as well as Turkey, because the measures at issue stemmed from the Turkey-EC customs union, meant that the complaint should necessarily fail; and

(iii) rules concerning the consultation stage of the dispute settlement procedure with respect to trade in textile and clothing products had not been followed by India.

3.2 In the view of Turkey, the Panel should make a preliminary ruling on these points, rejecting India's complaint.

3.3 **India** requested the Panel to rule that Turkey's request for preliminary rulings had factually and legally no basis, on the grounds that:

(i) the identification of the measures at issue (the restrictions Turkey imposed on textile and clothing products from India as from 1 January 1996, the date when Turkey began to align its restrictions to those of the European Communities) was sufficiently specific to enable Turkey to prepare its defense and the Panel to resolve the dispute;

(ii) it was not possible to bring a complaint against the European Communities with respect to the measures at issue, since these had not been taken by the European Communities nor were they legally attributable to the European Communities because the territorial scope of its obligations under the WTO Agreement did not extend to the customs territory of Turkey. Also, in the absence of a provision for a co-respondent status in the DSU, the European Communities's participation in the proceedings would not, by itself, oblige it to abide by the Panel's ruling and agree to a modification of the common EC-Turkey regime governing restrictions on imports of textile and clothing products from third countries; and

(iii) the special dispute settlement procedures of the ATC did not apply to all restrictions imposed on textile and clothing products but only to those for which the provisions of the ATC were invoked. Since Turkey had notified the TMB that its restrictions were not imposed under the provisions of the ATC but in accordance with Article XXIV of the GATT, the normal dispute settlement procedures applied to the restrictions at issue. The TMB, established for the sole purpose of supervising the implementation of the ATC, was obviously not the proper forum for the resolution of a dispute on the relationship between Article XXIV of GATT and the general prohibitions of new textile and clothing restrictions set out in Article XI of GATT and Article 2.4 of the ATC.

[47] See also para. 1.8 above.

3.4 India also noted that procedural arguments made by Turkey could not be divorced from the facts and substantive arguments Turkey would present to the Panel. For instance, to rule on Turkey's request the Panel would need to know whether Turkey presented any product-specific arguments, whether the measures at issue were taken by the European Communities or Turkey and which provisions of the GATT and/or the ATC Turkey invoked to justify its restrictions. India therefore stated its preference for the Panel to address the procedural points raised by Turkey after its substantive arguments were presented and an opportunity given to India to rebut those arguments.

3.5 **Japan**, the **Philippines** and the **United States**, as third parties, also submitted their views in this respect Both Japan and the United States considered that, in the absence of any standard working procedures for preliminary rulings, the procedural and organisational issues raised by Turkey should be disposed of by the Panel *in limine litis*, so that India would have an opportunity to address defects, if any, before the conclusion of the work of the Panel. The Philippines argued that the Panel should not consider Turkey's request for preliminary rulings because (i) the request was an *ex parte* communication in the sense of Article 18.1 of the DSU, not being required nor contemplated in the Panel's working procedures; (ii) the Panel's findings on the issues of law and fact involved in the request could deprive India and the third parties of their rights under procedural due process; and (iii) the issues raised in the request were inextricably linked with the substance of India's complaint and could not be resolved separately.

B. PRECISION OF THE REQUEST FOR THE ESTABLISHMENT OF THE PANEL

1. Arguments by the parties

3.6 **Turkey** submitted that it was incumbent upon the Panel to examine the request for its establishment to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It was important that a panel request be sufficiently precise because (i) it often formed the basis of the terms of reference of the panel pursuant to Article 7 of the DSU, and (ii) it informed the defending party and the third parties of the scope and the legal basis of the complaint.[48] Since the jurisdiction of a panel was established on its terms of reference, by which it was bound,[49] no uncertainty with regard to their scope was permissible, since any such uncertainty would be tantamount to a basic uncertainty concerning the scope of the jurisdiction of that panel.

3.7 Turkey also considered that, as noted by the Appellate Body in the *EC – Regime for the Importation, Sale and Distribution of Bananas* case,[50] such a fundamental issue concerning the scope of the panel jurisdiction could be decided early in the panel procedure without unfairness to any party or third party, but Turkey did not believe that for this purpose detailed panel working procedures needed to be first established, since panels had regularly addressed preliminary issues of this kind *in limine litis*.[51]

3.8 Turkey recalled that Article 6.2 of the DSU required a request for the establishment of a panel to identify "the specific measures at issue". In its request submitted in the present case, India merely referred to "the unilateral imposition of QRs by Turkey on imports of a broad range of textile and

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[48] See Appellate Body Report on *EC – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R ("*EC - Bananas III*"), para. 142. See also Panel Report on *EC – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/R/MEX ("*EC - Bananas III*"), para. 7.37.

[49] See Appellate Body Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted on 16 January 1998, WT/DS50/AB/R ("*India - Patent*"), para. 92.

[50] See Appellate Body Report on *EC - Bananas III*, para. 144 (footnote 1).

[51] For a recent example of preliminary rulings issued at the beginning of the first meeting with the parties by the Panel, see Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted on 2 July 1998, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R ("*Indonesia - Autos*"), Section XIV.A, paras. 14.1-9.

clothing products from India as from 1 January 1996",[52] which Turkey considered a clearly insufficient description of the "specific measures at issue". In particular, the measures complained of were not specified by reference to the place of publication, by a clear indication of the date of adoption or promulgation, the issuing authority and the type of measure, nor by a reference to their precise product coverage. In Turkey's view, such a lack of precision was contrary to the letter and the spirit of Article 6.2 of the DSU. The basic right of defense, or due process implicit in the DSU would be impaired if the identification of the specific measures complained of were not clear, so that the party with the *better guess* would prevail. It was fundamental for a fair process that the party that had allegedly committed a breach of its obligations be fully aware of the case held against it. Turkey considered that, this could only be achieved, in the circumstances of the present case, by a clear reference to the measures complained of and their exact product coverage.

3.9 **India** pointed out that Turkey could not claim that it was not adequately informed about the scope of the dispute at the beginning of the panel proceedings. The domestic legal basis and product coverage of Turkey's measures could not have escaped the notice of its own authorities since Turkey had itself notified all details to the WTO. Furthermore, India raised the matter of the restrictions imposed by Turkey on a number of separate occasions.[53] On none of these occasions did Turkey indicate that the description of the measure left any uncertainty regarding the scope of the dispute. On the contrary, Turkey made it clear that it was fully aware of the product coverage when it stated before the DSB that "… with regard to Turkey's textile quotas … none of the textiles and clothing categories which were subject to QRs had been fully utilised by any exporting country. In the case of India, textile and clothing quotas had been underutilised in both 1996 and 1997".[54] All Members, including Turkey, were thus fully informed of the facts on which Turkey now claimed ignorance.

3.10 India noted further that one of the purposes of the requirement of prior consultations (Articles XXII and XXIII of GATT and Article 4 of the DSU) was to ensure that Members conducted a detailed exchange of facts and views before resorting to the panel procedure. During consultations the respondent had the opportunity to seek clarifications regarding the scope of the complaint. India recalled in this context that Turkey had refused to consult with India altogether without the presence of the European Communities, although, in India's view, it would have been free to raise in the consultations the issue of European Communities's participation in the proceedings. To buttress its present claims, Turkey had invoked the principle of due process, recognized by the Appellate Body as inherent in the DSU.[55] However, India failed to see how could it be consistent with the principle of due process if a Member were permitted to first refuse to hold consultations and then claim ignorance on matters that could have been clarified in those consultations. India therefore considered Turkey's claim that it was insufficiently informed by India about the scope of the dispute as a case of *venire contra factum proprium* which should, for that reason alone, be rejected by the Panel.

3.11 India also submitted that its request for the establishment of a panel stated that the measures at issue were the "QRs [imposed unilaterally] by Turkey on imports of a broad range of textile and clothing products from India as from 1 January 1996",[56] thus clearly identifying the specific measures at issue. It noted that Turkey was aware of the details of the quantitative limits imposed by it, since these were notified jointly by the European Communities and Turkey to the CRTA and a copy of this notification was also sent to the Chairman of the TMB. There could be no uncertainty for the Turkish authorities regarding such details as the product coverage of these restrictions, the place of

[52] WT/DS34/2, para. 1.

[53] DSB meeting of 27 March 1996 (WT/DSB/M/13, dated 13 May 1996); DSB meeting of 24 April 1996 (WT/DSB/M/15, dated 15 May 1996); DSB meetings of 13 February 1998 and 13 March 1998 (WT/DSB/M/42, dated 16 March 1998, and WT/DSB/M/43, dated 8 April 1998); CRTA meeting of 16-18 and 20 February 1998 (WT/REG/M/16, dated 18 March 1998, paras. 140 and 141).

[54] WT/DSB/M/43, dated 8 April 1998, Item 2, para. 3.

[55] See Appellate Body Report on *India – Patent*, para. 94.

[56] WT/DS34/2, para.1.

publication, the date of adoption or promulgation, the issuing authority or the type of measure. The identification of the specific measures at issue in India's request for a panel, therefore, did not require Turkey to engage in conjectures as to the scope of the dispute.

3.12 India submitted further that its complaint was directed against Turkey's restrictive regime for textile and clothing products from India agreed with the European Communities. The dispute between Turkey and India concerned one narrow legal issue, namely, whether Article XXIV of GATT, the only provision invoked by Turkey to justify its restrictions, permitted Turkey to impose new restrictions on imports of textile and clothing products from India that were inconsistent with the provisions of Article XI:1 of GATT and Article 2.4 of the ATC. The manner in which India had identified the measures at issue fully enabled Turkey to prepare its defense on this dispute and the Panel to rule on it. India considered that the identification of the measures at issue was, therefore, sufficiently precise for the purposes of Article 6.2 of the DSU.

3.13 **Turkey** recalled the findings of the panel on *EEC – QRs against Imports of Certain Products from Hong Kong*, which included the following:

> "The Panel considered that just as the terms of reference must be agreed between the parties prior to the commencement of the Panel's examination, *similarly the product coverage must be clearly understood* and agreed between the parties to the dispute. The Panel considered that to allow the inclusion of an additional product item about which one party had not been formally advised prior to the commencement of the proceedings would be to introduce an element of inequity" (emphasis added).[57]

3.14 Turkey noted that, since under the DSU the parties to the dispute needed no longer to agree on the establishment of a panel, it was all the more important that the parties and the third parties be in the clear about the precise scope of the dispute, as the Appellate Body found in the *EC – Bananas III* case.[58] It also noted that, in the *EC – Customs Classification of Certain Computer Equipment* case, the Appellate Body, taking into account such clear logical and legal necessities, stated that "it may also be necessary to identify the products subject to the measures in dispute",[59] in this case rejecting the claim by the European Communities that the United States had violated Article 6.2 of the DSU on the basis that "the complaining parties may have identified [the products at issue] by broader grouping, but not spelled out in sufficient detail".[60]

3.15 Turning to the present case, Turkey recalled that, in its request for the establishment of a panel, India had not even indicated a broader grouping of products, but limited itself to a generic reference to "a broad range of textile and clothing products". In Turkey's view, if such generic reference would be deemed to be sufficient to comply with Article 6.2 of the DSU, the word "specifically" in that provision would be inevitably reduced to redundancy or inutility, thus breaching a fundamental principle of interpretation of international public law.[61]

3.16 **India** responded that Article 6.2 of the DSU did not prescribe the manner in which the specific measures at issue were to be identified. Turkey's interpretation was supported neither by GATT/WTO practice nor by Appellate Body rulings. In most requests for the establishment of a panel made under the GATT and the WTO Agreement, the measures at issue were not identified by date and place of publication nor was the product coverage indicated with precision. The WTO *EC –*

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[57] Panel Report on *EEC – QRs against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129 ("*EEC - Imports from Hong Kong*"), para. 30.

[58] See Appellate Body Report on *EC – Bananas III*, para. 142, footnote 1.

[59] Appellate Body Report on *EC – Customs Classification of Certain Computer Equipment*, adopted on 22 June 1998, WT/DS62, 67, 68/AB/R ("*EC - Computer Equipment*"), para. 67.

[60] Ibid., para. 70.

[61] See Appellate Body Report on *United States – Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R ("*US - Gasoline*"), p. 23, footnote 45.

Bananas III case, cited by Turkey in support of its position, was no exception. Close to 100 different regulations made up the EC regime for the importation, sale and distribution of bananas, which applied to over a dozen different products. Both the panel and the Appellate Body examined the totality of this regime, irrespective of whether the regulations at issue were identified in the terms of reference in detail, and neither the panel nor the Appellate Body considered the generic description of the products to which this regime applied to be inconsistent with Article 6.2 of the DSU.[62]

3.17 In India's view, Article 6.2 of the DSU essentially required that the complainant identify clearly the matter in dispute. Details were in most cases irrelevant to its resolution.[63] If Turkey's interpretation were accepted, Members would only be able to bring complaints about elements of a trade regime whose domestic legal basis and product coverage could be identified with precision at a particular point in time, leaving the authorities of the respondent complete freedom to change a detail of the regime and claim that the new regime was no longer the measure ruled upon by the DSB. Requests for the establishment of a panel on defined aspects of a trade regime had frequently been made in the past and the panels and parties had not found an indication of the domestic legal basis and product coverage as necessary to resolve the disputes. India considered that the possibility to bring complaints on the basis of such requests should remain in the future if the DSU was to serve its purpose.

3.18 India noted further that the GATT and WTO precedents cited by Turkey did not support its position. For instance, Turkey had quoted the GATT Panel Report on *EEC – Imports from Hong Kong*.[64] During the course of proceedings of this panel, Hong Kong had requested a ruling on a product not mentioned at all in its panel request. There was no parallel there with India's complaint because India did not request in its first submission a ruling on products that it had not mentioned in its panel request. The panel on the *EC – Computer Equipment* case had pointed out that the *EEC – Imports from Hong Kong* s case had to be distinguished from the case in which the complaining party merely elucidated the product coverage already specified in the request for the establishment of a panel.[65] India, just like the United States in the *EC – Computer Equipment* case, merely provided in its first submission details on the present product coverage of measures already identified in the panel request. Finally, Turkey referred to the Appellate Body Report on the *EC – Computer Equipment* case, in which the Appellate Body recognized that the complaining party might identify the products subject to the measures at issue "by broader grouping", rejecting the European Communities's claim that each individual product had to be identified with precision.[66] However, this Appellate Body ruling supported India's position that the identification of the measures at issue as the restrictions Turkey imposed as from 1 January 1996 on imports of textiles and clothing from India was sufficiently precise.

3.19 **Turkey** recalled Article 22.4 of the DSU, which referred to the "level of nullification and impairment", questioning how such level could be established if the precise product coverage of the dispute was unknown.

3.20 **India** made reference to Article 22.6 of the DSU, according to which the level of suspension of concessions, in the case of a failure to comply with recommendations or rulings adopted by the DSB under the procedures of Article 22 of the DSU, should be equivalent to the level of the nullification or impairment. India considered that Turkey's argument that such equivalence could

[62] See Panel and Appellate Body Reports on *EC – Bananas III (Complaint by the United States)*.

[63] For instance, if a Member complained about the import licensing procedures of another Member, it would normally not be necessary to identify the place and date of publication of the regulation promulgating the procedures and its current product coverage. What was relevant for the resolution of such a dispute was the import licensing procedure as such, not its current domestic legal basis and the particular products to which it applied at a particular point in time.

[64] See BISD 30S/129

[65] See Panel Report on *EC – Computer Equipment*, para. 8.9.

[66] See Appellate Body Report on *EC – Computer Equipment*, para. 67.

only be determined if the product coverage was precisely determined during the panel proceedings had no merit. The level of suspension to which the complainant was entitled to under Article 22.4 of the DSU obviously depended on the level of nullification or impairment at the time when the failure to comply with the DSU recommendations occurred. India's rights under Article 22 of the DSU would in the present case thus depend on the nullification or impairment caused by the Turkish measures when the reasonable period for compliance with the DSB recommendations or rulings would have elapsed. Thus, if Turkey were to remove several items from the coverage of its restrictive regime for Indian textile and clothing products, India's right to suspend concessions or other obligations would be curtailed correspondingly. In India's view, the product coverage at the present time was thus not relevant for the purposes of Article 22 of the DSU. Moreover, any dispute regarding the level of suspension was to be resolved under the separate procedures set out in Article 22.6 of the DSU. There was, therefore, no need to make in the panel proceedings the factual findings that might have to be made in a subsequent Article 22.6 proceeding.

3.21 **Turkey** also pointed out that a faulty request for the establishment of a panel could not be "cured" by a complaining party's argumentation in its written submissions to the panel, in accordance with the findings of the Appellate Body in *EC – Bananas III*.[67] The deficiency of India's request for the establishment of a panel was therefore a fatal procedural obstacle to carrying this case any further. Any other decision would amount to a violation of Turkey's essential procedural right as a respondent to be aware of the case held against it which was part of the demands of due process to be preserved by the Panel.[68]

3.22 **India** noted that no issue of a "cure", as implied in Turkey's reference to the Appellate Body ruling in *EC – Bananas III*, could arise when, as was the case of India's request for a panel and its first submission, the measures at issue in the request for a panel were the same measures that were referred to in the first submission of the complainant.

3.23 India concluded that the identification of the measures at issue was sufficiently specific to enable Turkey to prepare its defense and the Panel to resolve the dispute, and it, therefore, met the requirements of Article 6.2 of the DSU.

2. Arguments by third parties

3.24 **Japan** referred to the *Japan – Measures Affecting Consumer Photographic Film and Paper* case as an additional important precedent for the interpretation of Article 6.2 of the DSU. For the identification of the specific measures at issue in that case, the panel found that a measure not explicitly described in a request for the establishment of a panel, to be regarded as being included in the measures at issue, had to be subsidiary or so closely related to the latter that the responding party could reasonably be found to have received adequate notice.[69]

3.25 The **Philippines** submitted that there was no specific standard on the degree of specificity required in the phrase "identify the specific measures at issue" other than the phrase "sufficient to present the problem clearly", in Article 6.2 of the DSU. In the Philippines view, Turkey, by its own acts, had made it sufficiently clear that it understood the problem clearly, or ought to understand it, as a reasonable party acting in good faith in the context of non-contentious proceedings (as pointed out in Article 3.10 of the DSU). The Philippines also rejected Turkey's argument related to the level of nullification and impairment as having no relevance whatsoever to the identification of the specific

[67] See Appellate Body Report on *EC – Bananas III*, para. 143.

[68] See Appellate Body Report on *India – Patent*, para. 94, where it is stated that "the demands of due process … are implicit in the DSU".

[69] See Panel Report on *Japan – Measures Affecting Consumer Photographic Film and Paper*, adopted on 22 April 1998, WT/DS44/R.

measures at issue. The Philippines concluded that India was in compliance with Article 6.2 of the DSU.

C. NON-PARTICIPATION OF THE EUROPEAN COMMUNITIES IN THE DISPUTE

1. Arguments by the parties

3.26 **Turkey** noted that the creation and existence of a customs union was not only a fact which was taken into account by the drafters of the GATT, but was expressly referred to in Article XXIV:4 of GATT as "desirable" because of the economic integration between the countries parties to the customs union. India was well aware that the measures subject of its complaint had not been taken *unilaterally* by Turkey, but resulted from the completion of the customs union agreed between Turkey and the then EEC in the Ankara Agreement, as specified in more detail in Association Council's Decision No. 1/95 "on implementing the final phase of the Customs Union". Turkey referred to paragraphs 1 and 2 of Article 12 of Decision No. 1/95 as evidence of its lack of autonomy in adopting its external commercial policy concerning imports of textile and clothing products from countries outside the customs union. Turkey recalled that the conclusion of the Turkey-EC customs union, and more particularly the above-mentioned provisions were duly notified to the GATT and to the WTO.

3.27 **India** noted that the restrictions imposed by Turkey were acknowledged by both Turkey and the European Communities as having been imposed by Turkey. Thus, Article 12 of Decision 1/95 provided that "*Turkey shall*, in relation to countries which are not members of the Community, *apply* provisions and implementing *measures which are substantially* similar *to those of the Community*'s commercial policy set out in the following Regulations" (emphasis added).[70] Furthermore, the joint Turkey-European Communities communication to the CRTA on 8 November 1996 (containing preliminary information on Decision 1/95) reads as follows: "In this framework, *Turkey has introduced quantitative restrictions* and surveillance measures parallel with the practices of the EC and will similarly *align itself* with EC liberalisation" (emphasis added).[71] In the Turkey-European Communities communication to the CRTA on the details of the QRs imposed, there was again joint and clear acknowledgement that:

> "In order to assist Members in the examination of the customs union, Turkey and the European Communities are pleased to confirm, in the Annex hereto, details of the quantitative limits applied by Turkey in respect of imports of certain textile and clothing products from certain WTO Members, and in conformity with the provisions of Article XXIV of GATT 1994" (emphasis added).[72]

In India's opinion, there was therefore no doubt that the measures at issue were restrictions imposed by Turkey and not by the European Communities.

3.28 **Turkey** recalled that, according to the Appellate Body in *Japan – Taxes on Alcoholic Beverages*, Panel and Appellate Body Reports "*are not binding, except* with respect to resolving the particular dispute *between the parties to that dispute*"(emphasis added).[73] This corresponded to internationally recognized standards: Article 59 of the Statute of the International Court of Justice ("ICJ") contained similar language, as indicated in footnote 30 of the above-mentioned Appellate Body report. Turkey added that Article 63 of the ICJ Statute allowed for all the parties to an international convention to become an intervenient with regard to the interpretation of that

[70] See WT/REG22/1.

[71] WT/REG22/5, Section II.8 (Trade Provisions, Sector-specific provisions), sub-section on Textiles and Clothing.

[72] WT/REG22/7, p. 1.

[73] Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/AB/R ("*Japan - Alcoholic Beverages*"), p. 14.

convention, it being understood that such an intervenient would then be bound by the judgement of the ICJ.[74] Turkey noted that such a provision was absent from the DSU, Article 10 giving third parties only limited rights of participation.

3.29 **India** noted that, although the DSU did not provide for the status of co-respondent, the European Communities would have had the right to participate in the present proceedings as a third party (Article 10). As such, it would have had the right to request the Panel to accord it the enhanced third-party status which certain GATT and WTO panels have accorded to third parties with a direct contractual interest in the outcome of a proceeding.[75] This would have permitted it to be present at all meetings of the Panel with the parties and to submit its views in all stages in the proceedings. The European Communities deliberately chose not to participate in the proceedings in accordance with the provisions of the DSU. It would amount to an amendment of the DSU by the Panel if the European Communities were accorded rights of participation not foreseen in the DSU and never before granted to a GATT contracting party or WTO Member interested in supporting the respondent.

3.30 **Turkey** further submitted that it could not be obliged by a DSB ruling to breach an international agreement that was duly notified and had a recognized status in the WTO by virtue of Article XXIV of GATT. A generally accepted rule of public international law was contained in Article 26 of the Vienna Convention of the Law of Treaties ("VCLT"): *pacta sunt servanda*. This made it legally impossible for Turkey to act inconsistently with its obligations under the Turkey-EC customs union without the consent of the other party to that agreement. Any other solution would amount to obliging Turkey to breach its international obligations *vis-à-vis* the European Communities and would thereby be contrary to general principles of public international law which, in accordance with Article 3.2 of the DSU, was a source of law within the WTO dispute settlement system.

3.31 **India** considered that, although it might be true that Turkey faced conflicting obligations in the WTO and in its bilateral agreement with the European Communities, this issue was not germane to the task of the Panel, whose mandate according to Article 7.1 of the DSU was to examine exclusively Turkey's obligations under the WTO agreements cited by the parties to the dispute, not any other treaties accepted by Turkey. This was not the first case in GATT/WTO history in which a panel had examined GATT-inconsistent measures taken by the defendant as a result of a bilateral agreement with another State. So far, all panels faced with that situation had simply ignored it and left it to the defendant to decide how to resolve its conflict of international obligations.[76] Turkey's potential conflict of international obligations was, therefore, irrelevant in the current proceedings.

3.32 India noted that it was undisputed in international law that a treaty between two States does not create either obligations or rights for a third State without its consent.[77] The agreement reached between Turkey and the European Communities, therefore, could not modify the rights which India asserted before this Panel. Contrary to Turkey's defense based on the recognized status of a customs union under Article XXIV of the GATT, India argued that nothing in Article XXIV could possibly be

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[74] Article 63 of the Statute of the International Court of Justice reads as follows: "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgement will be equally binding upon it."

[75] See Panel Report on *EC – Bananas III (Complaint by the United States)*, para. 7.5; and the references to GATT precedents in footnote 330 of that report.

[76] Examples of such cases are: *Norway – Restrictions on Imports of Certain Textiles Products*, BISD 27S/119 (restrictions discriminating against Hong Kong imposed under bilateral agreements with six developing countries); *Japan – Trade in Semi-Conductors*, BISD 35S/116 (export restrictions on semi-conductors imposed under an agreement with the United States); *EC – Bananas III (Complaint by the United States)*, para. 3.30 (country-specific allocations of tariff quota shares under the "Framework Agreement on Bananas" concluded between the EC and certain Latin American countries).

[77] Article 34 of the VCLT: "*pacta tertiis nec nocent nec prosunt*" ("A treaty does not create either obligations or rights for a third State without its consent").

interpreted as authorizing WTO Members forming a customs union to restrict imports from third WTO Members. Article XXIV provisions could not be understood as an expression of the consent of third WTO Members to bear the consequences of whatever restrictions might be imposed on their trade under an agreement between WTO Members forming a customs union.

3.33 **Turkey** also maintained that India's claim could not succeed as long as India was unwilling to direct its complaint against both the European Communities and Turkey. If the European Communities was not fully involved in the present dispute, it would not be bound by its outcome and would therefore be under no obligation to agree to apply the agreement in a way that would satisfy India's pretensions. Turkey considered that India's claim should be rejected on the basis that, in order to pursue its claims properly, India should have cited both parties to the Turkey-EC customs union as respondents. In Turkey's view, the present case was comparable to a situation where the complainant directed its complaint against country A for a measure taken by country B; in such situation, the complaint would have to be turned down for lack of standing due to the obvious absence of international liability. The same rule should therefore apply in the present case, since there was no basis, in fact or in law, for the assumption that Turkey was alone internationally answerable and individually responsible for acts collectively taken by the parties to the Turkey-EC customs union through its institutions.

3.34 In that context, Turkey viewed India's ultimate aim as that of being able to increase its trade in textile and clothing products with the Turkey-EC customs union, and not with Turkey alone. However, the "level of nullification or impairment" (Article 22.4 of the DSU) of QRs applied by the Turkey-EC customs union with regard to such trade with a final destination in Turkey would in fact be nil, while such trade impairment was potentially measurable with regard to the trade in these products with a final destination in European Communities. India's choice of the respondent therefore amounted to a circumvention of the essential rights of defense of the European Communities as the party in the Turkey-EC customs union which would have to bear the trade consequences of any change in the existing import regime for textile and clothing products in Turkey as a constituent territory of the Turkey-EC customs union.

3.35 **India** noted that Turkey was not an EC Member State. Hence, the territorial scope of the European Communities's obligations under the WTO Agreement did not comprise the Turkish customs territory and the Turkish government was not an authority for whose acts the European Communities had assumed any responsibility under the WTO Agreement. The import restrictions adopted by Turkey within its customs territory were measures neither adopted by, nor legally attributable to the European Communities.[78] In the absence of any EC restrictions that India could possibly challenge under the WTO agreements, India could not reasonably be expected to initiate proceedings against the European Communities under the DSU.

3.36 Finally, in India's view, according to Article 19.1 of the DSU, the DSB could request the European Communities to modify their agreement with Turkey only if EC participation in that agreement, by itself, constituted a measure inconsistent with a WTO agreement covered by the DSU. This was, however, not the case. Moreover, a Member participating as a third party in the normal panel procedures is not bound by the outcome of the proceedings merely by virtue of its participation. As confirmed by the Appellate Body, the results of a panel proceeding bound only the complainant

[78] In India's view, the only measure the EC took with respect to the measures at issue was to seek a common EC-Turkey regime for third-country imports of textiles and clothing and to reach an agreement with Turkey on such a regime. However, these actions of the EC, by themselves, were not measures covered by WTO law. The only provision in the WTO agreements which specifically prohibited Members to seek the imposition of a measure by another Member or to conclude an agreement with another Member on such imposition was Article 11 of the Safeguards Agreement, a provision which obviously did not apply in the present case.

and the defendant in the proceedings.[79] There was no obligation for third parties participating in panel proceedings corresponding to that contained in the arbitration procedures of Article 25 of the DSU.[80]

3.37 India could therefore not see how a mere change in the status of the European Communities in the proceedings of the Panel could entail a change in India's rights towards the European Communities under the WTO agreements and oblige the European Communities to agree to a modification of the common EC-Turkey regime for imports of textile and clothing products from India. Under general international law, such an obligation could result only from an agreement between India and the European Communities according to which these would commit themselves to abide by the Panel ruling if it were permitted to participate in the Panel proceedings. India noted that the European Communities had not offered to assume that obligation.

2. Arguments by third parties

3.38 **Japan** submitted that the Panel had been established in accordance with the provisions of the DSU, since India questioned Turkey's obligations under the WTO Agreements (not Turkey's obligations *vis-à-vis* the European Communities under the Ankara Agreement). Japan further noted that there was no obligation under the DSU for India to complain against the European Communities in this particular case and that any general issue of mandatory co-respondents should be addressed in another context.

3.39 The **Philippines** submitted that the European Communities were not an indispensable party to the dispute and that the resolution of India's claims against Turkey was not precluded without the participation of the European Communities. The Philippines observed, in particular, the following:

(i) Turkey's invocation of the *pacta sunt servanda* principle contained in Article 26 of the VCLT was not relevant in this context, since the terms and conditions of any agreement between Turkey and the European Communities, as between themselves, was not the subject of the dispute. Rather, a necessary consequence of Articles 26 and 34 of the VCLT was that, in the WTO, as between Turkey and India, Turkey could not invoke whatever conflicting obligations it might have under a Turkey-EC agreement.

(ii) Even assuming that Turkey had acted in performance of an obligation imposed by a Turkey-EC agreement, the operative act from which India's cause of action arose (the promulgation of a law applicable in Turkish territory) was the exclusive and sovereign act of Turkey.

(iii) The Panel, or the Appellate Body, had no choice but to apply the WTO Agreement, since the Turkey-EC agreements were not "covered agreements". Moreover, in accordance with paragraph 4 of Article 30 of the VCLT,[81] the WTO Agreement was exclusively applicable as between Turkey and India in the context of this dispute.

(iv) It was irrelevant and immaterial that the European Communities be bound by the results of this dispute, since India did not seek any remedy from the European Communities.

3.40 The **United States** also argued in support of India's views, noting the following:

[79] See Appellate Body Report on *Japan – Alcoholic Beverages*, Section E.

[80] Where all parties to the proceeding, including any third Member that agreed to participate, "shall agree to abide by the arbitration award".

[81] "When the parties to the later treaty do not include all the parties to the earlier one: … (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations".

(i) The text of Article 10 of the DSU drew a balance between the rights of the parties to a dispute and the rights of other Members, a point made clear in the *EC – Bananas III* case, when the panel granted part but not all of a request for additional participatory rights for third parties.[82] In the present dispute, the European Communities had however not chosen to avail themselves of the rights afforded to it by the provisions of Articles 10.1-10.3 of the DSU.

(ii) Turkey's claim that it was not individually responsible under the WTO Agreement for the measures at issue because of Turkey's entry into the Ankara Agreement could not be accepted. The existence of the Ankara Agreement could not by itself limit the rights of India under the WTO Agreement with respect to those measures. This principle of customary international law, *pacta tertiis nec nocent nec prosunt*, was expressed in Article 34 of the VCLT: "A treaty does not create either obligations or rights for a third State without its consent."

(iii) Turkey's citation of the principle of *pacta sunt servanda* was inapposite, as the text of Article 26 of the VCLT made it clear that "Every treaty in force is binding *upon the parties to it* and must be performed by them in good faith" (emphasis added). This Article did not have an effect on Turkey's obligations to India, or India's rights *vis-à-vis* Turkey, as India was not a party to the Ankara Agreement.

(iv) The measures in question were not acts adopted by institutions of the Ankara Agreement but were of Turkey's responsibility, as clearly stated by the European Communities at the DSB meeting on 13 February 1998: the "basic policy on Turkey's future textiles regime [including the measures in question] had been agreed by the Communities and Turkish Ministers…".[83]

(v) In the *EC – Bananas III* case, the Appellate Body had already endorsed the examination under the DSU of measures adopted by one Member even when those measures were related to that Member's other international agreements and that the other parties to such agreements were not parties in the WTO dispute settlement proceeding.

D. CONSULTATION STAGE OF THE DISPUTE SETTLEMENT PROCEDURE WITH RESPECT TO TRADE IN TEXTILE AND CLOTHING PRODUCTS

1. Arguments by the parties

3.41 **Turkey** submitted that India had violated cogent rules of procedure which were applicable in the present case and which took precedence over the ordinary rules under the DSU. In Turkey's view, the Panel had thus not been regularly established with respect to matters which were covered by the ATC and should decide, therefore, *in limine litis* that all the alleged violations of the ATC were not correctly before it and that it could not rule upon them.

3.42 Turkey claimed that, though alleging inconsistency of the Turkish measures with Article 2 of the ATC, India had disregarded the requirements of the special and additional procedural rules under Article 8, paragraphs 5 and 10, of the ATC (in the context of Article 1.2 and Appendix 2 of the DSU). In particular, India had not requested the TMB to review promptly the particular matter that it considered detrimental to its interests under the ATC. By so doing, it did not allow the TMB to make the appropriate recommendations. However, pursuant to Article 8.10 of the ATC, a matter might be brought before the DSB under Article XXIII:2 of GATT and the relevant provisions of the DSU only

[82] See Panel Report on *EC - Bananas III*, paras. 7.8-7.9.
[83] WT/DSB/M/42, item 3, p. 6.

after the TMB had made recommendations and these could not be implemented. Thus, according to Article 1.2 of the DSU, the ordinary DSU rules did not apply in this case with respect to the alleged violation of the ATC: in particular it was not possible to request the DSB to establish a panel on this aspect of India's complaint in the absence of a TMB recommendation.

3.43 Turkey recalled that as from 1 January 1995, two dispute settlement procedures concerning textile and clothing products had undergone the complete panel and Appellate Body procedure.[84] In both cases, the TMB was requested to make recommendations before the request for the establishment of the panel was filed to the DSB.[85] In the Panel Report on *United States – Restrictions Affecting Imports of Woven Wool Shirts and Blouses*, in which India was the complaining party, the following could be read:

> "India noted that the matter had remained unresolved in spite of bilateral consultations between India and the United States held under Article 6.7 of the ATC…; the examination of the matter by the Textile Monitoring Body (TMB) under Article 6.10 of the ATC…; the communication sent to the TMB under Article 8.10 of the ATC, within one month of the TMB recommendations; and the review of the matter by the TMB under Article 8.10 of the ATC… Consequently, India considered that it had met all requirements in Article 8.10 of the ATC for the direct recourse to Article XXIII.2 of GATT 1994."[86]

3.44 In Turkey's view, India did not meet in the present case, unlike in the above-mentioned precedent, all requirements in Article 8.10 of the ATC, since it did not allow the TMB to make recommendations, it denied Turkey the opportunity to make its views known to the TMB before such recommendations were made and it disregarded the special and additional procedural rules under Appendix 2 of the DSU.

3.45 **India** submitted that Turkey's argumentation was based on the notion that the special dispute settlement procedures of the ATC applied to all restrictions on textile and clothing products whatever their legal basis. This, however, was clearly not the case. Pursuant to Article 2.4 of the ATC, new restrictions on textile and clothing products might be justified by invoking either a provision of the ATC or a provision of the GATT. If a Member invoked a provision of the ATC, the matter might be examined by the TMB, since Article 8.1 of the ATC gave to the TMB the mandate "to examine all measures taken *under this Agreement* and their conformity therewith" (emphasis added). If a Member invoked a GATT provision, such as Articles XII, XVIII or XIX, as the legal basis for its restrictions on textile and clothing products, the TMB would have to leave the matter to the WTO body competent to examine measures taken under the GATT provision, for instance the Committee on Balance-of-Payments Restrictions or the Committee on Safeguards. This followed not only from the definition of the TMB's mandate in Article 8:1 of the ATC but also from Article 3:3, which stipulated that "… Members shall provide to the TMB, *for its information*, notifications …" (emphasis added).

3.46 India noted that Article 2.4 of the ATC prohibited in principle all new restrictions on textile and clothing products except those justified by ATC or GATT provisions. If a restriction on such products was introduced under the provisions of the ATC, the TMB was competent and the special dispute settlement provisions of the ATC applied. This was not relevant to the present dispute, since

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[84] *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear* (complaint WT/DS24) and *United States – Restrictions Affecting Imports of Woven Wool Shirts and Blouses* (complaint WT/DS33).

[85] See Panel Report on *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, adopted on 25 February 1997, WT/DS24/R ("*US - Underwear*"), paras. 2.8-2.18.

[86] Panel Report on *United States – Restrictions Affecting Imports of Woven Wool Shirts and Blouses*, adopted on 20 March 1997, WT/DS33/R ("*US - Shirts and Blouses*"), para. 1.2.

Turkey had neither notified, pursuant to Article 2.1 of the ATC, QRs maintained under the MFA, not had it based its restrictions on the specific transitional safeguard mechanism of Article 6 of the ATC.

3.47 India argued further that, if a new restriction on textile and clothing products was introduced under the provisions of the GATT, the TMB was merely informed of the matter and the normal dispute settlement procedures applied. Article XXIV of GATT was so far the only provision Turkey had invoked to justify its introduction of new QRs on imports from India of certain textile and clothing products as from 1 January 1996.[87] In accordance with Article 3.3 of the ATC, Turkey provided to the TMB, for its information, on two occasions the notifications which were submitted to the CRTA for the measures at issue.[88] Consistently with its limited mandate, the TMB had merely taken note of the information provided.[89]

3.48 India noted that it was contradictory for Turkey to invoke a GATT provision as the legal basis for its new restrictions while claiming before this Panel that procedures of the ATC should be used by India to address the question of whether that GATT provision in fact provided the required legal basis. The TMB, established for the sole purpose of supervising the implementation of the ATC, was obviously not the proper forum for the resolution of a dispute on the relationship between Article XXIV of GATT and the general prohibitions of new textile and clothing restrictions set out in Article XI of GATT and Article 2.4 of the ATC.

3.49 India, therefore, concluded that it was entitled to pursue its claim that Turkey's restrictions violated Article 2.4 of the ATC under the normal dispute settlement procedures of the DSU.

2. Arguments by third parties

3.50 The **Philippines** submitted that India's claims under the ATC were within the Panel's jurisdiction, on the following grounds:

(i) It was not mandatory on Members, in the context of Article 8.5 of the ATC, to refer a matter to the TMB, but only mandatory on the TMB to act on a matter brought before it.

(ii) Article 8.10 of the ATC applied to a situation where a matter had been referred to the TMB; it did not establish exclusive jurisdiction in favor of the TMB to the exclusion of the DSB.

(iii) With reference to Turkey's invocation of Article 1.2 of the DSU, there was no difference between the special or additional rules and procedures set forth in the ATC and those under the DSU. Even if such difference existed, Article 1.2 of the DSU provided for a solution aiming at keeping the integrity of the claim intact: "the rules and procedures set out in [the DSU] should be used to the extent necessary to avoid the conflict".

IV. ADDITIONAL INFORMATION

4.1 Pursuant to Article 13.2 of the DSU, the Panel sought from the European Communities certain relevant factual and legal information regarding the matters at issue. The Chairman of the

[87] See WT/REG22/1, WT/REG22/5, WT/REG22/7 and WT/REG22/8.
[88] See G/TMB/N/308 and G/TMB/N/326.
[89] See para. 2.20 above.

Panel therefore addressed the following letter, dated 28 October 1998, to the Permanent Representative of the European Communities in Geneva:

> "I am writing with regard to the Panel on *Turkey – Restrictions on Imports of Textiles and Clothing Products*, Request by India (document WT/DS34). In this context, the Panel has had a first meeting with the parties and has asked them a series of questions in order to help clarify the facts of this dispute and the parties' related legal arguments. As you may be aware, parties in that dispute have invoked and raised arguments that relate to the Agreement between Turkey and the European Communities which these Members have notified to the WTO (document WT/REG22/1).
>
> In order to ensure that the Panel has the fullest possible understanding of this case, and pursuant to Article 13.2 of the DSU, the Panel would like to ask the European Communities for factual or legal information relevant to this case that they would wish to provide (for your information the full list of questions posed to Turkey is attached). In particular, the Panel would invite the European Communities to submit written responses to the following questions:
>
> 1. Can you provide the Panel with information with regard to negotiations which resulted in what was notified to the WTO under WT/REG22/1? Article 12 of Decision 1/95 provides that "From the date of entry into force of this Decision, Turkey shall, in relation to countries which are not members of the Community, apply provisions and implementing measures which are *substantially similar to those of the Community's commercial policy* set out in the following Regulations: (…)" Can the EC provide us with a description of all the alternatives that the EC and Turkey considered in trying to identify textile and clothing policies that would have been "substantially similar" to those of the EC. Was there any effort to look at alternative means of securing the same effect other than adopting exactly the same policy as that of the EC? Did parties consider using rules of origin to ensure that <u>only</u> Turkish exports of textile and clothing products to the EC would benefit from the preferential market access treatment to the EC market as envisaged in the customs union? Was any consideration given to the use of a provisions similar to that of Article 115 of the EC Treaty which has effectively been used amongst EC member states for many years before the completion of the EC single market?
>
> 2. How do you explain that the initial agreement between Turkey and the EC was signed in 1963 and that the transition period until now has lasted some 35 years? How would you qualify the nature of the Agreement notified as WT/REG22/1? Is it an interim agreement that should lead to a customs union by 2005 or would you qualify this agreement implementing a completed customs union?
>
> 3. Do all textile and clothing products circulate freely between EC territory and Turkey's territory? If so, since when? What about other industrial and agricultural goods? What legal means are used to ensure an effective EC border control of these goods under restrictions *vis-à-vis* Turkey?
>
> 4. How does the EC administer and control the respect of the overall EC/India and Turkey/India textile and clothing quotas at EC-Turkey's borders?
>
> 5. The agreement between the EC and Turkey provides that the parties maintain antidumping, countervailing and safeguard regimes applicable to imports of textile and clothing products from each other? Have parties used such measures against imports from each other?"

4.2 The EC Representative in Geneva replied substantively as follows:

"In reply to your letter of 28 October 1998, I would like to answer the questions that the Panel has asked of the European Communities pursuant to Article 13.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

Before doing so, I would like to clarify that it is not our intention to participate in any other way in this procedure, since India has chosen to direct its complain exclusively against Turkey in spite of the fact that it was clearly indicated to India that the measures at issue were taken in the framework of the formation of the EC/Turkey customs union. The European Communities has taken good note of this deliberate choice of India and our contribution to the debate before this Panel should therefore not be treated as that of a party or a third party to its proceedings.

We are of course pleased to answer the specific questions raised by the Panel under Article 13.2 DSU, but we do not believe it would be appropriate for us, under this provision, to enter into a broader discussion of the factual or legal elements that may be relevant for the resolution of this dispute since this could be confused with the pleading of a case before the Panel. We will therefore stick to the specific questions asked by the Panel and provide the requested factual information to the Panel as objectively as we can."

4.3 The Annex to the EC letter contained replies to the specific questions asked by the Panel, as follows:

Reply to question 1

"The objective from the outset of the negotiations was to include textile and clothing products within the customs union. Turkish exports to the European Union of textiles and clothing amounted to approximately 40 per cent of all Turkish industrial exports to the European Union and it was therefore considered essential that these products formed part of the customs union and hence be in free circulation within the customs union.

The use of rules of origin benefiting only Turkish exports would have been an exception to the principle of free circulation within the customs union and would have required the maintenance of customs and border checks within the customs union designed to ensure that Turkey would not become a transit point of goods in circumvention of the Community's quota system arising from Turkey's adoption of the Community's rates of tariffs, etc.

Article 115 of the EC Treaty lost a considerable degree of relevance following the completion of the EC single market. As such, no serious consideration was given to the use of provisions akin to those of Article 115 of the EC Treaty but it appears very doubtful whether such measures would have been workable or proportionate within the customs union."

Reply to question 2

"The core of the Ankara Agreement signed in 1963 is the establishment of a Customs Union in three stages. The Additional Protocol signed in 1970 and which entered into force in 1973 defined the modalities for implementing the transitional stage which was supposed to end after 22 years (in 1995). In accordance with the planned calendar, the final stage of the Customs Union entered into force on 31 December 1995 (with the adoption of Decision 1/95 of the EC-Turkey Association Council). Decision 1/95 defines the rules which ensure the proper functioning of the Customs Union. Despite the fact that Turkey benefits from certain adaptation periods (until 2001), in some areas such

as preferential commercial policy, protection of the intellectual property rights etc, we consider that the customs union has already reached its final phase with regard to the requirement of Article XXIV:8(a) of the GATT 1994. Precise data concerning the trade coverage and other details concerning the functioning of the customs union were submitted to the WTO Committee for Regional Trade Agreements and were also discussed in the recent Trade Policy Review of Turkey. It is worth noting that many provisions in the Customs Union Decision go beyond the definition of a Customs Union under Article XXIV of the GATT 1994."

Reply to question 3

"Industrial products including textiles products have been in free circulation between the EU and Turkey since the entry into force of the customs union on 31 December 1995. Shipment of textiles and clothing requires an ATR document indicating that the goods are in free circulation. No indication of origin is required for goods in free circulation. There is thus no specific EC border control in respect of goods for which Turkey has quantitative restrictions, the Turkish authorities having effected such control on entry of the goods into free circulation in Turkey.

Agricultural products will be included in the customs union following an adaptation period and for the time being enjoy preferential treatment subject to proof of origin including EUR-1 certificates and invoice declarations to enable the identification of the products."

Reply to question 4

"Turkey has adopted all the European Communities's relevant regulations concerning imports of textiles (e.g. Regulation EEC/3030/93, Regulation EEC/517/94 and Regulation EEC/3951/92). Thus the basic administrative principles are the same in both parts of the customs union. The Turkish authorities have observer status in the "management" committee chaired by the Commission set up under the relevant regulations. In addition, the Turkish authorities maintain an inter-departmental committee in order to take any necessary measures to ensure consistency between the EU and Turkey. So far as the management by the Community's integrated system of licensing is concerned, the Turkish authorities have full access to the European Community's computerised licensing system (*Système Integré de Gestion de Licences* or SIGL) and there is a regular exchange of information at administrative level. Thus, there is no administration or control of the overall EC/India and Turkey/India textile and clothing quotas at the EC/Turkey's borders. Once goods enter the customs union pursuant to the parties' respective systems, they are in free circulation and no further controls are necessary."

Reply to question 5

"The Customs Union Decision maintains the possibility for each party to apply trade defense instruments, including anti-dumping measures to the products originating from the other party. The Community imposed definitive anti-dumping measures on imports of polyester fibres from Turkey in June 1996. Provisional anti-dumping duties were imposed on imports of unbleached cotton fabrics from Turkey in April 1998. However, these expired in October without the imposition of definitive measures."

V. CLAIMS OF THE PARTIES

5.1 **India** requested the Panel to rule that the import restrictions which Turkey had imposed since 1 January 1996 in the context of its trade agreement with the European Communities on textiles and clothing products from India:

(i) were inconsistent with Articles XI and XIII of GATT and Article 2.4 of the ATC and were not justified by Article XXIV of GATT, and;

(ii) impaired benefits accruing to India under Articles XI and XIII of GATT and Article 2.4 of ATC.

5.2 India requested the Panel to recommend that Turkey bring its restrictions into conformity with its obligations under GATT and the ATC, basing its rulings and recommendations on the following findings:

(i) Article XXIV:5 of GATT did not permit Members forming a customs union to impose QRs on imports from third Members;

(ii) to the extent that there was a conflict between the provisions of Article 2.4 of the ATC (which permitted the European Communities but not Turkey to impose restrictions on imports of textiles and clothing products from India) and the provisions of Article XXIV:8 of GATT (which required Members forming a customs union to apply substantially the same restrictions on imports from third Members), the provisions of Article 2.4 of the ATC prevailed; and

(iii) Turkey had not rebutted the presumption that its restrictions on imports of textiles and clothing impaired benefits accruing to India under Articles XI and XIII of GATT and Article 2.4 of the ATC.

5.3 Subsidiarily, if the Panel were to accept the argument by Turkey that Article XXIV of GATT provided a waiver from the obligations under Articles XI and XIII of GATT and Article 2.4 of the ATC for measures necessary for the purposes of a customs union meeting the standards of Article XXIV, India requested the Panel to base its rulings on the following findings:

(i) for the purposes of the EC-Turkey trade agreement, an immediate harmonization of import restrictions on textiles and clothing products was unnecessary, because (a) the European Communities and Turkey were applying different import duties and regulations in respect of many sectors, policy instruments and trading partners and (b) in all areas in which their import duties or regulations differ, the European Communities and Turkey were able to implement border controls ensuring that only products originating in the territories of the European Communities and Turkey benefit from the preferential treatment under the EC-Turkey trade agreement; and

(ii) the type of agreement concluded between the European Communities and Turkey, that is an agreement providing for the establishment of a customs union at a future date, was not governed by the provisions of Article XXIV of GATT on completed customs unions and Turkey could therefore not invoke those provisions as justification for the restrictions.

5.4 **Turkey** requested the Panel to find that:

(i) India had not sufficiently exhausted the avenues of Article XXII of GATT, Article 4 of the DSU and Article XXIV of GATT in order to bring about an amicable settlement and adjustment;

(ii) India had not complied with the procedural requirements of the ATC;

(iii) the Panel could not substitute itself for the CRTA which had not yet completed its examination of the Turkey-EC customs union;

(iv) since Turkey argued that the measures forming the object of the complaint were a requirement of the Turkey-EC customs union, the Panel could not rule on their legality in the absence of agreed conclusions on the consistency of the Turkey-EC customs union with the obligations of Turkey and the European Communities under GATT;

(v) Turkey had not acted inconsistently with its rights and obligations under GATT and the ATC; and

(vi) as required under Article 3.6 of the DSU, the parties to the dispute should seek a negotiated solution to the matter, taking into account India's commercial interests and Turkey's obligations arising from the Turkey-EC customs union.

VI. MAIN ARGUMENTS BY THE PARTIES

A. INTRODUCTORY POINTS

1. Consultations

6.1 **Turkey** submitted that India had failed to comply with the principle of procedural economy and the spirit of the WTO dispute settlement mechanism which required that the panel procedure was to be considered as *ultima ratio* means to solve conflicts between Members, when unable to find a negotiated solution.[90] India had refused to enter into bilateral negotiations offered by Turkey, including the European Communities, and had also refused to deal with the issues in consultations under Article XXII of GATT.

6.2 Turkey said that it had accepted the request by India for consultations under Article XXIII of GATT on the measures it applied, on condition that representatives of the European Communities participate. Their participation was deemed essential, given that the application of the restrictions which constituted the object of India's complaint derived from the alignment of Turkey's commercial policy on that of the European Communities. Consultations scheduled to be held in Geneva on 18-19 April 1996 did not occur owing to India's refusal to accept the participation of EC officials. Turkey continued to offer to find a negotiated solution to India's complaint, and the subject was raised in discussions held in both capitals at different times and at a meeting between both countries' Trade Ministers in Geneva in May 1998. However, and despite the fact that the measures in question had never formed the subject of a consultation between Turkey and India under Articles XXII and XXIII of GATT, India requested the DSB to establish a panel regarding the imposition by Turkey of QRs on imports of certain textiles and clothing products.

6.3 **India** submitted that Turkey had violated Articles 3 and 4 of the DSU, since it had not entered within the 30-day period into the bilateral consultations requested by India, with a view to reaching a

[90] See Articles 3.10 and 4, as well as Articles 5.4 and 3.7 of the DSU.

mutually satisfactory solution. India submitted that Turkey had in particular contravened the provisions of Article 3.10 of the DSU. India considered that its recourse to the provisions of GATT and the DSU as regards consultations was frustrated in a most unprecedented manner, and the dispute remained unresolved.[91]

6.4 India explained that its request for consultations, pursuant to Article 4 of the DSU and Article XXIII:1 of GATT,[92] had been accepted by Turkey on 1 April 1996. While confirming its agreement to enter into consultations "on textiles and clothing restrictions applied by Turkey" at a mutually acceptable time and venue, Turkey considered that "the European Communities as our partner in the customs union should also be represented in the consultations". On 4 April 1996, India proposed the venue (Geneva) and dates (18-19 April 1996) for such consultations while clearly stating that it could not accept that the European Communities should participate in the consultations since, under the GATT and WTO practices, consultations under Article XXIII:1 of GATT were bilateral in nature; India asked for confirmation by Turkey of the date and venue of the bilateral consultations. On 16 April 1996, Turkey scheduled a meeting with its Indian counterparts for 18 April 1996 (3.30 to 6 p.m.), while stating its "understanding that representatives of the European Communities would also be participating". India stated that, despite that very short notice, it ensured the presence of its delegation at the consultations, but the delegation of Turkey did not attend the scheduled meeting nor did it provide an explanation for its absence. India submitted that it sent another communication to Turkey on 18 April 1996, proposing to enter into bilateral consultations on 19 April 1996. When India endeavoured to confirm with Turkey the date and venue of these consultations, it was informed that the latter was not in a position to enter into these consultations without the participation of the European Communities, and that this would be conveyed to India in writing by close-of-business on 19 April 1996. India submitted that the communication from Turkey, dated 19 April 1996, was received on 22 April 1996.

6.5 **Turkey** responded that it had refused consultations on the ground that such consultations did not involve the European Communities. It had good and proper reasons not to engage in formal consultations in which the European Communities would not be involved, namely that the measures complained of were a direct consequence of the Turkey-EC customs union and could not be modified without the consent of the European Communities. This did not mean that Turkey was not prepared to examine with India how to adjust the measures challenged and to bring about an amicable settlement. Turkey recalled the various steps it took and the latest attempts made as recently as 28 September 1998.

6.6 Turkey submitted that the issue it raised in its request for a preliminary ruling, with respect to EC participation in the dispute had also a substantive aspect.[93] It considered that in this case findings and recommendations, if any, of the Panel directed against the measures challenged by India and the resulting recommendations and rulings of the DSB, if any, could hardly be addressed to Turkey alone, as Turkey was only one of the parties to the Turkey-EC customs union.

6.7 **India** believed that Turkey's claim that, given its obligations towards the European Communities under the EC-Turkey trade agreement, it could not remove the restrictions on imports of textiles and clothing products from India without the consent of the European Communities, had no basis in international law. According to the relevant part of Article 41.1 of VCLT, "[t]wo or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone *if ... the modifications in question ... do[es] not affect the enjoyment by the other parties of their rights under the treaty* …" (emphasis added).

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[91] The DSB was informed of this situation on 24 April 1996 (WT/DSB/M/15, para. 3).

[92] See WT/DS34/1.

[93] In this context, Turkey welcomed the invitation addressed by the Panel to the European Communities to provide written information related to the customs union and hoped that the Panel would not refrain from asking the European Communities to present evidence orally, should that prove necessary.

6.8 India stated that the European Communities and Turkey were both party to a multilateral treaty, the WTO Agreement. In their trade agreement they had committed themselves to harmonize their textiles and clothing policies towards third countries without regard to Turkey's obligations under the WTO Agreement. They had thus concluded between them a treaty which modified the WTO Agreement as between them in a manner that affected the enjoyment of India's and other WTO Members' rights under the WTO Agreement. According to Article 41 of the VCLT, Turkey was therefore not bound by the EC-Turkey trade agreement to the extent that it entailed a violation of Turkey's obligations under the WTO Agreement towards third WTO Members.

6.9 India feared that, if the DSB were to rule in India's favour, Turkey would use its obligations under the EC-Turkey trade agreement as a pretext for not implementing the ruling. The European Communities's decision not to participate in the Panel's proceedings as third party suggested that it might lend its hand in such an approach. This would set an extremely harmful precedent for the multilateral trading system because it would imply that the obligations under a bilateral trade agreement could provide a justification for a failure to implement the obligations under the WTO Agreement. India therefore requested that the Panel make use of its power under the second sentence of Article 19.1 of the DSU and suggest that Turkey, when bringing itself into conformity with its obligations under the GATT and the ATC, took into account the principles set out in Article 41 of the VCLT.

6.10 India also noted later that, following its arguments on Article 41.1 of the VCLT, Turkey had conceded that two or more parties to a multilateral treaty that concluded an agreement amongst themselves could not make modifications to the multilateral treaty that affected the rights of other parties under the multilateral treaty. To Turkey's argument that remedy for the situation did not lie with Turkey alone, India reiterated that since in this case, the measure in question was taken by Turkey alone, India could bring a dispute against Turkey only.

2. Offers to settle

6.11 **Turkey** claimed that India, through its refusal to negotiate in a bilateral constellation, including the European Communities, had to assume responsibility for neglecting the avenue of a mutually satisfactory compensatory arrangement. In order to ensure that trade diversion into EC territory did not occur after the completion of the Turkey-EC customs union, Turkey had to impose, in accordance with its obligations under Decision 1/95,[94] restrictions on imports from India of those products already subject to quantitative limits when exported to the European Communities.

6.12 Turkey argued that a parallel could be drawn between the renegotiation of bound duties through the procedures established in Article XXIV:6 of GATT and the negotiation of compensatory adjustments or other equivalent means of compensation for the QRs required by the Turkey-EC customs union, which should be considered as "other regulations of commerce" in the meaning of Article XXIV:5(a) and XXIV:8(a) of GATT. Therefore, all the countries whose exports of textiles and clothing products were subject to EC restrictions were offered the possibility to negotiate with Turkey arrangements consistent with those that they had concluded with the European Communities. Such arrangements, in the negotiation of which the European Communities took an active part, were reached with 24 countries in the period which preceded and immediately followed the completion of the Turkey-EC customs union.[95] Turkey also noted that there were 28 other countries, including India, with which it was not possible to reach agreement and to which it accordingly applied unilateral restrictions or surveillance regimes. These restrictions only affected products whose export to the European Communities was also under restraint.

[94] In particular, Article 12 of Decision 1/95, para. 2 (see WT/REG22/1).

[95] Since then, integration lists identical to those of the EC had been put into effect by Turkey, in compliance with the relevant ATC provisions.

6.13 Turkey explained that a draft Memorandum of Understanding covering trade in certain textiles and clothing products had been sent to the Indian Embassy in Ankara on 31 July 1995 and that India had been invited to negotiate with Turkey, prior to the completion of the Turkey-EC customs union, an arrangement similar to the already existing India-EC arrangement covering trade in those products. The request was repeated in December 1995. Turkey claimed that it could not modify the restrictions unilaterally and accordingly insisted on the participation of EC officials in the bilateral negotiations. India refused negotiations with Turkey on the grounds that EC representatives would be present.

6.14 **India** recalled that it had all along stated clearly that the unilateral imposition of QRs by Turkey on imports of textile and clothing products from India was inconsistent with Turkey's obligations under GATT and the ATC, and were not authorised by Article XXIV of GATT. India also recalled that Turkey did not enter into consultations requested by India under the DSU. In bilateral discussions outside the framework of the DSU, India had requested the removal of the quotas at issue but Turkey merely offered to marginally increase their size. Neither the European Communities nor Turkey submitted offers of compensation to India.

6.15 **Turkey** also noted that it had made a fresh attempt to reach a negotiated solution with India to the problem which formed the object of India's complaint. In response to a suggestion made by its President to the President of India during the latter's state visit to Turkey on 17-20 September 1998, negotiations were held with the Indian counterparts in New Delhi on 28 September 1998. In the course of those negotiations, Turkey offered to increase by an average of 200 per cent - but in some categories by much more than that - the quotas made available for Indian exports of textiles and clothing to Turkey. It claimed that India refused to examine this offer and claimed instead that it was only prepared to discuss the complete elimination of quotas. Nevertheless, through a Note addressed on 12 October 1998 by the Turkish Embassy in New Delhi to the Indian Ministry of External Affairs, Turkey reiterated its call for a bilateral solution to be explored and invited India to attend further negotiations in Ankara, in the course of October 1998. According to Turkey, no response to this Note had yet been received from India.

6.16 In this respect, **India** pointed out that it was for India to assess the best means by which it could protect its interests, noting that the dispute was then clearly in the final stages of argumentation before the Panel.

B. LEGAL ARGUMENTS

1. Burden of Proof

6.17 **India** submitted that it was for Turkey to invoke an exception from the prohibition of discriminatory QRs set out in Article XI:1 of GATT and Article 2.4 of the ATC.

6.18 India argued that the current state of WTO case law in the area of burden of proof was summarized in the recent panel on *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* as follows:

> "Concerning the issue of what one may call the "burden of proof", the Appellate Body has confirmed the GATT practice whereby
>
> (a) it is for the complaining party to establish the violation it alleges;
>
> (b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met; and

(c) it is for the party asserting a fact to prove it."[96]

6.19 In India's view, the wording of Article 2.4 of the ATC, whereby it prohibited the introduction of new restrictions after 31 December 1994 "*except* under the provisions of this Agreement or relevant GATT 1994 provisions" (emphasis added) made it clear that the specific transitional safeguard mechanism in the ATC or any GATT provision that might justify the introduction of new discriminatory restrictions constituted an exception in terms of Article 2.4 of the ATC. It was thus for Turkey to invoke an exception to Article 2.4 of the ATC and to prove that the conditions contained under the relevant provisions were met.

6.20 Reacting to Turkey's statement that Articles XI and XIII of GATT and Article 2 of the ATC were not relevant, India referred to the ruling of the panel on the *Australia - Measures Affecting the Importation of Salmon* case.[97] In India's view, Turkey had not presented any arguments or facts to refute India's claim of inconsistency; therefore, it was correct to state that the violation of Articles XI and XIII of GATT and Article 2.4 of the ATC had not been disputed by Turkey. India believed that the legal *relevance* of these provisions was another matter.

2. Articles XI:1 and XIII of GATT

6.21 **India** submitted that Article XI:1 of GATT constituted a general prohibition on the imposition of QRs on imports. The QRs imposed by Turkey on imports of textiles and clothing were clearly inconsistent with this general prohibition and were not saved by any of the exceptions to this provision contained in GATT.

6.22 India submitted further that, to the extent that Turkey's QRs were discriminatory in nature, they were also inconsistent with the prohibition on discriminatory QRs in Article XIII:1 of GATT.

6.23 **Turkey** reiterated that its restrictions on imports of textiles and clothing from a number of third countries were consistent with Article 2 of the ATC on the basis of the provisions of Article 2:4. Once a measure was justified under Article 2.4 of the ATC, the debate about its consistency with the obligations arising from Articles XI and XIII of GATT became redundant, since the ATC provided an exception to the rules contained in those Articles.[98]

3. Article 2 of the ATC

6.24 **India** submitted that Article 2 of the ATC permitted WTO Members to continue to apply, during the transition period provided for, restrictions on textile and clothing products that were in force on the day before the entry into force of the Agreement (i.e. 31 December 1994) under the MFA. According to Article 2.1 of the ATC, such restrictions were to be notified in detail to the WTO by the Members maintaining them within 60 days following the entry into force of the WTO Agreement. As stated in Article 2.4 of the ATC, the restrictions so notified were "deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force" of the ATC. Turkey had not maintained restrictions on imports of textile and clothing products from India on 31 December 1994. The restrictions on textiles and clothing products from India were imposed by Turkey on 1 January 1996 and were consequently not in force on the day before the entry into force of the WTO Agreement.

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[96] Panel Report on *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted on 22 April 1998, WT/DS56/R ("*Argentina - Textiles and Apparel*"), paras. 6.34-6.40.

[97] As cited approvingly in the Appellate Body Report on *Australia - Measures Affecting the Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R ("*Australia - Salmon*"), paras. 1-3.

[98] See paras. 6.26 and 6.27 below.

6.25 India also noted that Article 2.4 of the ATC also provided that "[n]o new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions". India argued that the only provision of the ATC under which a Member could be allowed to introduce new QRs on imports of textiles and clothing products was under the transitional safeguard mechanism set out in Article 6 of the ATC. However, Turkey did not invoke the specific transitional safeguard mechanism set out in Article 6 of the ATC as a justification for its new restrictions. India argued that the GATT did not contain any provision permitting the imposition of discriminatory import restrictions for the purpose of protecting a Member's domestic industry. Turkey's restrictions were therefore inconsistent with Article 2.4 of the ATC, and also contravened Article XI:1 of GATT, which specifically prohibited QRs.

6.26 **Turkey** submitted that its restrictions on imports of textiles and clothing from a number of third countries were consistent with Article 2 of the ATC on the basis of the provisions of Article 2.4. Turkey claimed that the measures were justified under Article XXIV of GATT, which was to be considered as a "relevant GATT provision" in the sense of Article 2.4 of the ATC, and therefore covered by this provision. Turkey later confirmed that Article XXIV was the legal basis for its restrictions at issue.[99]

6.27 In Turkey's opinion, India assumed that there was a conflict between Article XXIV of GATT and the ATC and that, in that case, ATC obligations prevailed. Turkey refuted such an assumption on the grounds that footnote 3 to Article 2.4 of the ATC did not exclude Article XXIV, which meant, in the present case, that Turkey could introduce new restrictions under Article XXIV.

6.28 **India** did not agree with Turkey's interpretation, recalling the drafting history of the ATC. It argued that footnote 3 to Article 2.4 merely restricted the applicability of safeguard provisions under Article XIX of GATT to products already integrated; for non-integrated products, the provisions of Article 6 of the ATC would apply.

6.29 **Turkey** responded in this respect that the drafting history was only relevant when doubts subsisted as to the precise meaning of legal provisions. Turkey considered that, in this particular case, no such doubts could be justified since footnote 3 was quite explicit.

4. Article XXIV of GATT

(a) Relationship between Article XXIV and other GATT provisions

6.30 **India** submitted that what was at issue in the present dispute was not whether the Turkey-EC customs union met the requirements of Article XXIV:5(a) but whether this provision provided an authorisation to impose, on the occasion of the formation of a customs union, new barriers to the trade of third Members inconsistently with Article XI:1 of GATT and Article 2.4 of the ATC on the grounds that other barriers to imports had been voluntarily reduced. India's claim was that WTO Members forming a customs union, irrespective of whether their union met the requirements set out in Article XXIV or not, had to abide by the disciplines of Article XI:1 of GATT and Article 2.4 of the ATC with respect to the trade of third Members. The question of whether the Turkey-EC customs union was consistent with the requirements of Article XXIV therefore did not arise in this dispute. India was seeking a ruling on an obvious legal point on which there had so far been agreement among WTO Members, including the European Communities, Turkey's partner in the envisaged customs union.

[99] On 24 November 1998, the Panel asked the following question to Turkey: "Can the Panel assume that Turkey's defense to India's claims of violations of Articles XI and XIII of GATT and Article 2.4 of ATC is based exclusively on Article XXIV of GATT?" Turkey responded: "Yes. Turkey believes that Article XXIV provides the legal basis for the measures which India complains about."

6.31 **Turkey** submitted that the measures challenged by India could not possibly be assessed on their consistency with the relevant WTO rules separately and in isolation from the Turkey-EC customs union of which they were an integral part. Turkey disagreed with India's position that the GATT did not permit the application of restrictions determined by the Turkey-EC customs union on imports from other Members into the Turkey-EC customs union via Turkey, despite the fact that this customs union and in particular its common regulation of commerce would be consistent with GATT.

6.32 Turkey presented the arguments below in support of its view that the consistency of the measures challenged by India with the WTO rules was to be determined by reference to Article XXIV:5 to XXIV:8 of GATT and not to other GATT provisions.

6.33 Turkey started its presentation by analyzing the ordinary meaning of Article XXIV:4 and XXIV:5. Recalling the terms of these provisions, Turkey considered that their plain meaning was clearly that the provisions of GATT did not prevent the imposition of a regulation of commerce at the institution of a customs union, as long as on the whole this was not more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of the customs union. If, as argued by India, Article XXIV:5(a) did not allow Members forming a customs union to introduce a common regulation of commerce determined by restrictive measures lawfully applied by a Member party to that customs union, the plain wording of Article XXIV:5(a) would be deprived of any meaning. As had been made clear by the Appellate Body[100], an interpretation might not result in reducing whole clauses or paragraphs to redundancy or inutility.

6.34 Turning to the context of Articles XXIV:5 to XXIV:8, Turkey noted that Article XXIV basically dealt with:

(i) the territorial scope of the GATT as regards customs territories (paragraphs 1 and 2);

(ii) preferences granted between adjacent countries in certain circumstances (paragraph 3);

(iii) rules applying to the formation of economic integration agreements, i.e. customs unions and free-trade areas (paragraphs 4 to 10);

(iv) the special relationship between India and Pakistan; and

(v) the application of the GATT to sub-central entities (paragraph 12).

6.35 Turkey viewed all these provisions as having in common that they were all concerned with the scope of application of the GATT, both generally and in particular circumstances. Article XXIV should therefore not be regarded as a "justification", a "defense", an "exception" or a "waiver". Rather, Article XXIV determined the outer limits of the scope of GATT and was not an incursion into the normal application of the rights and obligations contained in its substantial provisions, as the above-referred words appeared to suggest. For instance, sub-central entities were subject to a "best endeavours" clause under Article XXIV:12, while economic integration agreements under Article XXIV:4 and following had to comply with specific requirements in order to qualify as such, but these requirements were different from the obligations which applied to separate customs territories not related among themselves by an economic integration agreement.

6.36 Turkey argued that, on the basis of these considerations, Article XXIV:4-10 could be viewed as *lex specialis* for the rights and obligations of WTO Members at the time of formation of an economic integration agreement. Such a characterization did obviously not alter in any way the concrete obligations to be fulfilled by WTO Members wishing to enter into an economic integration agreement in conformity with these provisions.

[100] See Appellate Body Report on *US - Gasoline*, p. 22.

6.37 Turkey added that its conclusion that Article XXIV:5-8 did not constitute an exception found also support in a systemic analysis. It was significant that Article XXIV:5-8 did not appear in Part II of GATT, which contained substantive provisions and derogations from and exceptions to these substantive obligations (e.g., Articles XX and XXI). Article XXIV belonged to Part III of GATT, which contained a number of general and institutional provisions (such as those on "Joint Action by the Contracting parties", "Acceptance, Entry into Force and Registration", "Amendments" and "Withdrawal").

6.38 In Turkey's view, free-trade areas, and even more so customs unions, implied that GATT contracting parties, now WTO Members, embarked on a closer economic integration and entered *inter se* into commitments that were going beyond those of the GATT. This resulted in trade between the constituent parties as a rule free from all customs duties and other classical obstacles to trade. In free trade areas this regime applies to goods originating in the constituent parties. In customs unions this regime applied also to goods originating in other countries, provided that such goods had been subjected, when imported in any of the constituent parties of such customs union, to common customs duty rates and a common regulation of commerce. When forming free trade areas, and even more so customs unions, countries created a new situation in their relationships with other GATT contracting parties. The situation arising in the case of customs unions bore some analogy to two or more GATT contracting parties entering into a confederation.

6.39 Turkey noted that the GATT could have left such a situation to negotiations, if and when contracting parties decided to form a free-trade area or a customs union, but instead it had foreseen provisions, i.e. Article XXIV:4-8, designed to deal with the new situation, defining what GATT meant by customs unions and free-trade areas and setting forth the conditions under which this new situation in the relationship between the constituent parties and the other GATT contracting parties was deemed to be in conformity with the GATT. These provisions were thus quite properly inserted in Part III on general and institutional provisions.

6.40 In view of these arguments Turkey concluded that, contrary to what India asserted, the consistency with WTO rules of the measures challenged by India was to be determined by reference to Article XXIV:5-8 of the GATT and not to other GATT provisions. This in turn depended on the consistency with the WTO rules of the Turkey-EC customs union of which the measures challenged formed integral part. In Turkey's view, there was no room for conflict between these measures and other GATT provisions.

6.41 **India** had understood Turkey as arguing in essence that the terms "the provisions of [the GATT] shall not prevent" in Article XXIV:5 implied that Article XXIV was an exception from other GATT provisions and hence also from Article XI, and as considering that the present dispute concerned the question of whether Article XXIV contained a sufficient justification for the measures at issue. Later, Turkey had also claimed, in responding to questions, that Article XXIV was the legal basis for its actions but denied its use of this provision as a defense or justification, considering that Article XXIV defined "the outer limits of the applicability of the GATT" and that this provision "disapplied" Article XI.

6.42 India considered that all rules of the GATT defined the limits of applicability of the GATT and it was not clear to India what this legal characterization of Article XXIV implied for the resolution of the present dispute. India also did not know what Turkey attempted to convey with the novel term "disapply" and in what respects a provision establishing an exception differed from a provision that "disapplied" another. The relevance of the fact that Article XXIV had been included in Part III of the GATT 1947, to which Turkey apparently attached importance, escaped India. In its view, this fact might simply be related to the existence of the grandfather clause in the Protocol of Provisional Application and accession protocols. Non-tariff measures covered by Part II, but required under existing legislation, were exempted by that clause, while Article XXIV applying in practice to *future* arrangements did not need to be qualified by such clause.

6.43 In India's opinion, the simple fact was that new restrictions on imports of textiles and clothing from a single Member were explicitly prohibited by Articles XI and XIII of GATT and Article 2.4 of the ATC and that it was up to Turkey to assert that another provision in a WTO agreement permitted those restrictions.[101] That assertion would normally be described as a defense and the provision invoked as such a justification.

6.44 India disputed Turkey's claim that Members forming a customs union might impose new restrictions on imports from third WTO Members (even discriminatory restrictions on the trade of one WTO Member) by meeting only the two requirements set out in paragraphs 5(a) and 8(a)(ii) of Article XXIV. If this was the case, such Members would thus be freed from the burden of satisfying the many substantive and procedural requirements other Members imposing quantitative restrictions had to meet. Thus, it would not be necessary for them to invoke and observe the provisions of the Safeguards Agreement or the ATC when they wished to accord temporary import protection to their textiles or clothing industry; they could do this simply under the framework of Article XXIV.

6.45 India noted that the requirements for quantitative restrictions permitted under the exceptions from Article XI of the GATT applied to each and every individual restriction that a Member imposed. By contrast, the requirements set out in paragraphs 5 and 8 of Article XXIV applied to the import regimes of the Members forming the customs union taken as a whole. They neither authorized nor prohibited any specific set of import restrictions. Therefore, if Turkey were correct, an individual restrictive import measure imposed in the context of the formation of a customs union could never be the subject of a panel ruling because it could, as such, not be found to be inconsistent with Article XXIV:5 and 8.

6.46 India pointed out, however, that Members forming a customs union that wished to raise the level of a tariff above the rate bound under Article II had to negotiate with its trading partners in accordance with Article XXVIII of the GATT and offer compensatory market-opening commitments. India argued that by definition a customs union or free-trade area could not be formed without the elimination or reduction of tariffs on a preferential basis, but could be formed without the imposition of new QRs against third parties. There was thus no corresponding obligation to compensate Members adversely affected by non-tariff restrictions, including those covering bound items, that Members forming a customs union could impose. Moreover, acceptance of Turkey’s argument would therefore induce WTO Members forming a customs union to replace the protection afforded by their tariffs by quantitative restrictions. This would upset the balance of concessions resulting from past trade negotiations and undermine the principle that protection should be afforded by ordinary customs duties only.

6.47 India was of the view that, if Turkey’s argument were accepted, Members forming a customs union could legally circumvent the procedural and substantive requirements in respect of quotas, which the negotiators of the WTO agreements agreed to permit in exceptional circumstances, and would have every incentive to do so. In respect of such Members, the WTO agreements could no longer operate as a legal framework providing effective assurance of market access and the WTO dispute settlement procedures would be rendered ineffective. This would create a serious imbalance between the obligations of Members forming a customs union and other Members, and would upset the balance of concessions negotiated between them. The drafters of the GATT and the Uruguay Round agreements could not possibly have intended this result.

6.48 India recalled the statement by the Appellate Body that, since all interpretation must be based on the text of the treaty, the process of interpretation had not to lead to "the imputation into a treaty of words that are not there or the importation into the treaty of concepts that were not intended".[102] India

[101] This followed from the consistent jurisprudence of the Appellate Body on the distribution of the burden of proof (Report on *Australia - Salmon*, section VI, paras. 1-2).

[102] Appellate Body Report on *India - Patent*, para. 45.

considered that an acceptance of Turkey's position would clearly be contrary to this fundamental principle of interpretation.

6.49 Moreover, India argued that Turkey's view that Article XXIV:4-10 was *lex specialis* in relation to Articles XI and XIII of GATT and to Article 2.4 of the ATC logically implied that there was a conflict between these two sets of provisions.[103] India considered that, if such a view were to be accepted, the inevitable conclusion, in the light of the General Interpretative Note on Annex 1A to the WTO Agreement, would be that Turkey had to resolve the conflict by observing Article 2.4 of the ATC.[104]

(b) Article XXIV:5(a)

6.50 **India** recalled that, in the communication dated 9 January 1996 handed to the Indian authorities at Ankara, Turkey attempted to justify its new restrictions with reference to Article XXIV:5(a) of GATT. India submitted that obligations under Article XI:1 of GATT and Article 2.4 of the ATC were not modified by Article XXIV:5(a) of GATT.

6.51 India argued that any interpretation of Article XXIV:5(a) that would entail an authorisation to impose, on the occasion of the formation of a customs union, new barriers to the trade of third Members inconsistently with Article XI:1 of GATT and Article 2.4 of the ATC on the grounds that other barriers to imports had been voluntarily reduced was excluded by the general principle set out in Article XXIV:4, which provided a recognition of the purpose of a customs union as "not to raise barriers to the trade" of other Members with such territories.

6.52 India noted that, according to Article XXIV:6 of GATT, Members parties to a customs union wishing to raise tariffs beyond the rate bound under Article II of GATT had to renegotiate them under the procedure for the modification of tariff concessions in Article XXVIII of GATT. India considered that, if tariff concessions under Article II could not be ignored by Members forming a customs union, an interpretation of Article XXIV permitting such Members to ignore their obligations under Article XI:1 of GATT and Article 2.4 of the ATC was not justified.

6.53 India also recalled that the issue of the introduction of new QRs by a party to a regional trade agreement had been discussed in detail in the GATT Working Party on the Accession of Greece to the European Communities.[105] Several delegations stated their concern with the introduction of new discriminatory QRs by Greece on imports from state-trading countries of products, which they claimed were contrary to Articles XI and XIII of the GATT and contravened their Protocols of Accession. The Working Party Report recorded the response of the European Communities as follows:

> "With reference to Article XXIV:5 and against the background of the very considerable liberalisation of restrictions which would occur in Greece, it was hard to claim that barriers were being created; even if it might be true for one or two products, the overall situation was clearly the opposite. On the question of the alleged inconsistency of this with Article XIII, the EC did not consider this point relevant to the Article XXIV:5 exercise; the matter could be further discussed in the context of the relevant Accession Protocols for the countries concerned."[106]

[103] The *lex specialis derogat legi generali* principle was inseparably linked to the question of conflict (see Panel Report on *Indonesia - Autos*, footnote 649).

[104] See also paras. 6.95 to 6.100 below.

[105] See BISD 30S/168, paras. 25-33.

[106] Ibid., para. 32.

6.54 The issue of new QRs was again discussed in detail in the GATT Working Party on the Accession of Spain and Portugal to the European Communities.[107] Several delegations expressed concern regarding Spain's imposition of new QRs on imports from third countries. The European Communities defended the new restrictions with the argument that, on the whole, the number of Spanish restrictions had declined. Those delegations responded that newly established GATT-inconsistent measures could not be traded off against the alleged reduction of other barriers. The Working Party Report recorded the ensuing discussion as follows:

> "Some members of the Working Party stated that since acceding to the Communities, Spain had introduced discriminatory QRs which contravened Articles XI, XIII and XXIV:4 as well as their countries' Protocols of Accession to the GATT under which contracting parties undertook not to increase the element of discrimination which they maintained on these countries' imports. Before acceding to the Communities, Spain had repeatedly notified the GATT that it maintained no discriminatory QRs on their countries' imports and they had no reason to doubt the validity of these notifications. Since Article XXIV did not provide a waiver from obligations contained in Articles XI and XIII and did not allow or require a country acceding to a customs union to adopt the more restrictive trade regime of the customs union, they called on the Communities and Spain to eliminate all GATT-inconsistent measures, which in the case of one of these countries affected one quarter of its total exports to Spain. The same members of the Working Party considered that measures that were inconsistent with the GATT could not be traded off against the alleged reduction of other barriers and could not be included in the assessment of incidence of changes in "other regulations of commerce" required by Article XXIV:5(a) under which only GATT-consistent measures should be taken into account. They did not consider the Treaty of Accession was in conformity with the GATT and reserved their rights under the General Agreement."[108]

6.55 India noted that, on the question of other regulations of commerce, and in particular QRs, the European Communities agreed that Article XXIV did not provide a waiver from other provisions of the GATT. By the same token, however, the role of the Working Party in this context was to examine the situation in the light of Article XXIV rather than with respect to any other provision such as Articles XI or XIII. Contracting parties were free to reserve their GATT rights and to have recourse to other provisions on these questions.[109]

6.56 **Turkey** submitted that Article XXIV:5 of GATT authorized the formation of a customs union, as defined by Article XXIV:8(a), provided that the conditions of Article XXIV:5(a) were met. If it had been the intention of the Members to ban the imposition of new QRs whenever a customs union was being instituted, Article XXIV:5 would have been a redundant provision.

6.57 Turkey considered that provisions of Article XXIV:5(a) should be read as permitting, at the time of the completion of a customs union, the introduction of restrictive regulations of commerce to the trade of third countries, provided that the overall incidence of duties and other regulations of commerce was not higher or more restrictive after the completion of the customs union than before. Further clarification was brought to the expression "on the whole" used in Article XXIV:5, in paragraph 2 of the Understanding on the Interpretation of Article XXIV of GATT 1994 ("Understanding on Article XXIV"). The view that a total prohibition on new restrictions was not intended, found its confirmation in the last sentence of that paragraph, which stated, *inter alia*, that "for the purposes of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and *trade flows affected* may be required" (emphasis added). In

[107] See BISD 35S/293, paras. 19-21.
[108] Ibid., paras. 19-20.
[109] Ibid., para. 45.

Turkey's view, such a provision would not be meaningful if it had been the intention to totally prohibit the imposition of new restrictions by one party to the customs union.[110]

6.58 Turkey noted that this point had been made very effectively by the European Communities at a meeting of the Working Party on the Accession of Spain and Portugal, as follows:

> "The task was general, namely to reach a view on whether the general incidence of customs duties and regulations after enlargement was on the whole more or less restrictive than before. Even if a negative incidence were shown to be the case for certain items, such as when duties were increased or replaced by variable levies, one had to consider whether these effects were not balanced by the effects of other changes in the tariff sector taken as a whole. An overall appreciation of effects of changes in tariffs and regulations of commerce had to be made. In assessing general incidence, one had to avoid too static an analysis and to take into account the trade-creating effects of the establishment or enlargement of a customs union."[111]

In its conclusions, the Working Party had noted that:

> "Because of the divergent views expressed, [it] was unable to reach agreed conclusions as to the consistency of the Treaty with the General Agreement. It decided to forward to the Council, this report which summarizes the views expressed by its members during the discussion. It noted the fact that many members of the Working Party had reserved their rights under the General Agreement and that these rights would not be prejudiced by submission of the report."[112]

6.59 Nevertheless, problems which might have arisen in connection with the accession of Spain and Portugal to the European Communities were settled under the procedures of Article XXIV:6 and no contracting party chose to invoke Articles XXII and XXIII in relation to the question of whether the obligations arising out of Articles XXIV:4 and XXIV:5(a) had been met.

6.60 Turkey noted further that, if it had been the intention of WTO Members to prohibit the imposition of new restrictions at the time of the formation or enlargement of customs unions, they would no doubt have seized the opportunity provided by the Uruguay Round to do so.

6.61 Turkey also recalled that, despite regular examinations of the Association Agreements between Turkey and the European Communities, both prior to and subsequent to the completion of the Turkey-EC customs union, no recommendations had ever been addressed to the parties to the agreement under Article XXIV:7(b). In the absence of such recommendations, it could not be argued that the Association Agreement and the Turkey-EC customs union to which it had led were inconsistent with obligations arising out of Article XXIV.

6.62 In Turkey's view, therefore, Article XI:1 had to be read in conjunction with Article XXIV, concluding that measures whose application constituted a requirement of the Turkey-EC customs union were deemed to be justified under Article XXIV.[113]

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[110] In its Report on *US - Gasoline*, the Appellate Body had made clear that an interpretation might not result in reducing whole clauses or paragraphs to redundancy or inutility (p. 22).

[111] Appellate Body Report on *US - Gasoline*, para. 6.

[112] Ibid., para. 49.

[113] In this context, Turkey recalled that the accession of Sweden to the European Union on 1 January 1995 had led it to adopt the EC's common commercial policy in textiles and clothing, which had resulted in the replacement of a tariff-based system by QRs similar to those applied by Turkey since the completion of the Turkey-EC customs union, without the relevant procedures of the MFA being observed. No country had however invoked Article XXII or Article XXIII rights in connection with the adoption of those measures by

6.63 In support of its argument, Turkey also recalled changes in its import regime *vis-à-vis* third countries triggered by the completion of the Turkey-EC customs union, which led to an incidence of tariff levels much lower than that of Turkey's previous tariff and to a process of alignment of its external trade policy with that of the European Communities resulting in the Turkish market becoming as open as the EC market to products of third countries. Turkey also referred to developments in its imports of textiles and clothing products in this respect, stressing that the lower level of tariff protection had led to a more open access to the Turkish market in these products despite the introduction of a system based on QRs, and recalled that the restrictions in question were of a temporary nature and would be phased out as foreseen in the ATC.

6.64 Turkey concluded that, overall, the Turkey-EC customs union had resulted in the lowering of the general incidence of duties and other regulations of commerce and, consequently, the requirements of Article XXIV:5(a) had been met.

6.65 Turkey explained that there were basically only three options open to the parties to a customs union when setting up a single set of external trade rules, in accordance with Article XXIV:8(a)(ii) requirements, both for reasons of logic and for practical purposes. Supposing that WTO Member A and WTO Member B formed a customs union, the options for establishing single external trade rules could be:

(i) to extend the external trade rules of Member A to the entire customs union;

(ii) to extend the external trade rules of Member B to the entire customs union; or

(iii) to develop an external trade regime for the entire customs union somewhere in the middle between options (i) and (ii).

6.66 For this reason, Article XXIV:6 provided for the procedure to give compensatory adjustment in case of increased bound customs duties, which clearly indicated that the otherwise stringent rules of Article II were in this case applied in a more flexible way in order not to stand in the way of the creation of a customs union. However, the special rules contained in Article XXIV:5-8 did not only provide increased flexibility in the application of Article II. For example, although not specifically spelled out anywhere in these provisions, Turkey stated that it would simply make no sense if they did not authorize a derogation from Article I as well, and this had never been contested.

6.67 Turkey argued that the derogation authorized by Article XXIV:5 was not limited to a particular GATT rule, but encompassed all those rules from which a derogation was necessary to permit the formation of customs unions. In support of this argument, Turkey noted that the opening clause of Article XXIV:5 was drafted in language that was similar to the language used in the opening clause of Article XX, which demonstrated that the derogation referred to all the provisions of the GATT, and not just from those contained in Article II, more specifically mentioned in Article XXIV:6.[114] In this context, Turkey recalled that it had offered to enter into negotiations to address India's concerns with regard to the change in its external trade regime, but India had not wished to participate in such negotiations.

Sweden despite the fact that Sweden was not applying quantitative restrictions to imports of textiles and clothing before. Moreover, the formula used in the calculation of the quota levels to be applied by Turkey after completion of the Turkey-EC customs union was the same as the one used in the accession of Austria, Finland and Sweden.

[114] Of course, as required by Article XXIV:5(a), the overall impact of the creation of the customs union should not be such as to be on the whole more trade-restrictive than the general incidence of the duties and regulations of commerce applicable to the constituent territories prior to the formation of the customs union. As demonstrated before, however, this was not the case in the Turkey-EC customs union.

6.68 **India** endeavoured, following the provisions of Article 3.2 of the DSU and the consistent jurisprudence of the Appellate Body, to interpret Article XXIV:5 of the GATT, which Turkey invoked as a defense, in accordance with the principles of interpretation set out in Articles 31 and 32 of the VCLT. These principles required an interpretation in accordance with the ordinary meaning to be given to the terms of Article XXIV:5 in their context and in the light of the object and purpose of the GATT.

6.69 India could not see how the terms of Article XXIV:5 could provide for a justification of the measures taken by Turkey. This provision authorized merely the formation of a customs union or free trade area, nothing else. Its terms consequently exempted from the other obligations under the GATT only measures inherent in the formation of a customs union. For instance, a customs union or a free trade area could only be formed by the granting of preferential treatment inconsistent with Article I and Article XXIV therefore clearly provided a justification for it. However, customs unions and free trade areas could be formed without the introduction of new QRs on imports from third Members inconsistent with Article XI of GATT. There was, in particular, nothing that required Members forming a customs union to impose new restrictions on imports from one particular third Member inconsistently with Article XIII of GATT and Article 2.4 of the ATC. Article XXIV:4, according to which the purpose of customs unions and free trade areas should not be to raise barriers to the trade of third Members, was drafted on that assumption. The terms of Article XXIV therefore could not be interpreted to provide a legal basis for discriminatory restrictions against a third Member inconsistent with Articles XI and XIII of GATT and Article 2.4 of the ATC.

6.70 In this regard, India referred to the GATT panel on the *EEC-Member States' Import Regimes for Bananas*, which summarized the legal implications of the text of Article XXIV as follows:

> "The Panel noted the argument of the EEC that the restrictions and prohibitions on imports of bananas, even if inconsistent with Article XI:1, were nonetheless consistent with the General Agreement because they were covered under the provisions of Article XXIV. *The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union or free trade-area, or adopting an interim agreement leading to the formation of a customs union or free trade area, but not for any other purpose. Article XXIV:5 to 8 therefore did not provide contracting parties for a justification for restrictive import measures as such; it merely provided them - within the limits set out in this provision - with a justification for not applying to imports originating in such a union or area the restrictive measures that they were permitted to impose under other provisions of the General Agreement.* The Panel therefore considered that the import restrictions on bananas could not be justified by Article XXIV."[115]

6.71 Though the report of this panel was not adopted, the Appellate Body recognized that the reasoning in a not-adopted panel report could provide useful guidance.[116] In India's view, the succinct and clear exposition of the legal situation flowing from the terms of Article XXIV in the above quotation was such an example.

6.72 With reference to the next element to be considered under the principles of interpretation of the VCLT, i.e. the context in which the terms set out in Article XXIV:5 appeared, India noted that, since the preceding paragraph, Article XXIV:4, stated why customs unions and free trade areas were permitted and which purposes they were to serve, Article XXIV:5 had to be interpreted consistently with the principles set out therein. This meant that, in the absence of any clear indication to the

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[115] Panel Report (not adopted) on *EEC - Member States' Import Regimes for Bananas*, DS32/R ("*EEC - Bananas I*"), para. 358 (emphasis added).

[116] Appellate Body Report on *Japan - Alcoholic Beverages*, section E.

contrary, Article XXIV:5 could not be interpreted as providing a justification for measures raising barriers to the trade of third Members.

6.73 India noted further that Article XXIV:6 was also part of the context of Article XXIV:5. Both according to the terms of this provision and the consistent practice under it, it applied only to custom duties bound under Article II, and the related paragraphs 5 and 6 of the Understanding on Article XXIV, also referred only to customs duties. There was no corresponding mechanism for renegotiation and compensation following an increase in QRs. India considered this a logical consequence of the principle that tariffs were negotiable (and renegotiable under Article XXVIII) while QRs might only be imposed in narrow circumstances defined in the WTO agreements. Given that rules governing quotas were fundamentally different from the rules governing tariffs, there was no basis to apply Article XXIV:6 by analogy to quotas, as Turkey had claimed. Moreover, paragraph 4 of the Understanding on Article XXIV made it explicit that paragraph 6 of Article XXIV established the procedures to be followed when a Member forming a custom union proposed to increase a bound rate of duty. Had the Uruguay Round negotiators meant to extend Article XXIV:6 to quotas, they would have formulated this provision accordingly.

6.74 India noted that two important conclusions for the interpretation of Article XXIV:5 could be drawn from Article XXIV:6. Firstly, if Members forming a customs union could not ignore their obligations under Article II and any duty increased by such Members was to be brought into conformity through a renegotiation under Article XXVIII, it could reasonably be concluded that they could also not ignore such obligations in respect of quotas. Secondly, Members adversely affected by a duty increase had to be compensated under the procedures of Article XXVIII; since Article XXIV did not provide for any form of compensation for Members adversely affected by the imposition of a new quota, it could logically be concluded that Article XXIV was not meant to authorize the imposition of quotas.

6.75 Turning to analyze, in accordance with Article 31:3(b) of the VCLT, subsequent practice in the application of Article XXIV:5, India could not find any which would lend support to Turkey's interpretation of this provision.

6.76 India recalled that the claim that Article XXIV:5 of GATT authorized QRs inconsistent with Article XI was made by the six members of the EEC in 1957 when the CONTRACTING PARTIES to GATT 1947 examined the Treaty of Rome. The Report of the Sub-Group considering the EEC's restrictions recorded the following:

> "Most members of the sub-group could not accept the interpretation of the Six of paragraph 5(a) ... The notion that paragraph 5(a) would require that temporary QRs should be treated in the same way as normal protective measures such as tariffs in determining the trade relations between countries in a customs union and third countries would be contrary to the basic provision of the Agreement which precludes the use of QRs as an acceptable protective instrument."[117]

6.77 India noted that this had been the position of third countries in all cases in which the claim that Article XXIV:5 justified restrictions had been made.[118] More recently the European Communities had accepted this position since it stated during the GATT examination of Portugal and Spain's Accession to the European Communities as follows:

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[117] *Reports on the European Economic Community*, adopted on 29 November 1957, BISD 6S/70, para. 5.

[118] See detailed references to past discussions in the GATT on the use of QRs by Members forming a customs union in the third-party submission of Thailand (para. 7.84 below).

> "On the question of the other regulations of commerce, and in particular QRs, the Communities agreed that Article XXIV did not provide a waiver from other provisions of the GATT."[119]

6.78 India also considered that it was on the basis of such interpretation of Article XXIV that the EC-Turkey Association Council Decision 1/95 had been drafted. Referring to paragraphs 2 and 3 of Article 12 of the Decision, it noted that the provisions described the adoption of the same policy in the textile sector as an "objective" and recognized that "cooperation" between the European Communities and Turkey was required to achieve this objective. Moreover, the provisions made it clear that the drafters envisaged the possibility that Turkey would not succeed in negotiating restraint agreements identical to those of the European Communities because they explicitly agreed that in this case the European Communities would continue to apply the system of certificates of origin to prevent the circumvention of its policies through shipments into the European Communities *via* Turkey. The parties, when drafting these provisions, thus recognized that Turkey could not, simply by invoking Article XXIV, unilaterally impose the import restrictions which the European Communities was entitled to impose under the transitional provisions of the ATC.

6.79 India recognized that the pronouncements listed above might not be sufficiently "concordant, common and consistent" to constitute subsequent practice within the meaning of Article 31:3(b) of the VCLT;[120] however, they demonstrated that the claim that Article XXIV:5 provided a waiver from the general prohibition of QRs had never been accepted and that the European Communities and Turkey had themselves not proceeded on the assumption that it did provide such a waiver. Turkey negotiated restraint agreements similar to those of the European Communities with 24 countries; it imposed unilateral restrictions or surveillance regimes to imports from 28 countries with which it was not possible to reach agreements, among them India. India noted that the interpretation of Article XXIV which the European Communities and Turkey had adopted in response to their failure to conclude restraint agreements with all exporting countries was in complete contradiction with the legal assumption on which their original decision to negotiate such agreements was based.

6.80 **Turkey** disagreed with India's argument according to which, if the Turkey-EC customs union could put in place a common regulation of commerce determined by restrictive measures applied by the European Communities, the obligations under Article XI:1 of GATT and Article 2.4 ATC would be ignored. Turkey pointed out that, while the GATT expressly stated that its provisions "shall not prevent the formation of a customs union" (the *chapeau* of Article XXIV:5), it took account of the pre-existing obligations of members of a customs union *vis-à-vis* other GATT contracting parties by the requirements in Article XXIV:5(a) relating to the customs tariff and the common regulation of commerce of the customs union.

6.81 Turkey also disagreed with India's argument that, unlike in the case of the raising of customs duties rates for certain items that might result from the establishment of a common customs tariff, there was no procedure on compensatory adjustment for QRs and that as a result Article XI obligations could be ignored. According to Turkey, it could not be inferred from the fact that Article XXIV:6 only referred to increases of customs duty rates that the intention behind Article XXIV:5(a) was to prohibit restrictive measures of a common regulation of commerce of a customs union, determined by one of the parties to such customs union. Such interpretation would be difficult to reconcile with Article XXIV:5(a) providing a test for the GATT consistency of a customs union with the GATT establishing, *inter alia*, that a regulation of commerce of a customs union could not *on the whole* be more restrictive than the regulation of commerce applicable in the constituent territories prior to the formation of the customs union.

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[119] *Report of the Working Party on the Accession of Portugal and Spain to the EC*, adopted on 19-20 October 1988 (BISD 35S/293).

[120] See the Appellate Body Report on *Japan - Alcoholic Beverages*, Section E, on this issue.

6.82 Turkey noted that Article XXIV:6 did not exclude compensatory adjustments, where the common regulation of commerce of a customs union applied a restrictive measure taking account of the application of such a measure by a party to a customs union prior to the formation of that customs union. In agreeing to the Understanding on Article XXIV, WTO Members made this clear. In paragraph 2 of that Understanding they agreed on further rules on the evaluation under Article XXIV:5(a) of the general incidence of duties *and* other regulations of commerce applicable before and after the formation of a customs union, when recognizing "that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required".

6.83 Turkey submitted that it would make little sense to provide for an evaluation of the overall incidence of other regulations of commerce if, as India asserted, the regulation of commerce of the Turkey-EC customs union could not be determined by pre-existing restrictive measures applied by the European Communities. It would equally make little sense to provide for an examination of individual measures, with a view of the evaluation of their incidence if, as India asserted, GATT did not permit the regulation of commerce of the Turkey-EC customs union to be determined by pre-existing restrictive measures applied by the European Communities. Why evaluate the incidence of a measure which would be prohibited? It would also make little sense to provide for an evaluation of the incidence of individual measures of a regulation of commerce of a customs union, if this would not to give rise, where appropriate, to a duty to offer a compensatory adjustment. In this context, Turkey drew attention to the steps taken by Turkey in this sense. In respect of textiles and clothing products, Turkey had negotiated adjustments with 24 countries. Turkey had also, repeatedly but in vain, offered to India to negotiate adjustments.

(c) Article XXIV:8(a)

(i) Relationship between Article XXIV:8(a)(ii) and other Article XXIV provisions

6.84 **India** submitted that the obligations under Article XI:1 of GATT and Article 2.4 of the ATC were not modified by Article XXIV:8(a)(ii) of GATT, which required Members forming a customs union to apply substantially the same regulations of commerce to the trade with other Members of the WTO.

6.85 India recalled that, in the communication dated 9 January 1996, Turkey attempted to justify its new restrictions with reference to Article XXIV:8(a)(ii) of GATT as follows:

> "The GATT jurisprudence since 1957 has considerably widened the scope of "regulations of commerce". Indeed, in the 1986 Working Party examining the accession of Spain and Portugal to the Community, it was no longer disputed that QRs formed part of "other regulations of commerce". The conformity assessment of the EU-Turkey Customs Union in the framework of Article XXIV should therefore not be abused in an attempt to shape new substantive WTO law. *Since a customs union must cover "substantially all trade" and may not exclude particular economic sectors, the EC's customs union with Turkey must also cover the textiles sector*, which, it must be recalled, represents over 40% of Turkey's trade with the Community." (Emphasis added.)

6.86 In India's view, however, that sub-paragraph merely defined one of the requirements to be fulfilled by an RTA to qualify as a customs union within the meaning of Article XXIV. The provision could not possibly be interpreted to imply that Members, in fulfilling that requirement, were *entitled* to ignore their WTO obligations when applying restrictions to imports from third Members. Article XXIV:4 made it clear that the purpose of a customs union was not to raise barriers to the trade of third countries, and Article XXIV:6 stipulated that tariff bindings could not simply be ignored by Members forming a customs union which, if necessary, had to renegotiate them in accordance with the

procedures set out in Article XXVIII. If the obligations under Article II could not be ignored by Members forming a customs union, how could one reasonably conclude that the obligations under Article XI:1 of GATT and Article 2.4 of the ATC could be ignored?

6.87 India recalled that this position was also taken by the representative of Thailand at the meeting of the CRTA in October 1996:

> "... Article XXIV:6 ... required the parties to RTAs to enter into compensation negotiations under Article XXVIII. A unilateral withdrawal of concessions under Article II of GATT 1994 would thus constitute a breach of the multilateral rules. Similarly, the imposition of QRs by new members of a customs union violated the provisions of GATT 1994, as this could not be justified under Article XXIV."[121]

6.88 India also warned against importing into Article XXIV:8(a)(ii) in terms of creating rights to impose QRs where there were not specifically provided. Moreover, while Turkey claimed to be obliged by Article XXIV:8 to adopt common quotas with the European Communities for textiles and clothing, it was also claiming the right to follow divergent trade policy practices and to adopt different instruments in other areas. India noted in this respect differences *inter alia* in external trade policies on agriculture, steel and other sensitive industrial products, as well as in relation to anti-dumping, countervailing and safeguards measures. There was additionally no requirement that Members fulfil the requirements of Article XXIV:8(a) immediately.

6.89 **Turkey** submitted that Article XXIV:8(a)(ii) required it to apply to third countries import restrictions similar to those applied to the same countries by the European Communities, since the term "regulations of commerce" had traditionally been interpreted as incorporating QRs.[122] This was precisely the reason for Article 12 of Decision 1/95 unequivocally envisaging the wholesale adoption by Turkey of the EC Common Commercial Policy Instruments, as well as the EC Customs Code, in the area of textiles and clothing products, prior to the completion of the Turkey-EC customs union. Article 12(1) specified the external trade measures to be adopted by Turkey towards third countries, which constituted the critical mass of commercial policy regulations applied by the European Communities. Appropriate measures were envisaged to prevent trade diversion to Turkey over the EC customs territory.[123] The provisions of Decision 1/95 which had permitted the European Communities to continue applying - even after the completion of the Turkey-EC customs union - certificates of origin to imports of textiles and clothing from Turkey, had lapsed because Turkey had been able to meet all the requirements for the free circulation of these products set out in the Decision itself (including the adoption of substantially the same commercial policy as the European Communities for those products).

6.90 Turkey referred again to the example of a customs union between WTO Members A and B, where A applied (fully WTO-compatible) QRs on certain imports but low tariffs, while B had no QRs but (fully WTO-compatible) high tariffs on such imports. In such a case, the mentioned option (i) would entail that the A-B customs union would have to adapt its external trade regime to that of B, which meant raising tariffs to the high B level, an undoubtedly permissible move under Article XXIV:6. Option (ii) would result in the A-B customs union aligning its external trade regime with A, which would entail the introduction of QRs corresponding to those of A. Option (iii) would attempt to find some middle ground between the other two options.

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[121] WT/REG22/M/1, para. 17. India, Japan, Hong Kong, and the United States expressed their agreement with Thailand.

[122] See BISD 35S/293, para. 45.

[123] A transitional period was only provided for in Article 16 of Decision 1/95 (see WT/REG22/1) for alignment by Turkey on the EC preferential trade policy as no risk of trade diversion through the Turkish customs territory was likely as long as Turkey maintained towards the countries concerned a more restrictive import regime than that of the European Communities.

6.91 In Turkey's view, the position of India would entail, in the context of the present case, that options (ii) and (iii) be legally unavailable. This would come down to an overly restrictive interpretation of Articles XXIV:5 and XXIV:8(a)(ii), because under this reading, the inescapable need to raise the tariffs to a high level could easily enter into conflict with the requirement of Article XXIV:5(a) according to which the external trade regime of the customs union should not on the whole be more restrictive than the general incidence of the external trade regime of each of the constituent territories prior to the formation of the customs union. This would make option (i) likewise legally unavailable.

6.92 Turkey was of the view that any interpretation of Article XXIV which could lead to the conclusion that in certain circumstances, WTO Members with diverging external trade regimes were legally inhibited from forming a customs union would also be in contradiction with the objective clearly stated in Article XXIV:4. In order to fully preserve the right of WTO Members to form customs unions, it was necessary to keep open in all cases options (i), (ii) and (iii) as referred to above, since only by maintaining this flexibility would it be possible to allow WTO Members to form a customs union where they have diverging (but entirely legal) external trade regimes prior to the formation of such a customs union. As already mentioned, this reading of Article XXIV:8(a)(ii) was also commanded by the requirements laid down in Article XXIV:5(a).

6.93 Turkey considered therefore that, under India's reading, Articles XXIV:5-8 could stand in the way of the formation of a customs union between WTO Members with diverging external trade regimes. Such a reading of the portions of Article XXIV flew in the face of the purpose of this provision which was, on the contrary, to facilitate the formation of customs unions.

6.94 Turkey submitted further that, contrary to India's reading, Article XXIV:8(a)(ii) did not merely define a customs union. If such interpretation were followed, the set of GATT provisions on customs unions would be incoherent and logically inconsistent. If, in order to qualify as a customs union, the Turkey-EC customs union had to cover substantially all trade - as required by Article XXIV:8(a)(i) - it had obviously to cover trade in textiles and clothing products, which represented 40 per cent of Turkey's sales in the European Communities. If such trade had to be covered, the Turkey-EC customs union had to have a common regulation of commerce with other countries in accordance with Article XXIV:8(a)(ii). Such common regulation of commerce, as determined by restrictive measures which the European Communities applied in conformity with WTO rules, applied to goods imported in the Turkey-EC customs union *via* Turkey. Article XXIV:5(a) could not be interpreted as prohibiting this: if it were, the absence of a common regulation of commerce for textiles and clothing products would result in the exclusion of these products from the coverage of the Turkey-EC customs union, which then would not meet the requirement of Article XXIV:8(a)(i).

(ii) Relationship between Article XXIV:8(a)(ii) of GATT and Article 2.4 of the ATC

6.95 **India** believed that, implicit in Turkey's argument that Article XXIV:8(a)(ii) required it to apply to its customs territory the same import restrictions that the European Communities were authorized to apply under the transitional arrangements of the ATC, there was the claim that a conflict existed between the provisions of Article 2 of the ATC and those of Article XXIV:8(a)(ii) of GATT. India also believed that, implicit in this argumentation was the further claim of Turkey that it was entitled to resolve this conflict in favour of its obligations under Article XXIV:8(a)(ii).

6.96 For these reasons, India considered that Turkey's argumentation had to be examined in the light of the General Interpretative Note to Annex 1A of the WTO Agreement, which read:

> "In the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A of the Agreement Establishing the WTO ..., the provision of the other agreement shall prevail to the extent of the conflict."

6.97 In the *EC-Bananas III* case, the panel interpreted this note as covering two types of conflicts: Firstly, conflicts between obligations contained in GATT and obligations contained in agreements listed in Annex 1A to the WTO Agreement, where those obligations were *mutually exclusive* in the sense that a Member could not comply with both obligations at the same time. Secondly, the situation where *a rule in one agreement prohibited what a rule in another agreement explicitly permitted*, illustrated by the panel with the following example:

> "… Article XI:1 of the GATT 1994 prohibits the imposition of quantitative restrictions ... Article 2 of the … ATC … authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2.1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions ... However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994."[124]

6.98 India noted that, in the present proceedings, no conflict of the first type arose because the European Communities and Turkey could meet their obligations under Article XXIV and Article 2.4 of the ATC simply by not imposing any restrictions on imports of textiles and clothing. However, the second type of conflict between Article XXIV:8(a) of GATT and Article 2.4 of the ATC did arise because, while the former required the European Communities and Turkey to apply substantially the same regulations of commerce, the latter explicitly required them to apply different regulations of commerce. The provisions of Article 2.4 of the ATC therefore clearly prevailed to the extent of this conflict.

6.99 India therefore submitted that the European Communities and Turkey could meet their obligations under the WTO agreements if they were to form a customs union under which the import policies of the European Communities and Turkey on textiles and clothing differed to the extent that their obligations differed under Article 2.4 of the ATC. Turkey's defense based on the notion of a conflict of obligations was therefore without any legal basis. In this context, India noted further that the ATC was a newly negotiated agreement designed to exempt partially the textiles and clothing sector from the earlier GATT disciplines during a transitional period; it therefore constituted a later and more specific statement of Members' rights and obligations in the field of textiles and clothing.

6.100 **Turkey** submitted that, with regard to the ATC, no conflict existed. In addition, Turkey considered that it was in the first place for the TMB to determine the relationship between the ATC and GATT, as this relationship depended on an interpretation of the ATC. Turkey therefore continued to believe that this issue could not be considered by the Panel without prior examination by the TMB which had been given the task to examine measures taken under the ATC and their conformity therewith.

6.101 Turkey submitted further that, in any case, since the ATC specifically referred back to the "relevant GATT 1994 provisions" in Article 2.4, Turkey could not see any basis for construing a conflict between ATC and GATT. This was also evidenced by footnote 3 to Article 2.4 of the ATC, which solely excluded Article XIX of GATT from the reference contained in the main body of this provision.[125] Finally, the ATC established a transitional regime, the ultimate aim of which was full integration of the textiles and clothing sector in the GATT. It would therefore be surprising if Article XXIV of GATT would be considered inapplicable in the context of the ATC, since the purpose of the

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[124] Panel Report on *EC - Bananas III (Complaint by the United States)*, para. 7.159 and footnote 403.
[125] See also, in this respect, paras. 6.27 to 6.29 above.

ATC was to phase out gradually any special rules applying to textiles and clothing products and to phase in all the GATT rules, which obviously included Article XXIV.

(iii) Differences between the formation of a customs union and the enlargement of an already existing one

6.102 **India** noted that Turkey had not become a Member State of the European Communities, and the territory to which the European Communities applied the WTO Agreement had therefore not been extended to comprise that of Turkey. The new restrictions were consequently not EC measures extended to the territory of Turkey, but restrictions imposed by Turkey. In this context, India recalled that, in the communication dated 9 January 1996, Turkey further attempted to justify its new restrictions as follows:

> "To the extent that the EC's current regime for textiles is in accordance with WTO rules including the ATC, nothing prevents the Community from applying its existing regime to the enlarged territory of the EU-Turkey customs union, as has been done by the EC on the occasion of previous enlargements."

6.103 India was of the opinion that this statement was both factually and legally incorrect. While the European Communities were responsible for the implementation of the WTO Agreement within its own separate customs territory (which essentially comprised the European territories of its Member States),[126] it had assumed no obligations under the WTO Agreement in respect of the territory of those countries with which it had concluded a customs union agreement. The case before the Panel was thus not the case of an extension of the territory to which the European Communities applied the WTO Agreement (which occurred for instance when Austria, Finland and Sweden acceded to the European Communities and when Germany was unified). This case concerned the adoption by Turkey of the EC restrictive textiles and clothing import regime within the framework of an RTA. There was therefore no need for the Panel to make any findings on the complex legal issues arising from an extension of the territorial application of the WTO Agreement by the European Communities to the territory of States that acceded to the European Communities but remained Members of the WTO.

6.104 **Turkey** submitted that, from the point of view of rights and obligations arising out of membership of the WTO, there was no distinction between accession to the European Communities and participation in a customs union with it, as long as a single customs territory had been created with the inclusion of both parties. For that reason, the procedures followed, whether in relation to Article XXIV:5(a) or Article XXIV:6, were identical in both cases. In Turkey's opinion, the precedents set by EC accessions were valid for the examination of its own customs union with the European Communities. While the decision-making processes varied depending on whether a country had acceded to the European Communities or joined in a customs union with it, what mattered was the fact that the obligations which arose out of both cases were indistinguishable in essence, as in the case of the Turkey-EC customs union which had a single customs territory as provided for in Article 3(3) of Decision 1/95. Precisely because a common commercial policy was applied over this single customs territory, Turkey and the European Communities had insisted on the latter's participation in the examination of India's complaint by the Panel, since the elements of that common commercial policy could not be modified without the consent of the European Communities.

6.105 Turkey therefore did not agree with the argument made by India concerning the alleged difference in WTO terms between an extension of the EC customs union through accession of new member States and the substitution of a single Turkey-EC customs territory for the pre-existing individual customs territories of Turkey and the European Communities respectively. In fact, in both cases, the territory covered by the customs union was extended by comparison to the situation

[126] See Article XXIV:1 and the Explanatory Notes at the end of the WTO Agreement.

prevailing beforehand. The main difference was in the administration of the customs union, which was the responsibility of the European Communities alone in the case of an accession, but the joint responsibility of Turkey and the European Communities in the case of the Turkey-EC customs union. This was however entirely irrelevant for the application of Article XXIV:5 to 8 of GATT.

(iv) Scope of harmonization of the external trade regime in the Turkey-EC regional trade agreement

6.106 **India** noted that Turkey and the European Communities had chosen to eliminate the barriers on trade between them in respect of most industrial products, and Turkey had harmonized certain aspects of its external trade policies with those of the European Communities. However, outside the sector of textiles and clothing, the European Communities and Turkey would continue to apply different trade policy measures to third countries. The RTA between the European Communities and Turkey, at its present stage of implementation, could best be characterized as a free-trade area whose parties had chosen to harmonize certain aspects of their external trade policies. The argument that Article XXIV required Turkey to raise the level of its restrictions in the field of textiles and clothing to that of EC restrictions was therefore particularly unconvincing in this context. As the representative of the United States pointed out in the CRTA:

> "The reasoning by the EC that Article XXIV required new member countries to adopt certain restrictive and discriminatory arrangements so as to ensure the smooth functioning of the Turkey-EC customs union was dubious, as it was not applied across the board. The selectivity of this reasoning confirmed that it was being used as a disguised restriction to the trade of third countries. In textiles, Turkey was required to adopt quotas, but in other areas was exempted. Regional trade agreements should have the objective of strengthening, rather than weakening the multilateral trading system."[127]

6.107 **Turkey** submitted that over 98 per cent of trade between Turkey and the European Communities was covered by the Turkey-EC customs union and the criteria contained in the twin sub-paragraphs of Article XXIV:8(a), were more than fulfilled in the completion of the customs union. With reference to the requirements in Article XXIV:8(a)(i), Turkey noted the following:

(i) Duties and QRs had been eliminated on intra-trade in industrial products. Textiles and clothing products, which accounted for around 40 per cent of Turkey's exports to the European Communities, were in free circulation in the Turkey-EC customs union. As far as steel products were concerned, they would be incorporated into the customs union before the ECSC was phased out in 2001 and benefit from free circulation.

(ii) The only sector not fully covered by the Turkey-EC customs union in 2002 would be agriculture, although intra-trade in agricultural products would have been significantly liberalised. 90 per cent of intra-trade in agricultural products had been liberalised as a result of a separate Decision of the Association Council, Decision 1/98, which entered into force on 1 January 1998.

6.108 With respect to the harmonisation exercise carried out by Turkey in the area of commercial policy, Turkey referred to the provisions contained in Section III of Decision 1/95 and, stressing its comprehensive nature, noted as follows:

[127] WT/REG22/M/1, para. 13.

(i) Turkey had adopted the CCT for all industrial products, except those of EURATOM and ECSC.[128]

(ii) Turkey had adopted in the textiles and clothing sector a trade regime identical to that of the European Communities, in conformity with Article 12(2) of Decision 1/95.

(iii) Turkey, as the European Communities, applied restrictions on a limited range of products imported from some state-trading countries not Members of the WTO.

(iv) In order to achieve free circulation of agricultural products between the two parties, Turkey has to adopt necessary elements of the Common Agricultural Policy. The "European Strategy" for Turkey, endorsed by the European Council at its meeting held in Cardiff on 15-16 June 1998, had proposed modalities for reaching that objective and discussions on these proposals were expected to be initiated shortly

(v) In competition and state-aids, the harmonisation process had already been initiated and, once completed, resort to anti-dumping and countervailing duties would cease and identical policies would be applied to third countries.[129] (Meanwhile, the Parties to the Turkey-EC customs union were required to coordinate their actions towards third countries.)[130] Such gradual integration of anti-dumping actions was envisaged in Article 4.3 of the WTO Agreement on Implementation of Article VI of the GATT 1994.

6.109 Consequently, Turkey was of the view that the Turkey-EC customs union could not be described, as India did, as a "free trade area whose members have chosen to harmonise certain aspects of their external trade policies", nor could it be argued that "Turkey has chosen to harmonise its commercial policies with those of the EC on a selective basis".

(v) Other options available

6.110 **Turkey** submitted that there were no alternative solutions to the imposition of quantitative limits. No alternative could be devised which would not impair the principle of free circulation of these products between Turkey and the European Communities as long as their importation into the European Communities was subject to restrictions. Since 1 January 1996, no specific border controls (other than regular border checks to verify that goods are under free circulation or under preferential regime) existed between Turkey and the European Communities for products covered by the customs union, including those which were subject to QRs when imported from third countries; products were accompanied by a circulation document which indicates that they are in free circulation. All textile and clothing products therefore circulated freely between the European Communities and Turkey's territories since that date.

6.111 Turkey indicated that maintaining the regulations of commerce applied prior to the formation of the Turkey-EC customs union would be equivalent to excluding the goods, imported into Turkey under Turkey's pre-customs union regulation of commerce, from the coverage of the customs union. Reintroducing the pre-customs union regime would also substantially reduce the degree of market access available for third countries in Turkey, and would require the European Communities (as the other party in the Turkey-EC customs union) to raise bound tariffs substantially, which was almost certainly not feasible.

[128] Exceptionally, for a transitional period ending on 1 January 2001, imports from third countries of products covering 1.4 per cent of eight-digit tariff lines would be subjected to higher duties than the CCT, in accordance with Article 19 of the Additional Protocol.

[129] See Article 44(1) of Decision 1/95 (WT/REG22/1).

[130] See Article 45(2) of Decision 1/95 (WT/REG22/1).

6.112 Turkey recalled that the deviations from the Turkey-EC customs union were in any case of a temporary nature and insignificant in terms of the volume of trade affected. For that reason, the provisions of Decision 1/95 relating to compensatory measures during the period until Turkey had fully aligned itself to the CCT and EC preferential trade policy, had never been invoked.

6.113 **India** submitted that, in all areas in which their import duties or regulations differed, the European Communities and Turkey were able to implement border controls ensuring that only products originating in their respective territories would benefit from the preferential treatment under the trade agreement.

6.114 India noted that, because of the many differences in the duties and restrictions the European Communities and Turkey applied to imports from third countries, they had to ensure that exporters of other countries did not take advantage of such differences by transshipping their exports *via* the partner with the lowest barriers to imports. Given the absence of a complete harmonization of external policies, Decision 1/95 explicitly safeguarded the parties' right to impose the necessary controls in these areas. In this respect, India referred to the customs controls in the case of differences in arrangements on textiles and clothing, as contained in paragraphs 2 and 3 of Article 12 of the Decision; the supplementary levies in the case of differences in import duties, provided for in its Article 16.3(a); and the trade controls needed because of differences in the use of countervailing and anti-dumping measures and safeguard actions, according to Article 46 of the Decision. In India's view, all these provisions demonstrated that Decision 1/95 provided, in each case in which EC and Turkey's import policies differed, for the border controls necessary to ensure that exporters in third countries did not take advantage of those differences. In each of these cases, the principle of free circulation did not apply.

6.115 India drew attention in particular to the fact that Article 12.3 of Decision 1/95 specifically provided for the application of restrictions and certificates of origin to textiles and clothing products from third countries with whom Turkey had not concluded restraint arrangements equivalent to those of the European Communities, thereby explicitly contemplating differences between their individual arrangements with third countries and giving the European Communities the right to apply the controls necessary to ensure that such differences did not entail transshipments *via* Turkey.

6.116 India concluded that, though Turkey had claimed that there were no alternatives to its restrictions on imports of textiles and clothing products from India, Decision 1/95 itself provided for such an alternative. With respect to the European Communities' response to a question by the Panel that it appeared "doubtful" that the use of rules of origin benefiting only Turkish exports of textiles and clothing products "would have been workable or proportionate within the customs union",[131] India remarked that such measures were considered to be workable and proportionate in the many other areas in which EC and Turkey's policies diverged.

6.117 India further submitted that for the purposes of the EC-Turkey trade agreement, any immediate harmonization of import restrictions on textiles and clothing products was unnecessary. The European Communities and Turkey were applying different import duties and regulations in respect of many sectors, policy instruments and trading partners. They pursued entirely different external policies in respect of a very broad range of products, trading partners and trade policy instruments.[132] The agreement which the European Communities and Turkey claimed to be a customs union was concluded in the form of Decision 1/95 of the EC-Turkey Association Council. According to the text of Decision 1/95 and the recent Secretariat Report on Turkey issued in the context of the Trade Policy Review Mechanism ("TPR Secretariat Report"), the European Communities and Turkey maintained divergent policies in the following areas:

[131] See para. 4.3 above, Reply to question 1.

[132] See WT/REG22/M/1 and also *Trade Policy Review: Turkey*, *Report by the Secretariat*, dated 14 September 1998, WT/TPR/S/44 ("*TPR Secretariat Report on Turkey*"), pp. xii-xiv.

(i) In their automobile import policies in relation to Japan, in accordance with Article 12.4 of the Decision, which stated that the provisions of the Decision should not constitute a hindrance to the implementation by the European Communities and Japan of the Arrangement relating to trade in motor vehicles, mentioned in the Annex to the WTO Agreement on Safeguards.

(ii) In customs duties for non-agricultural products, in accordance with Article 15.1 of the Decision, which allowed Turkey to retain until 1 January 2001 customs duties higher than the CCT in respect of third countries for products agreed by the Association Council.[133]

(iii) With respect to preferential trade regimes, given that, according to Article 16.1 of the Decision, Turkey was to align itself progressively with the EC preferential customs regime until 1 January 2001. However, to the extent that the EC preferential regime was based on agreements, this was subject to successful negotiations with the third countries concerned.[134]

(iv) In agricultural products, an additional period (of undefined length) is required to put in place the conditions necessary to achieve free movement of these products, according to Article 24 of the Decision.

(v) With respect to trade defense instruments (i.e. countervailing and anti-dumping measures as well as safeguard actions), according to Articles 44-47 of the Decision, the European Communities and Turkey were able to take such measures against each other and, independently from one another, against third countries.[135]

(vi) In government procurement, Article 48 of the Decision merely foresaw negotiations on a harmonization of policies in this area. At present, the European Communities were party to the WTO Agreement on Government Procurement, but not Turkey.

(vii) On trade-related investment measures, foreign companies setting up a joint venture in the automobile sector typically agreed to incorporate a certain share of local content in their production under informal arrangements with the Turkish government.[136] These arrangements, which had not been notified to the WTO, led to competitive conditions for imported automobile parts and components in the Turkish market different from those prevailing in the EC market.

6.118 India argued from the above that the European Communities and Turkey did not have the same external trade policies in the field of agriculture, 290 "sensitive" industrial products, shoes and other leather goods. The automobiles and automobiles parts and components sectors in Turkey and the European Communities were subject to different arrangements affecting imports. The European

[133] According to the *TPR Secretariat Report on Turkey* (p. 22), Turkey would maintain rates of protection above those specified in the EC's common external tariff (CET) for "sensitive" products equivalent to 290 items at the HS-twelve-digit level for up to five years. These items included *motor vehicles* with an engine capacity smaller than 2,000cc, bicycles, *leather cases and bags*, *footwear* and their parts, *furniture*, chinaware and ceramic ware, iron and steel wires and ropes not electrically insulated, and paper or paperboard sacks and bags for cement or fertilizers.

[134] According to the *TPR Secretariat Report on Turkey* (paras. 33 and 36), Turkey had not yet adopted the GSP of the EC and was still discussing free-trade agreements with Tunisia, Egypt, Morocco and Palestine

[135] In the CRTA, the EC representative confirmed that Decision 1/95 had no provisions on the common application of anti-dumping and countervailing measures (see WT/REG22/M/1, para. 45) and further explained that the European Communities and Turkey would harmonize common safeguards rules only after a transitional period (ibid., para. 40).

[136] *TPR Secretariat Report on Turkey* (para. 87).

Communities and Turkey did not apply the same legislation or the same external policies with respect to anti-dumping, countervailing and safeguard measures. The import tariffs for automobiles and the export restraints agreed with Japan differed. Turkey restricted the purchase of imported automobile parts and components through informal arrangements but not the European Communities. The European Communities and Turkey had not liberalized their mutual trade in agricultural products except for the industrial component of processed agricultural products.[137] Therefore, for the purposes of the trade agreement they concluded, Turkey and the European Communities did not have to impose the same restrictions on imports of textiles and clothing. Given the long transitional periods agreed for so many sectors, policy instruments and trading partners, they could also have exempted the textiles and clothing sector from the coverage of the agreement until the end of 2004 when the transitional period under the ATC lapsed. Turkey's decision to immediately adopt the EC policies in the field of textiles and clothing restrictions but not in the agricultural, automobile, shoes and leather goods sectors could be easily explained by a desire of Turkey to tailor the scope of the customs union to its domestic political constraints rather than its obligations under the GATT and the ATC.

(d) Turkey-EC regional trade agreements in the framework of Article XXIV

(i) Compatibility with Article XXIV provisions

6.119 **Turkey** submitted that the legitimacy of RTAs, whether customs unions or free- trade areas, as an exception to the MFN rule, had been recognised since work started on the Charter of the International Trade Organisation in the 1940s. The Havana Charter recognised the desirability of "preferential agreements for economic development and reconstruction".[138] The present text of Article XXIV of GATT was adopted at the Havana Conference in 1948. In Turkey's opinion, it was generally acknowledged that such arrangements could lead to a better allocation of world resources as long as their "trade diverting" effects were less significant than their trade creating effects."

6.120 Turkey submitted further that full transparency had always been maintained in the GATT, and subsequently the WTO, by Turkey and the European Communities with respect to the Association between them and its evolution over the years. In asserting that its Association with the European Communities had never been challenged in the GATT or the WTO, Turkey summarized the main observations contained in the Working Party Reports on (i) the Ankara Agreement, (ii) the 1970 Additional Protocol and (iii) the 1973 Supplementary Protocols, as follows:[139]

> (i) "The signatories of the [Ankara] Agreement recalled that ... the final objective of the Agreement, notably by the institution of a customs union, [was] the accession of Turkey to the Community when the operation of the Agreement [made] it possible ..." The Working Party was informed of the fact that the external tariff of the customs union would be that of the EEC, that trade regulations applied by Turkey towards third countries would be approximated with those of the EEC and that as between the parties, the customs union regime would involve the elimination of all customs duties and charges with equivalent effect and all QRs. The main criticism raised by Contracting Parties related to what was considered to be the "undetermined duration" of the transition to the customs union. One of the members of the Working Party, considered that the tariff quotas to be put into effect by the EEC for the benefit of exports of certain Turkish products constituted a unilateral preferential arrangement which had the effect of "widening the area of discrimination against third countries

[137] This, despite the fact that the agricultural sector of Turkey accounts for 14 per cent of GDP and about half of the labour force, and would therefore most likely be an important element in EC-Turkey trade relations were zero tariffs applied to such products as well. (See *TPR Secretariat Report on Turkey*, p. xi.)

[138] See United Nations Conference on Trade and Employment, *Final Act and Related Documents*, ICITO, April 1948, Chapter 15.

[139] See para. 2.14 for references to these Reports.

and eroding their rights under the General Agreement". The parties responded that "it was a case of an economic integration Agreement between parties at very different stages of development and that such arrangements are rightly characterised by a certain imbalance in the obligations undertaken during their formative period". In reply to further questions regarding the possible trade effect of the Agreement on third parties, Turkey and the EEC stated that they were prepared "to consult with contracting parties on matters affecting the operation of the General Agreement as required by Article XXII". One member of the Working Party said that "if the CONTRACTING PARTIES were to decide that the Agreement was not in conformity with the relevant provisions of Article XXIV, then the provisions of paragraph 7(b) should apply". However, no contracting party resorted to the provisions of Article XXII and no recommendation was addressed to the parties to the Agreement under Article XXIV:7(b).

(ii) When Turkey and the EEC notified to the GATT the 1970 Additional Protocol and Interim Agreement, they stated that the "Additional Protocol defined the rhythm and modalities of the realisation of the customs union". The parties, in their statements to the Working Party, reiterated the fact that the long-term objective of the Agreement was "Turkey's accession to the EEC" and that the details for the implementation of the transitional stage prior to the completion of the customs union were set out in the Additional Protocol. While some members of the Working Party found the provisions of the Protocol "reasonable and justified when considering the different levels of development of the EEC and Turkey", others were of the view that the extended period for completing the customs union could not be considered "reasonable" in the sense of Article XXIV:5(c). In accordance with Article XXII:1 of GATT 1947, Turkey and the EEC undertook to "give sympathetic consideration to representations made by contracting parties". However, no such representations were ever made.

(iii) At the further examination of the Association, on the basis of the 1973 Supplementary Protocols and Interim Agreement, some members of the Working Party agreed with the parties that the Supplementary Protocol "conformed fully to Article XXIV of the General Agreement". Other members of the Working Party considered the transitional period envisaged as too long and criticised the maintenance of discrimination in the dismantling of duties and QRs by Turkey in favour of the European Communities. Nevertheless, no contracting party invoked the right to consult under Article XXII in relation to any provision of the Agreement.

6.121 Turkey recalled that, in subsequent years, the two parties had reported regularly on the implementation of the Association Agreements and on the progress made in reaching their objectives. Full transparency had therefore been maintained on this subject and contracting parties had had the opportunity of expressing their views on it when the reports were examined by the GATT Council. No country invoked any rights under GATT 1947 throughout this period.

6.122 Turkey also recalled that, on 22 December 1995, Turkey and the European Communities notified to the WTO the text of Decision 1/95 which had been formally adopted on that same day and which set out the modalities for the completion of the Turkey-EC customs union provided for in the Association Agreements. Turkey and the ECSC notified in July 1996 the free-trade agreement on ECSC products, which entered into force on 1 August 1996.

6.123 Turkey noted that, in the WTO context, two meetings of the CRTA had so far been devoted to examining Decision 1/95, which set out the modalities for the completion of the Turkey-EC customs union provided for in the Association Agreements. At the first meeting, the Chairman stated that "the parties had provided the Secretariat with information and data to enable it to compute the general

incidence of duties as required under Article XXIV:5(a), and for purposes of facilitating negotiations under Article XXIV:6 of GATT 1994". Some members of the CRTA had agreed with the parties in that the creation of a customs union between them was consistent with the provisions of Article XXIV:4, 5 and 8, and that the Turkey-EC customs union would benefit third parties, as the general incidence of duties and other regulations of commerce had been lowered. Other members considered that the agreement failed to meet the obligations of Article XXIV, essentially because it did not at the moment provide for free movement of agricultural products, and because of the QRs on imports of textiles and clothing products introduced by Turkey to align its external trade policy on that of the European Communities. Turkey and the European Communities had responded by explaining that liberalisation of trade in agricultural products was a requirement of the Association Agreement (a separate Association Council Decision providing in due course for the elimination of most restrictions on such trade between the two parties entered into force on 1 January 1998).

6.124 Turkey considered that, though the CRTA had not yet concluded its examination of the Turkey-EC customs union, there was no indication, two and a half years after the completion of the customs union, that it would recommend to the parties, under Article XXIV:7(b), that modifications be made to the Agreement. Turkey added that no country had asked for compensatory adjustment with respect to any tariff bindings that might have been affected by the Turkey-EC customs union. It also noted that the completion of the customs union as originally scheduled convincingly replied to the principal criticism raised in the Working Parties entrusted with the task of examining the Association in the past, namely that the transitional period was too long to be considered "reasonable". By fulfilling its commitments as originally intended, Turkey had demonstrated that it had made good use of such transitional period.

6.125 Noting that India recognized that the present dispute did not cover the question of whether or not Turkey met the requirements of Article XXIV:5(a), Turkey concluded that, for the purposes of the present dispute, India did not contest that the provisions of this Article were applicable to the Turkey-EC customs union and that it assumed, for the purposes of this dispute, that the Turkey-EC customs union fulfilled the requirements of those provisions. In Turkey's opinion, it could hardly be otherwise, since the question of the compatibility of the Turkey-EC customs union as such with the requirements of Article XXIV:5(a) was not within the terms of reference of this Panel. Rather, this question was presently examined by the CRTA under Article XXIV:7(b). Turkey noted that the present dispute was therefore limited to the question as to whether Article XXIV contained a sufficient justification for the measures at issue.[140]

6.126 **India** agreed with Turkey that panels should not make determinations which were to be made according to explicit provisions of the GATT and other WTO Agreements by bodies composed of representatives of Members. India also did not believe that the present case required the Panel to assess the consistency of the EC-Turkey trade agreement with the requirements of Article XXIV.[141]

(ii) Type of agreement under Article XXIV

6.127 **India** submitted that, if the Panel were to consider the relationship between the EC-Turkey trade agreement and the provisions of Article XXIV relevant for its conclusions, it should, in the view of India, adopt the approach followed by the GATT panel on *EEC-Bananas I*, which reacted as follows to the EEC's claim that the preferences it granted to developing countries in the framework of the Lomé Convention were covered by Article XXIV:

[140] See also, in this respect, para. 6.133 below.

[141] India reserved the right to challenge in a future proceeding the preferences that the EC and Turkey accord each other if WTO jurisprudence were to emerge according to which panels are entitled to rule also on those matters that were to be resolved according to the provisions of the GATT and other WTO legal instruments by bodies composed of Members, such as the provisions of Articles XII:4, XVIII:12, XIX:3 XXVIII:1 and XXIV:7 of GATT.

> "The Panel first examined the argument of the EEC that Article XXIV:7 sets out special procedures for the examination of free trade areas by the CONTRACTING PARTIES, and that the overall consistency of such free trade area with Article XXIV could therefore not be investigated by a panel established under Article XXIII. ... The Panel observed that, whatever the precise relationship between the procedures under Article XXIII and XXIV, the provisions of Article XXIV:7 empower the CONTRACTING PARTIES to make recommendations only on agreements establishing a customs union or free trade area, or interim agreements leading to such a union or area. These provisions thus do no apply to any agreement notified to the CONTRACTING PARTIES but only the four specified types of agreements. The Panel therefore concluded that, notwithstanding the issue of whether the procedures of Article XXIV:7 supersede those of Article XXIII:2, it would first have to examine whether the Lomé Convention is an agreement of the type to which the procedures of Article XXIV:7 apply. The Panel could not accept that tariff preferences inconsistent with Article I:1 would, by notification of the preferential arrangement and invocation of Article XXIV against the objections of other contracting parties, escape any examination by a panel established under Article XXIII. If this view were endorsed, a mere communication of a contracting party invoking Article XXIV could deprive all other contracting parties of their procedural rights under Article XXIII:2, and therefore also of the effective protection of their substantive rights, in particular those under Article I. The Panel concluded therefore that a panel, faced with an invocation of Article XXIV first had to examine whether or not this provision applied to the agreement in question. ... The Panel then proceeded to examine whether the Lomé Convention was one of the types of agreement mentioned in Article XXIV."[142]

6.128 In India's view, the reasoning underlying this example of judicial restraint could be transposed to the present case. The Panel need not decide whether the determinations to be made under Article XXIV:7 could be made by a panel nor whether the EC-Turkey agreement was consistent with Article XXIV. It was sufficient for the Panel to decide into which of the four categories of agreements the type of agreement notified by the European Communities and Turkey fell. India argued that the type of agreement concluded between the European Communities and Turkey (i.e. an agreement under which the same import duties and regulations were to be applied to imports from third countries only at a future date) was not governed by those provisions of Article XXIV that related to completed customs unions, but fell into the category of interim agreements leading to the formation of a customs union. Since Turkey had invoked the provisions of Article XXIV on completed customs union as a legal cover for measures taken under an agreement that provided for the establishment of such an union at a future date and to which those provisions could not apply, the Panel should reject Turkey's invocation of the provisions on completed customs unions as a potential legal basis for the restrictions at issue.

6.129 India considered that there was yet another reason why the Panel need not determine whether the EC-Turkey agreement met the requirements of Article XXIV. When the agreement was examined by the CRTA, the European Communities and Turkey did not clarify the precise nature of the agreement and made contradictory and vague statements on this issue in response to pointed questions raised by other Members. Although the European Communities and Turkey claimed that the agreement established a customs union fully consistent with the requirements of Article XXIV,[143] they also said that the harmonization of certain policies would take place at the end of transitional periods,[144] thereby admitting that the agreement was in effect an interim agreement leading to the formation of a customs union.

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[142] *EEC - Bananas I*, paras. 158-159 (emphasis in the original).
[143] See WT/REG22/M/1, para. 4.
[144] See WT/REG22/M/1, paras. 5, 8, 10, 12, 28, 29 and 30.

6.130 India further noted that Turkey had claimed in the CRTA that it might, consistently with Article XXIV, apply import policies *different* from those of the European Communities in the areas of agriculture, steel and other "sensitive" industrial products, preferential trade agreements, the GSP, anti-dumping duties, countervailing measures, and safeguards. Before the Panel, Turkey claimed that, to conform to Article XXIV, it had to apply the *same* policies as the European Communities in the field of textiles and clothing. However, these two legal claims could not be simultaneously accepted by the Panel. The first proposition was correct if the EC-Turkey agreement was an *interim agreement* leading to the formation of a customs union because, in that case, Turkey's import policies could deviate from those of the European Communities during a transitional period in certain sectors, including textiles and clothing. The second proposition was correct if that agreement was a fully fledged customs union because, in that case, Turkey would be required to adopt the same policies in all areas, including textiles and clothing. India agreed that the Panel should not determine whether the EC-Turkey agreement met the requirements set out in Article XXIV for customs unions or those for interim agreements leading to the formation of a customs union. However, India disagreed that the Panel had to accept the proposition implied in Turkey's argumentation that one agreement notified under Article XXIV could be at the same time a customs union agreement *and* an interim agreement leading to the formation of a customs union.

6.131 India noted, furthermore, that, to question 2 of the Panel, on whether in its view the agreement with Turkey was an interim agreement that should lead to a customs union by 2005 or an agreement implementing a completed customs union, the European Communities avoided a reply by incorrectly referring to the date of 2001, by mentioning Article XXIV:8(a), and by defining the requirements of this sub-paragraph in terms of a "final phase".[145] The reference to 2001 was incorrect because the agreement did not establish *any* final date for common policies in the fields of agriculture, "commercial defense" instruments and preferential trade policies. Moreover, the European Communities appeared to take the view that the requirements of Article XXIV:8(a) were met by entering into the "final phase with regard to the requirements of Article XXIV:8(a)" and thus imparted upon this provision the notion of transition that was contained in the concept of interim agreement. It might therefore be concluded that the European Communities in response to a clear question by the Panel refused to confirm that the EC-Turkey agreement established a customs union within the meaning of Article XXIV:8(a).

6.132 In view of the above, India concluded that the type of agreement existing between the European Communities and Turkey was not governed by the provisions of Article XXIV on customs unions.

6.133 **Turkey** submitted that it had defended the view that it was not the Panel's task to substitute itself for the CRTA and that the Panel could not rule on the legality of the measures forming the object of the complaint in the absence of agreed conclusions on the consistency of the Turkey-EC Agreements with Article XXIV. Turkey wished to clarify that, while pursuant to the institutional arrangements of the WTO the assessment of the Turkey-EC customs union was a matter for the CTRA and ultimately for the CTG, this should not prevent the Panel from verifying whether the Turkey-EC customs union might *prima facie* be regarded as a customs union within the meaning of Article XXIV:8(a).

6.134 In this connection, Turkey drew attention to the TPR Secretariat Report on Turkey, which in the Introduction to the Summary Observations highlighted, as a general point, the wide range of reforms implemented by Turkey within the framework of the customs union between Turkey and the European Communities "taking it significantly beyond its Uruguay Round commitments as well as

[145] See para. 4.3 above.

generating improved and more secure trading opportunities for third countries",[146] noting in particular that "the [Customs Union Decision] goes well beyond the basic requirements of a customs union".[147]

6.135 Turkey disagreed with India's allegations that the customs union between Turkey and the European Communities was in fact an interim agreement and that therefore under this agreement Turkey was not required to apply the same external trade policy, including in the area of textiles and clothing, as the European Communities. Turkey also noted that, while India, in its first submission, had described the Turkey-EC customs union as such, it had later decided to downgrade the status of the customs union to that of a *mere trade agreement*.

6.136 Turkey elaborated that the customs union was a definitive agreement providing for the phasing in of harmonized policies in certain specific areas which did not affect the character of the customs union because of their limited trade impact. The 290 "sensitive" products for which a transitional period ending on 1 January 2001 had been allowed for Turkey to adjust to the CCT only accounted for 1.5-2 per cent of Turkey's total imports. Much of the gradual alignment on the CCT which started with the completion of the customs union had already been made in the 2.5 years elapsed since then and the margin of difference between the CCT and the tariff applied for those products in Turkey was being progressively reduced so that the alignment would be completed on 1 January 2001, bearing in mind that for the remaining 17,000 tariff lines covered by the customs union the alignment had already been completed on 1 January 1996. Coal and steel products would be incorporated in the Turkey-EC customs union when included in the EC customs union itself, in 2002; meanwhile , they were covered by a free-trade agreement similar to the ECSC Agreement itself. Alignment on the EC preferential trade regimes was taking place. As far as agriculture was concerned, the objective of free movement was contained in the Association Agreement and was being reached by stages. Association Council Decision 1/98, which provided for mutual trade preferences in these products and entered into force on 1 February 1998, consolidated the elimination of customs tariffs on 70 per cent of trade in these products between Turkey and the European Communities.

6.137 Turkey therefore concluded that India's arguments on the alleged incomplete nature of the Turkey-EC customs union were groundless.

6.138 **India** remarked that the quote of the TPR Secretariat Report made by Turkey was partial and therefore misleading. There was no reference to Article XXIV requirements in the Secretariat's observations. In India's view, since a customs union could be established without a harmonization of a number of domestic policies, the Secretariat had correctly observed that certain of the measures taken went beyond the requirements of a customs union.

5. Nullification or Impairment

(a) Trade aspects

6.139 **Turkey** submitted that the Turkey-EC customs union had benefited third countries and could not be described as having raised barriers to their trade with Turkey. The CCT, adopted under the Turkey-EC customs union, had an incidence of tariff levels much lower than that of Turkey's previous tariff. The average Turkish tariff had been 18 per cent while the level of the CCT was 5.6 per cent and, with the implementation of the Uruguay Round results, this rate would fall further to 3.5 per cent.

6.140 Turkey added that, in undertaking the process of alignment of its external trade policy with that of the European Communities, it had embarked in the negotiation of free trade agreements with the countries which had concluded similar arrangements with the European Communities. Those

[146] *TPR Secretariat Report on Turkey*, p. x.
[147] *TPR Secretariat Report on Turkey*, p. xi.

agreements already in force had been notified to the WTO; further such agreements would be notified prior to their entry into force. Turkey was also preparing the adoption of a GSP scheme similar to that of the European Communities and of preferential arrangements applicable to ACP countries under the Lomé Convention. In accordance with Article 16 of Decision 1/95, alignment by Turkey with the EC common commercial policy would be completed in 2001.

6.141 Turkey considered that, as a result, the Turkish market had became as open as the EC market to third-country products and that those products would enjoy even larger benefits in the Turkish market following the completion of the Turkey-EC customs union. It also affirmed that, overall, the Turkey-EC customs union had resulted in the lowering of the general incidence of duties and other regulations of commerce. The requirements of Article XXIV:5(a) of GATT had therefore been met.

6.142 Turkey submitted further that, although the replacement of an essentially tariff-based system by one based on quantitative controls might appear to be more trade restrictive, the exact opposite occurred with its new import regime for textiles and clothing products, reflecting the fact that a prohibitively high tariff-based system had been replaced by a more transparent and predictable regime. Turkey noted that, in the preparatory process to the customs union, Turkey's import duties on textiles and clothing products from third countries had been reduced from 37 per cent in 1993, to 27 per cent in 1994 and 21 per cent in 1995, this benefiting those countries even before the customs union itself was completed. Moreover, in the following two years, due to the further reduction in tariffs offered by the customs union, imports of textiles and clothing products increased considerably, reaching $3.6 billion in 1997, which represented an increase of over 100 per cent compared to 1994. Turkey also noted that, following the completion of the Turkey-EC customs union, its imports from third countries had increased faster than those from the European Communities.[148]

6.143 Turkey stressed that the above import results should be seen against the fact that Turkey was a major exporter of textiles and clothing, with a highly competitive industry. The substantial expansion of imports, particularly of those from third countries, in 1996 and 1997 was an indication of the degree of liberalization attained as a result of the completion of the Turkey-EC customs union.

6.144 In this context, Turkey considered India as an important competitor for Turkish producers in certain categories of textiles and clothing, not only in third countries' markets but also in the Turkish market itself. The imposition of QRs on imports of certain categories of textile and clothing products originating in India had not reduced the inflow of products from that country. Imports of textile and clothing products from India into Turkey had increased from $32.5 to $137 million in the period 1994-1997.[149] Despite such a massive increase, Turkey had chosen not to invoke the means available to it under the WTO, to slow down this process.

6.145 Turkey added that India benefited more in terms of market share than any other country from the opening of the Turkish textile and clothing market resulting from the completion of the Turkey-EC customs union. Its share in Turkey's total imports of these products had risen from 1.99 per cent in 1994 to 3.82 per cent in 1997.

6.146 Turkey pointed out that, for most of the 19 categories of textile and clothing imports to which QRs were applied India had never been an important and regular supplier to the Turkish market,[150] and its share in the Turkish market in those products remained below 3 per cent for the period 1994-1997.[151] Before the entry into force of the Turkey-EC customs union, its imports from India of the products under the relevant tariff headings corresponding to those 19 categories were subject to an average custom duty rate of 34.31 per cent. After the entry into force of Turkey-EC customs union,

[148] See Table II.2 above.
[149] See Table II.5 above.
[150] The only exceptions were product categories 1, 23, and 29.
[151] See the supporting tables reproduced in the Annex to this report, Appendix 4a and Appendix 4b.

these products were subject to an average custom duty rate of 11.74 per cent (1996). This rate had been lowered further to 11.6 per cent in 1997, and would continue to be lowered further as a result of the implementation by Turkey of the concessions made by the European Communities during the Uruguay Round. Turkey pointed out that the improvement in market access was reflected in the 134 per cent increase in imports from India of products in the 19 categories between 1994 ($13.08 million) and 1997 ($30.66 million).[152]

6.147 Commenting upon trade figures, Turkey noted that in 1995, i.e. the last year before completion of the customs union, duty reductions were phased in three separate instalments and India's exports immediately began to benefit from these reductions. In Turkey's view, 1995 was therefore clearly an atypical year for trade projections.

6.148 **India** remarked that the correct figure for India's exports to Turkey of the 19 restricted product categories in 1997 was $19.87 million, not $30.66 million as reported by Turkey.[153] India also noted that, apart from absolute values, the important point was the trend in exports, which demonstrated that Turkey's QRs had affected India's interests. From the trade data provided (Table II.4), two irrefutable facts could be drawn in this respect: a serious and significant decline in India's exports of restricted products to Turkey had occurred after the introduction of the restrictions; and for the non-restricted categories, there was an increase in India's exports to Turkey.

6.149 In India's view, the level of exports of textiles and clothing products from India to Turkey was influenced not only by Turkey's trade regime but also by the evolution of the market, as well as by the import regimes of other countries. It would not be possible to segregate the impact of the quotas from the impact of such other factors. It would also not be possible to segregate the impact of Turkey's reduction of tariffs from the impact of the new restrictions.

(b) Arguments

6.150 **India** noted that the presumption that measures inconsistent with the GATT impaired the benefits accruing to a Member under the GATT could not be rebutted with a demonstration that the restrictions had no trade effect.[154] It was not possible to balance the adverse impact of the (discriminatory) quotas against any favourable impact of the (MFN) tariff reductions for the purpose of determining the consistency of the quotas with Articles XI and XIII of GATT and Article 2.4 of the ATC.[155]

6.151 India submitted further that the import restrictions which Turkey had imposed since 1 January 1996 in the context of its trade agreement with the European Communities on textiles and clothing products from India impaired benefits accruing to India under Articles XI and XIII of GATT and Article 2.4 of ATC.

6.152 India noted later that, though Turkey claimed (in answering a question from India) that the restrictions at issue had "no economic substance" and that India was therefore not subject to nullification or impairment, it had not elaborated this point in its defense. India considered as violating the principle of due process recognized by the Appellate Body to be inherent in the DSU if the defendant were permitted to present a defense in its first submission but leave the presentation of all the facts and arguments substantiating that defense to its rebuttal submission, thereby either

[152] See Table II.5 above.

[153] See paras. 2.43 to 2.46 above for details on differences between trade data provided by India and Turkey.

[154] See also the arguments reported in paras. 6.159 and 6.160 below.

[155] See the rulings of the panel on *United States - Section 337 of the Tariff Act of 1930* (BISD 36S/386-387), which clearly rejected such a "balancing test" for the purposes of Article III. The reasoning of this panel applied equally to the balancing the benefits of voluntary tariff reductions against the adverse impact of quotas imposed inconsistently with Articles XI and XIII of GATT and Article 2.4 of the ATC.

depriving the complainant of the opportunity to respond to that defense in its rebuttal submission or delaying the panel procedures if such an opportunity was granted.

6.153 India therefore did not know how Turkey would later substantiate its claim. It had assumed, for the purposes of the argument, that Turkey would attempt to demonstrate on the basis of trade statistics that no impairment had occurred. India was of the view that such an attempt could not succeed.[156]

6.154 India noted that, in 1960, the CONTRACTING PARTIES to GATT 1947 decided that a GATT-inconsistent measure was presumed to cause nullification or impairment and that it was up to the party complained against to demonstrate that this was not the case.[157] This principle was taken over in the dispute settlement procedures adopted at the end of the Tokyo Round,[158] and was now reflected in Article 3.8 of the DSU. In this context, Turkey might claim that the "adverse impact" to which this provision referred was the trade impact caused by its failure to carry out its obligations under Articles XI and XIII of GATT and Article 2.4 of the ATC and that, therefore, a demonstration that the exports of India did not decline was sufficient to rebut the presumption. However, Article 3.8 of the DSU needed to be interpreted in the light of GATT 1947 jurisprudence reflected in this provision. According to this jurisprudence, the "adverse impact" of the violation of a provision prescribing conditions of competition could not be determined on the basis of the actual impact of the violation on trade flows.

6.155 India recalled that in the *Japan-Measures on Imports of Leather* panel proceedings, Japan argued that, since the quotas had not been fully utilised, they had not restrained trade and had consequently not caused a nullification or impairment of benefits accruing under Article XI of GATT. The panel rejected the argument on the grounds that the existence of a QR "should be presumed to cause nullification or impairment not only because of any effect it had on the volume of trade but also for other reasons, e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans".[159] This ruling indicated that a demonstration that no adverse trade impact had as yet occurred was insufficient to rebut the presumption. The rationale of prohibiting QRs required a demonstration that there was no potential future impact.

6.156 This reasoning was carried further in the *United States-Taxes on Petroleum and Certain Imported Substances* case. The United States argued that the tax differential between domestic and imported petroleum products was not causing nullification or impairment because it was so small that it could not possibly cause trade effects. However, the panel ruled that Article III did not protect expectations on trade volumes but expectations on competitive conditions accorded to imported products, and that a measure establishing conditions of competition less favourable for imported products than for domestic products was therefore *ipso facto* a nullification of the benefits accruing under that provision, whether or not trade volumes were adversely affected. The panel explained its ruling as follows:

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[156] For a complete review of the jurisprudence on non-violation cases, see the following publications cited by the Appellate Body in its report on *India - Patent* (footnote 26): Ernst-Ulrich Petersmann, "Violation-Complaints and Non-Violation Complaints in Public International Trade Law", in German Yearbook of International Law, Volume 34, 1991, pp. 175 - 229; and Frieder Roessler, "The Concept of Nullification and Impairment in the Legal System of the World Trade Organization", in Ernst-Ulrich Petersmann (ed.), International Trade Law and the GATT/WTO Dispute Settlement System, Studies in Transnational Economic Law, Volume 11, Kluwer Law and Taxation Publishers (Deventer and Boston: 1997), pp. 123-142.

[157] See BISD 11S/99-100.

[158] See para. 5 of the Annex to the Understanding on Dispute Settlement adopted on 28 November 1979.

[159] Panel Report on *Japan - Measures on Imports of Leather*, BISD 31S/94 ("*Japan - Leather*"), para. 55.

> "An acceptance of the argument that measures which have only an insignificant effect on the volume of exports do not nullify or impair benefits accruing under Article III:2, first sentence, implies that the basic rationale of this provision - the benefit it generates for the contracting parties - is to protect expectations on export volumes. That, however, is not the case. Article III:2, first sentence, obliges contracting parties to establish certain competitive conditions for imported products in relation to domestic products ... It is conceivable that a tax consistent with the national treatment principle (for instance a high but nondiscriminatory excise tax) has a more severe impact on the exports of other contracting parties than a tax that violates that principle (for instance a very low but discriminatory tax). The case before the Panel illustrates this point: the United States could bring the tax on petroleum in conformity with Article III:2, first sentence, by raising the tax on domestic products, by lowering the tax on imported products or by fixing a new common tax rate for both imported and domestic products. Each of these solutions would have different trade results, and it is therefore logically not possible to determine the difference in trade impact ... resulting from the nonobservance of this provision. For these reasons, Article III:2, first sentence, cannot be interpreted to protect expectations on export volumes; it protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement."[160]

6.157 In its report on *EC-Bananas III*, the Appellate Body ruled that the reasoning in the GATT panel report cited above applied also in that case,[161] which concerned, inter alia, the EC obligations under Articles XI and XIII of GATT. It thereby rejected the argument of the European Communities that the benefits accruing to the United States under these provisions had not been impaired because the United States had not exported a single banana to the European Communities, nor was it in a position to do so. The Appellate Body thereby rejected as untenable the idea that a measure might be inconsistent with a GATT provision prescribing certain conditions of competition but nevertheless not impair benefits accruing under it for lack of any trade effect. India observed that the provisions at issue in the present dispute - Articles XI and XIII of GATT and Article 2.4 of the ATC - were all provisions prescribing conditions of competition. Any attempt by Turkey to rebut the presumption of Article 3.8 of the DSU with trade statistics could not therefore but fail.

6.158 India also referred to the case involving an Italian scheme under which credit facilities were accorded to farmers in a manner discriminating against imported agricultural machinery, where the panel reacted to Italy's claim that the measure had no adverse trade effects by stating: "If the considered view of the Italian Government was that these credit facilities had not influenced the terms of competition on the Italian market, there would not seem to be a serious problem in amending ... the law so as to avoid any discrimination".[162] With this case in mind, India asked why the Turkish authorities did not eliminate the restrictions at issue in this dispute if their considered view was that they had no economic substance.

6.159 Although India considered trade statistics completely irrelevant for the resolution of the present dispute, it nevertheless highlighted a few features in the evolution of India exports to Turkey. During the year before the imposition of Turkey's restrictions, exports of the clothing items that were now restricted had grown by 57 per cent compared to the previous year. During the year immediately following the imposition of the measures, they declined by 74 per cent. In respect of textiles, the situation was even more extreme. Here, the growth rate in the year prior to the introduction of the

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[160] Panel Report on *United States - Taxes on Petroleum and Certain Imported Substance*, BISD 34S ("*US - Superfund*"), p. 159.

[161] Appellate Body Report on *EC - Bananas III*.

[162] Panel Report on *Italy - Discrimination Against Imported Agricultural Machinery*, BISD 7S/67.

measures was 200 per cent and the decline in the subsequent year 48 per cent.[163] Against this background, India questioned the validity of Turkey's allegation that its complaint was without economic substance.

6.160 Finally, India recalled that it was not seeking in these proceedings findings specific to particular restricted items, nor had Turkey presented any defense specific to any particular restricted items. The dispute could therefore be settled by a ruling on all restrictions imposed by Turkey on textile and clothing products imported from India as from 1 January 1996 (that is, to the knowledge of India, the items included in the 19 product categories).

6.161 **Turkey** noted that it followed from the text of Article 3.8 of the DSU that (i) a proceeding brought by a complaining party against a violation of a WTO rule was and remained based on the purpose to protect benefits against nullification or impairment; and (ii) a violation of a WTO rule was not in and by itself a nullification or impairment of benefits of a Member complaining about such violation, but constituted only a presumption of nullification or impairment.

6.162 Turkey also noted that a WTO rule could be seen as an obligation for one Member and a right for another one. The concept of nullification and impairment made clear that for a complaint to succeed there needed to be more than a breach of a complainant Member's right. That such a concept appeared in GATT 1947 and was maintained in the DSU was hardly surprising. Many domestic jurisdictions required an "interest to sue", i.e. that a complainant should show more than that his right was breached. Similarly in international law a complainant had to show a legal interest.[164]

6.163 Turkey considered that the requirement that a benefit be nullified or impaired made it clear that the alleged breach of a Member's right had to have an economic impact on the complaining Member. This had been confirmed in several panel reports, in particular *US-Superfund*, and in the Appellate Body Report on *EC-Bananas III*.

6.164 In Turkey's view, the quantities that could be exported by India to Turkey under the restrictions of the Turkey-EC customs union exceeded on the average by 134 per cent India's exports to Turkey in 1994, the last full year before the tariff reductions provided by the Turkey-EC customs union were phased in over 3 separate instalments in 1995. Moreover, India's exports to Turkey in the years 1996-1998 of the products covered by the measures challenged remained significantly below the possibilities opened under these measures.[165] It seemed obvious to Turkey that the way in which the panel in the *US-Superfund* case and the Appellate Body in the *EC-Bananas III* case defined nullification or impairment, and the reasons for which they considered that the presumption had not been rebutted could be of no assistance to India in the present case:

(i) In the *US-Superfund* case the panel considered that Article III:2 GATT "protects expectations on the competitive relationship between imported and domestic products. A change in the competitive relationship contrary to that provision must consequently be regarded *ipso facto* as a nullification or impairment of benefits accruing under the General Agreement".[166] In that case, the competitive relationship between the imported and the domestic gasoline, whose change to the detriment of the imported gasoline was considered as a nullification or impairment of benefits accruing to the complaining GATT Contracting Parties, resulted from the imposition

[163] See also paras. 6.148 and 6.149 above, Table II.4 and the Annex to this report, Appendix 3a.

[164] See ICJ, *South West Africa Cases* (Second Phase), ICJ Report 1966, p. 47; ICJ, *Barcelona Traction Light and Power Co. Ltd*, ICJ Report 1970, p 32.

[165] In 1996, for 12 out of the 19 categories the amounts licensed remained below 50 per cent of the quotas , and for 8 out of these 19 categories even below 10 per cent. In 1997 for 6 out of the 19 categories the amounts licensed remained below 50 per cent of the quotas. In 1998 for 9 out of 19 categories the amounts licensed remained below 50 per cent of the quotas.

[166] Panel Report on *US - Superfund*, para. 5.1.9.

of a rate of tax applied to imported gasoline that was 3.5 cents/barrel higher than the rate applied to domestic gasoline which competed on the United States market. As this higher tax rate was passed through to consumers, its trade impact was obvious.

The present case did not concern Indian products subjected on the Turkish market to a discriminatory taxation rendering them more expensive on that market than similar Turkish products. The measures challenged had no impact on the competitive relationship between Indian and Turkish textiles and clothing products on the Turkish market. In fact, the competitive relationship improved in view of the substantial reduction of tariff protection resulting from the customs union.

(ii) In *EC-Bananas III*, the Appellate Body referred to a "potential export interest by the United States" that "cannot be excluded". On this point the Appellate Body report was far from clear and did not explain why this potential export interest amounted to "an expectation of a competitive relationship" that needed to be protected against the EC measures. [167]

The present case did not relate to a situation in which India was a potential exporting country faced with measures that effectively prevented exports to Turkey. The measures challenged were manifestly not preventing India from exporting to Turkey. As already indicated, the quantities that might be imported from India into Turkey far exceeded India's exports in 1994, the last complete year before the entry into force of the Turkey-EC customs union. Moreover India's current exports to Turkey were significantly below the effectively more favorable possibilities opened by the measures challenged. As indicated earlier, the quantities India stated it would export to Turkey were quite unrealistic.

6.165 Turkey also drew attention to some particular developments of the WTO law relating to the concept of nullification and impairment that were relevant to this case. Though in 1987 the panel in the *US-Superfund* case noted that "there was no case in the history of the GATT in which a contracting party had successfully rebutted the presumption" and concluded that "the presumption had in practice operated as an irrefutable presumption",[168] later developments made it clear that Members did not share or endorse that view. On the contrary, when they agreed on the DSU, they expressly confirmed in Article 3.8 that a violation was only a *prima facie* case of nullification and impairment. They even added a qualification: "This means that there is *normally* a presumption" (emphasis added). This was all the more significant as in the WTO Agreement on Subsidies and Countervailing Measures a claim of nullification or impairment of benefits no longer needed to be made in dispute settlement procedures concerning prohibited subsidies, as appeared from Article 4.1 of the Agreement. Similarly, the concept of a violation as a rebuttable presumption of nullification or impairment was absent from the GATS, as a Member which considered "that any other Member fails to carry out its obligation or specific commitments under this Agreement may have recourse to the DSU" (GATS Article 23:1). In light of these developments, Turkey was of the view that *US-Superfund* could no longer be considered as good law and that a recommendation or a ruling of the DSB that would treat the presumption of nullification and impairment as irrefutable would add to the rights of a complaining party and diminish those of a respondent party.

6.166 Turkey concluded that its alleged violation, if any, of the relevant WTO rules, should be treated fully as a rebuttable presumption of a nullification or impairment of India's benefits and that it had demonstrated that *prima facie* the alleged violation, if any, of the relevant WTO rules had not resulted in a nullification or impairment of India's benefits.

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[167] Appellate Body Report on *EC - Bananas III*, para. 252.
[168] Panel Report on *US - Superfund*, paras. 5.1.6 and 5.1.7.

6.167 Turkey also put forward an additional argument against a finding of nullification and impairment in the present case. By introducing the presumption that a violation of a WTO rule by a Member constituted nullification and impairment of benefits accruing to the complaining Member, Article 3.8 of the DSU made also clear that there was necessarily a causal link between the violation of a WTO rule and the nullification or impairment. Assuming *arguendo* that India's exports would have been higher but for the measures challenged and from this that Turkey had not rebutted the presumption of Article 3.8 of the DSU, according to Turkey, it was highly relevant that India repeatedly rejected Turkey's offer to negotiate and preferred to do otherwise than the 24 countries that accepted to negotiate with Turkey and obtained satisfactory adjustments. This meant in effect that, even if India's benefits were nullified or impaired, the chain of causation between the measures challenged and the nullification and impairment would be broken by India's rejection of the opportunity to negotiate adjustments.

6.168 Turkey submitted that there was a general principle of law, that could be expressed in a variety of doctrines and could take a variety of forms, according to which one could not seek redress for harm that one had brought onto oneself by not taking measures that would have prevented or at least mitigated the harm caused by another party. This general principle was *inter alia* reflected in the International Law Commission's Draft Articles on State Responsibility, whose Article 6bis (paragraph 2) provided that "[i]n the determination of reparation, account shall be taken of the negligence or the wilful act or omission … of the injured State".[169]

6.169 Turkey also argued that a WTO case consisted of the violation element and the resulting nullification and impairment element; if the complainant failed in either one of the elements, a panel ought to reject the complaint without addressing the other element. According to Turkey, in the present case, it had rebutted the presumption that the alleged violation resulted in nullification or impairment of India's benefits. Therefore, India's complaint could be rejected without addressing the issue of the alleged violation of the relevant WTO rules.

6.170 To this last argument, **India** responded that the question of nullification or impairment was legally and logically subsidiary to the question of violation.[170] The Panel had first to examine whether an infringement occurred. India considered that this followed also from Article 11 of the DSU, which did not entitle panels to deny the complainant the right to a ruling on the conformity of the measures at issue on the grounds that they had no adverse effects. To the knowledge of India, there was no case in the history of the GATT and the WTO in which a panel examined the question of whether the presumption of impairment had been rebutted before the question of whether the presumption applied.

6.171 India also questioned the validity of Turkey's argument that India was partly responsible for the damage it incurred, because it had refused to accept Turkey's offer to negotiate a settlement based on an increase in the quotas. In India's view, the principle of international law cited by Turkey could not apply when a WTO Member refused to accept a partial implementation of the obligation incurred by another Member.

6.172 India also noted that discriminatory import restrictions were inconsistent with Articles XI and XIII, irrespective of whether the relevant quotas were exhausted.[171]

6.173 India argued that Turkey had essentially claimed that the customs union was on balance beneficial to India because any adverse effect of the quantitative restrictions adopted in the framework of the EC-Turkey trade agreement was offset by the effect of the tariff reductions. India, according to

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[169] Yearbook of the International Law Commission (1993), Vol. II, Part II, Chapter IV.

[170] The presumption in Article 3.8 of the DSU only applying "in cases in which there is an infringement of the obligations assumed under a covered agreement".

[171] BISD 31S/113.

Turkey, was therefore incorrect when it argued that the evidence demonstrated "that the customs union has impaired benefits to which it claims entitlement."

6.174 India remarked that at issue in this complaint was *not* whether the EC-Turkey trade agreement was consistent with Article XXIV and consequently also not whether benefits accruing to India were impaired as a result of the customs union that the European Communities and Turkey alleged to have formed under that agreement. At issue were the restrictions which Turkey had imposed since 1 January 1996 on imports of textiles and clothing products from India and consequently whether *these restrictions* impaired benefits accruing to India under the GATT and the ATC. The overall impact of the customs union on India's exports was therefore irrelevant to the measure at issue.

6.175 India added that implied in Turkey's argumentation was the assertion that discriminatory import restrictions inconsistent with Articles XI and XIII of GATT and Article 2.4 of the ATC did not impair benefits accruing under these provisions if the Member imposing the restrictions voluntarily reduced its import tariffs and thereby accorded offsetting trade benefits to other Members. However, in India's view, ordinary customs tariffs applied on an MFN basis have an impact on the conditions of competition that was completely different from that of prohibited discriminatory QRs. Tariff reductions tended to improve India's opportunities to engage in price competition but Articles XI and XIII of GATT and Article 2.4 of the ATC guaranteed India the right to engage in price competition without being hampered by discriminatory quantitative limitations. It was this benefit accruing to India which was being impaired by the measures at issue. India pointed out that, in its Third Party Submission, the United States had noted that Turkey said that the reduction in average tariffs resulting from the customs union agreement meant that the agreement "cannot be described as having raised barriers" to trade with Turkey. In the first place, the evaluation under Article XXIV of the level of trade barriers went beyond an evaluation of tariffs. Moreover, implicit in Turkey's argument was the assertion that India should accept the discriminatory QRs unilaterally imposed by Turkey because of the tariff reductions Turkey voluntarily granted to all WTO Members under the agreement, since the net effect of the two measures taken together was an increase in India's exports. This argument was fundamentally flawed for two reasons.

6.176 Firstly, as made clear by the reasoning of the *US-Superfund* panel[172], endorsed by the Appellate Body in the EC-*Bananas III* case,[173] the benefit accruing to India under Articles XI and XIII of GATT and Article 2.4 of the ATC was not the protection of its expectations on the volume of textiles and clothing products to Turkey. These provisions protected India's expectations regarding the competitive conditions for its exports of textiles and clothing products to Turkey. The competitive conditions prescribed by the provisions of the GATT governing multilateral tariff reductions were completely different from those prescribed by the provisions governing QRs. The former were designed to ensure that all Members could equally engage in price competition, the latter were intended to ensure that price competition was not subject to quantitative limits, to the extent that such limits were permitted, that they did not differ between Members. Turkey's calculations demonstrating that "a net profit" resulted from the grant of tariff reductions and the imposition of discriminatory quotas were irrelevant.

6.177 Secondly, implicit in Turkey's claim was the assertion that India had the obligation to accept the denial of benefits to which it was entitled under the rules governing discriminatory restrictions because of the reductions of duties consequent upon the formation of a customs union. There was no WTO provision nor any principle of law that supported this proposition. Paragraph 6 of the Understanding on Article XXIV confirmed that the advantages accruing to third Members as a result of the formation of a customs union did not entail any obligations on their part. If this was the principle that governed Article XXIV:6 negotiations, a different principle could not govern the assessment of the adverse impact of an illegal measure in the context of Article 3.8 of the DSU.

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[172] Panel Report on *US - Superfund*, p.158.
[173] Appellate Body Report on *EC - Bananas III*, paras. 249-253.

6.178 India also noted that Turkey had recognized that past panels and the Appellate Body in the *EC-Bananas III* case had consistently ruled that the provisions of the GATT on non-tariff measures protected expectations on conditions of competition and not on trade volumes and that, consequently, the presumption that a measure inconsistent with such a provision impaired benefits accruing under the GATT could not be rebutted with a demonstration that the complainant's exports did not decline.

6.179 In response to Turkey's claim that these precedents were no longer "good law" because they had been superseded by legal developments that dictated another approach and that rejection of these precedents was implicit in the inclusion of Article 3.8 into the DSU, India noted that the wording of Article 3.8 of the DSU was in substance identical to the wording of the third and fifth sentences in paragraph 5 of the Annex to the 1979 Dispute Settlement Understanding. If the drafters of Article 3.8 of the DSU had meant to negate the continued validity of the principles on nullification and impairment developed under GATT jurisprudence, they would surely not have adopted language identical to the terms of the provision under which that jurisprudence was developed.

6.180 India noted that the Appellate Body had confirmed in the *EC - Bananas III* case the continued validity of the jurisprudence developed under the GATT 1947, in particular the principles developed in the *US - Superfund* case.[174] In response to Turkey's allegation that the present case was distinct from the *EC - Bananas III* case, India pointed out that India was actually an exporting country faced with measures by Turkey that effectively prevented exports to Turkey.

6.181 India also stated that Turkey had apparently further misunderstood India's argument. India had not questioned the existence of Article 3.8 of the DSU. The 1979 Decision also had the same provision. There were two aspects: Firstly, India disagreed with Turkey when Turkey argued that the Panel had to first discuss whether nullification and impairment had occurred and that the question of violation could be taken up later. In India's view, the first issue was whether a violation had occurred. In this context, India noted that implicit in the remarks by Turkey was an admission that there was a case of violation. India certainly had demonstrated it. Secondly, India had pointed out on the basis of the available jurisprudence, that the provisions of the GATT on non-tariff measures protected expectations on conditions of competition and not on trade volumes and that, consequently, the presumption that a measure inconsistent with such a provision impaired benefits accruing under the GATT could not be rebutted with a demonstration that the complainant's exports did not decline. Trade volumes were not relevant. Even assuming that trade volumes were relevant, India had already supplied data to the Panel which clearly demonstrated that the discriminatory QRs imposed by Turkey had adversely affected India's textile and clothing exports to Turkey.

VII. SUMMARY OF ARGUMENTS PRESENTED BY THIRD PARTIES

A. HONG KONG, CHINA

1. General

7.1 Hong Kong, China submitted that Turkey had unilaterally imposed discriminatory QRs on imports of textiles and clothing from Hong Kong, China and some other WTO Members as from 1 January 1996. Turkey's measures covered a broad range of textile and clothing products from selected Members including Hong Kong, China. According to Turkey, these measures were taken in order "to achieve the Customs Union between the EC and Turkey" and "to fulfill the requirements of Article XXIV".[175]

[174] Appellate Body Report on *EC - Bananas III*, paras. 249-253.
[175] WT/REG22/6.

7.2 Hong Kong, China did not question the right of Members to form a customs union in accordance with WTO rules and had no intention to focus on whether Turkey had fulfilled the requirements of Article XXIV of GATT. Its concern was that Turkey's measures constituted an infringement of the WTO Agreement. Specifically, Hong Kong, China submitted that the measures were inconsistent with Article 2.4 of the ATC and hence with Article XI *ipso facto* and Article XIII of GATT. The GATT did not provide *carte blanche* for a customs union to introduce discriminatory QRs.

7.3 Hong Kong, China considered that, in line with the views of the Appellate Body in *US - Shirts and Blouses*,[176] a party claiming a violation of a provision of the WTO Agreement by another Member needed to assert and prove its claim. Having done so, it was up to the defending party to bring forward evidence and arguments to disprove the claim. Furthermore, the burden of establishing a defense including that derived from exceptions from obligations under certain provisions of GATT should rest with the defending party. Turkey claimed that the measures were required as part of a process of alignment of its external trade policy with that of the European Communities so as to ensure the free circulation of products, including textile and clothing products, covered by the Turkey-EC customs union, relying on Article XXIV to justify the measures. The burden of proof rested therefore with Turkey to substantiate its claim that a customs union formed under Article XXIV did provide a derogation from other GATT provisions.

2. Article 2 of the ATC and Articles XI and XIII of GATT

7.4 Hong Kong, China submitted that Turkey's measures were in violation of Article 2.4 of the ATC. Hong Kong, China viewed Article 2 of the ATC and Article XI of GATT as both dealing with QRs, the former specifically about QRs in the textiles and clothing sector, and the latter about QRs in the goods field. Since the former was *lex specialis* to the latter, any time Article 2.4 of the ATC was violated, Article XI of GATT was violated *ipso facto* (but not vice versa).

7.5 The objective of the ATC was to reintegrate trade in the textiles and clothing sector into the full disciplines of the GATT over a period of ten years starting from 1995. Article 2.4 of the ATC provided that the restrictions which were notified by a Member under Article 2.1 when the WTO came into force constituted "the totality of such restrictions" and that no new restrictions in terms of products or Members were to "be introduced except under the provisions of this Agreement or relevant GATT provisions".

7.6 As at or before 31 December 1994, Turkey maintained no QRs on imports of textile and clothing products from Hong Kong, China. It only started to do so on 1 January 1996. Obviously, Turkey's measures were <u>new</u> restrictions which had never been notified as having been in force on the day before entry into force of the ATC. Nor had Turkey justified them under other provisions of the ATC. Turkey had therefore violated Article 2.4 of the ATC unless it could justify the measures under other provisions of GATT.

7.7 The burden of proof was with Turkey to identify "the relevant GATT 1994 provisions" and to clearly demonstrate the relevance of such provisions in the context of the ATC in general, and to the extent that such provisions should provide an exception to Article 2.4 of the ATC in particular. However, Turkey had not provided any legal arguments that could substantiate its claim in this respect. Hong Kong, China therefore submitted that Turkey had failed to discharge the burden of proof. Moreover, in its view, Article XXIV:5 of GATT did not provide any exemption for Turkey's measures.

7.8 Hong Kong, China submitted further that Turkey's measures were inconsistent with Article XIII of GATT. Non-discrimination was a fundamental principle of the WTO. Since the measures

[176] Appellate Body Report on *US - Shirts and Blouses*, p. 16.

applied only to selected Members and textile and clothing products from many other Members were not subject to the same measures, Turkey was obviously in breach of the principles of non-discrimination under Article XIII of GATT.

3. Article XXIV of GATT

7.9 In the view of Hong Kong, China, Article XXIV only set out the obligations to be fulfilled when customs territories of the constituent parties formed a customs union. It did not enable or provide justifications for any Member to establish or extend discriminatory QRs against selected third parties. Article 31 of the VCLT required that "a treaty shall be interpreted … in the light of its object and purpose". The specific object and purpose of GATT was set out in its preamble as "entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce".

7.10 If the imposition of discriminatory QRs using Article XXIV as a waiver was permitted, it would render meaningless the purpose of a customs union, as reaffirmed in the preamble of the Understanding on Article XXIV, that economic integration agreements "should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members". It would be difficult to think of a more adverse effect than the imposition of discriminatory QRs against selected third parties.

7.11 Hong Kong, China did not agree with Turkey's view that the intention of the authors of Article XXIV:5 had been to permit the introduction of new restrictive regulations of commerce which might be made necessary by the formation of a customs union, as long as their effect on the whole was not more restrictive than that of the previously applicable regime. Hong Kong, China did not consider that Article XXIV:5 went so far as to provide a waiver from other provisions of the GATT.[177] It also questioned whether an overall reduction of barriers could legally justify GATT-inconsistent measures.

7.12 Were Article XXIV:5 to be interpreted as providing *carte blanche* for customs unions to impose discriminatory QRs against selected third parties, subject only to the proviso that the balance of all third parties' trade interests taken as a whole be respected, the outcome could be highly discriminatory, contrary to the interests of natural justice, and not consistent with the object and purpose of GATT as stated above. Such an interpretation would thus not be in accordance with the VCLT. Hong Kong, China considered, therefore, that the opposite was the case, i.e. that Article XXIV:5 did not sanction the imposition of discriminatory QRs.

7.13 In the view of Hong Kong, China, Article XXIV:8 was a definition clause. In itself it created neither rights nor obligations. Article XXIV:8(a)(i), on the internal trade regime of a customs union, entailed the elimination of duties and other restrictive regulations of commerce with respect to (i) substantially all the trade between the constituent territories, or (ii) substantially all the trade in products originating in such territories. Article XXIV:8(a)(ii), on the external trade regime of a customs union, entailed the application by members of a customs union of substantially the same duties and other regulations of commerce to the trade of third parties.

7.14 While the meaning of the two key terms "substantially all the trade" in Article XXIV:8(a)(i) and "substantially the same" in Article XXIV:8(a)(ii) might not be completely clear and precise, they all undoubtedly pointed to the unambiguous effect that the required free circulation of goods within a customs union and the alignment of the external trade regimes of constituent territories *need not be absolute*.

[177] This was the view of the European Communities stated in the Working Party on the Accession of Portugal and Spain to the EC (see BISD 35S/318, para. 45).

7.15 As regards the internal trade regime of a customs union, it was quite clear from Article XXIV:8(a)(i) that a customs union could be based on (i) the principle of free circulation of goods or (ii) a set of origin rules, provided its benefits applied to substantially all the trade in products originating in the constituent territories. In other words, some deviations from the free circulation of goods within a customs union were not ruled out totally.

7.16 Likewise, some differentials between the external trade regimes of constituent territories were clearly provided for in sub-paragraph (a)(ii) as borne out by the use of the word "substantially". Hong Kong, China considered that the purpose of such flexibility was to address, among others, situations where it was not justified, by virtue of other provisions of Article XXIV, for a constituent territory to impose new discriminatory QRs against selected third parties for the purpose of alignment. In the view of Hong Kong, China, Article XXIV of GATT did not necessarily require a constituent territory to align every aspect of its external trade regime with that of the other constituent territory, especially if the regime of the latter was more restrictive and discriminatory.

4. Alternative solutions and conclusions

7.17 As far as Hong Kong, China understood, a border still existed between the European Communities and Turkey. There were existing arrangements which satisfied the procedural/ documentary requirements for goods entering the EC Member States *via* Turkey. Against this background, derogation from the free circulation of goods was possible and was, in fact, foreseen by Decision No.1/95 of the EC-Turkey Association Council implementing the final phase of the Turkey-EC customs union, e.g.:

(i) Equivalent but independent anti-dumping legislation was maintained *vis-à-vis* third countries. The customs authorities of each party ensured that their own anti-dumping measures were not circumvented by checking the origin of the products imported into their territory from the other party.

(ii) The EC customs authorities checked, at the border between the European Communities and Turkey, the origin of vehicles imported into the European Communities *via* Turkey. EC imports of Japanese vehicles *via* Turkey were treated as direct EC imports for the purpose of the ceilings laid down in the 1991 EC-Japan Agreement relating to trade in motor vehicles, mentioned in the Annex to the WTO Agreement on Safeguards.

7.18 Since derogation from free circulation of goods was to a certain extent permitted within a customs union, Hong Kong, China doubted whether Turkey's measures were a necessary precondition for the implementation of the Turkey-EC customs union. Hong Kong, China's view was that a temporary certificate of origin system on textile and clothing products not originating in Turkey, until quotas were phased out altogether by the end of 2004, was a viable alternative to QRs. This meant a different import regime for regulating the circulation from Turkey to the European Communities of products not originating in Turkey. However, it could hardly be construed as excluding a major sector of trade from the customs union, nor would it require the suspension of the free circulation of textile and clothing products originating in Turkey, which need not be affected.

7.19 Hong Kong, China concluded from its analysis that Turkey's measures were inconsistent with Article 2.4 of the ATC (Article XI of GATT was violated *ipso facto*) and Article XIII of GATT, and that they were not justified by Article XXIV of GATT. Hong Kong, China requested the Panel to pronounce on the inconsistency of Turkey's measures with Article 2.4 of the ATC and Articles XI and XIII of GATT, and to recommend that Turkey brings its measures into conformity with its obligations under the WTO.

B JAPAN

1. General

7.20 Japan submitted that, being a country which was not a party to any RTA and was greatly benefiting from the multilateral trading system, it had a great interest in ensuring that RTAs were consistent with the WTO Agreement and that such agreements did not lead to forming trade blocs. Japan's trade interests would be severely affected, if any measure similar to Turkey's import quota on textiles and clothing should be introduced as a consequence of the establishment of similar customs unions. As this panel is to address the systemic issue of consistency of the automatic application of restrictive measures at the institution of a customs union with WTO principles, Japan has a substantial interest in this case.

7.21 Japan considered that RTAs derogated inherently from the MFN principle and could bring discriminatory treatment to third countries. RTAs, therefore, might run the risk of weakening the open multilateral trading system. In this context, in accordance with Article XXIV of GATT, it was necessary to avoid their negative effects upon the trade of third countries, a point Members reaffirmed in the preamble of the Understanding on Article XXIV.[178] In the Singapore Ministerial Declaration, Ministers also reaffirmed the primacy of the multilateral trading system and renewed their commitment to ensure RTAs' complementarity with it and consistency with its rules.

7.22 In Japan's view, RTAs were governed by Article XXIV of GATT, but the parties to RTAs, as WTO Members, should also abide by the MFN principle and other provisions of the WTO Agreement. Close scrutiny of RTAs was called for and the provisions of Article XXIV of GATT were to be interpreted strictly in the light of the purposes of the multilateral trading system, to ensure and strengthen it. Article XXIV had to be interpreted in good faith, in the context of and in the light of the object and purpose of the WTO Agreement as a whole,[179] and with due consideration given to its overall spirit and basic principles.

2. Arguments

7.23 Japan submitted that the introduction of new QRs by Turkey was inconsistent with Turkey's obligation under Article XI of GATT and Article 2.4 of the ATC, unless Turkey demonstrated that it fulfilled the conditions for invoking Article XXIV of GATT. In the *US - Underwear* case, the need for strict interpretation of the provisions for exception clauses was demonstrated by the panel concluding that the parties invoking the exception bore the burden of proof that the conditions for invoking the exception had been fulfilled.[180]

7.24 Japan believed that the claims by Turkey that Article XXIV:5 or XXIV:8 of GATT were applicable to the current case and that it was entitled to the exception to the general rule stipulated in Article XI of GATT and Article 2.4 of the ATC, could not be justified.

7.25 In Japan's view, the requirement contained in Article XXIV:8(a)(ii) of GATT, that a member of a customs union apply "substantially" the same duties and other regulations of commerce *vis-à-vis* third parties, did not mean that "exactly" the same regulations of commerce were necessarily to be

[178] Members reaffirmed "that the purpose of such agreements should be to facilitate trade … and not to raise barriers … and that … the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members".

[179] Panel Report on *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/R ("*US - Shrimp*"), para. 7.35.

[180] Panel Report on *US - Underwear*, para. 7.16.

applied.[181] The issue then lied in whether there were any specific types of regulations of commerce whose very nature did not merit uniform application by the members of the customs union. What needed examination was whether a measure had minimized the adverse effect on third countries, and in light of the relevant WTO provisions and their intent.

7.26 Japan submitted that consideration of both Article XXIV:8 and other relevant WTO provisions led to the conclusion that Article XXIV:8(a)(ii) should not be interpreted so as to give the parties the right to introduce new restrictive measures, including QRs and anti-dumping and safeguard measures which had not been allowed prior to their signing the RTA. Article XXIV:8(a)(ii) did not call for the parties to take any measures inconsistent with other provisions of the WTO Agreement in order to apply "substantially the same duties and other regulations of commerce" and could thus not be invoked as a "relevant GATT 1994 provision" under which "new restrictions" could be exceptionally introduced, as provided in Article 2.4 of the ATC. Japan therefore believed that the introduction of new QRs by Turkey, which was inconsistent with Turkey's obligation under Article XI of GATT and Article 2.4 of the ATC, could not be justified by Article XXIV:8(a)(ii) of GATT.

7.27 Japan noted further that it was important to interpret provisions in Article XXIV:5 of GATT in the light of the purpose of a customs union or of a free-trade area, as contained in Article XXIV:4. Japan also recalled the provisions in paragraph 2 of the Understanding on Article XXIV with respect to the overall assessment of weighted average tariff rates and of customs duties collected and the recognition contained therein that "for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected" might be required. In this regard, it noted the difficulty to numerically assess the effect of QRs, let alone make judgments as to whether QRs in conjunction with the duties and other regulations of commerce imposed at the same time was "on the whole higher or more restrictive than the general incidence of the duties and regulations of commerce …", as required in Article XXIV:5(a).

7.28 In Japan's view, the individual regulations of Turkey needed to be examined in order to verify that they did not constitute more restrictive measures *vis-à-vis* third countries. In this context, the introduction of GATT-inconsistent measures (in this case, those inconsistent with Article XI of GATT and Article 2.4 of the ATC) should be first presumed as "more restrictive" in the sense of Article XXIV:5 of GATT.

C. THE PHILIPPINES

1. General

7.29 The Philippines noted that the preamble of the Understanding on Article XXIV recognized that customs unions and free-trade areas had "greatly increased in number and importance since the establishment of GATT 1947" and covered "a significant proportion of world trade". The formation of such RTAs could contribute to the attainment of the objectives of the WTO Agreement. However, if interpreted and invoked erroneously, or abused, WTO provisions authorizing the formation of customs unions and free-trade areas could likewise easily lead to the entrenchment of practices which were in subversion of those objectives.

7.30 Panels in disputes involving Article XXIV of GATT 1947 and of GATT 1994, for various reasons, did not rule squarely on issues similar to those raised in this dispute. Contracting Parties to GATT 1947 and WTO Members had expressed various views on some of such issues in the relevant bodies, but those views remained as such. The Philippines considered that, short of an authoritative

[181] For example, it would not be necessary or adequate that an anti-dumping measure of a member of the customs union be introduced automatically in the other members simply because they formed a customs union.

interpretation by the Members themselves, this was a timely opportunity for a rules-based analysis of the relevant provisions of Article XXIV of GATT.[182]

7.31 The Philippines had opted to participate as a third party primarily on the basis of its legitimate trade interest in exports of textile and clothing products to Turkey. In addition, the Philippines realized that the broader systemic implications of the issues raised were indeed far-reaching and delved into core principles which were the very foundation of the WTO itself.

2. Articles XI and XIII of GATT and Article 2 of the ATC

7.32 The Philippines submitted that the promulgation and imposition of the QRs established by Turkey as of 1 January 1996 on imports into its territory of a broad range of textile and clothing products, applicable only on imports of some Members, including India and the Philippines, were *prima facie* violations of Articles XI:1 and XIII:1 of GATT since:

(i) the restrictions were in the nature of proscribed "prohibitions and restrictions" in the sense of Article XI:1 of GATT;

(ii) Turkey did not cite the existence of any of the situations specified in Article XI:2 of GATT under which the prohibitions and restrictions otherwise proscribed under Article XI:1 may be imposed; neither did it attempt to establish that it had complied with any of the conditions specified thereunder; and

(iii) Turkey did not attempt to establish that the restrictions were applicable to imports of textile and clothing products from all Members, in accordance with provisions in Article XIII:1 of GATT; on the contrary, as part of its affirmative defense, it confirmed that the restrictions were not applied against the importation of like products from, at the very least, the EC Member States.

7.33 The Philippines also considered that, since Turkey had no restrictions in force as of 1 January 1995 and thus did not so notify under Article 2.1 of the ATC, Turkey's quantitative limitations on imports of textile and clothing products were proscribed "new restrictions", for purposes of Article 2.4 of the ATC. In the context of Article 2.4 of the ATC, Turkey did not attempt to establish that its restrictions were imposed under ATC provisions within the exceptions provided for, but invoked Article XXIV of GATT as a "relevant GATT 1994 provision" justifying its restrictions.

7.34 The Philippines submitted that Article XXIV was not a "relevant GATT 1994 provision" for purposes of Article 2.4 of the ATC. "Relevant" qualified "GATT 1994 provisions". Based on the succeeding discussion, Article XXIV was not a "relevant" GATT provision. Article XXIV neither permitted Turkey to promulgate the measure nor to impose the restrictions. The "relevant" GATT provision was, and remained to be, Article XI, under which Turkey did not attempt to justify the restrictions.

7.35 Therefore, the promulgation of the measures and the imposition of the restrictions were *conclusively* in violation of Article 2.4 of the ATC. The Philippines noted that Turkey's defense was in the nature of an *affirmative defense*: Turkey admitted the violation of Articles XI and XIII of GATT and of Article 2.4 of the ATC, but attempted to exonerate itself on the basis of Article XXIV.

[182] At present, in essence, WTO Members were still going through the process of acclimatising themselves from a *pragmatic, diplomacy-based* multilateral trading system to one avowedly *rules-based*. However, today, in the context of a rules-based system, pragmatism and diplomacy could have a proper role after, and only after, subsisting rules had been clarified.

3. Article XXIV of GATT

(a) Customs unions in context

7.36 The Philippines viewed a customs union as a paradox in the context of the WTO Agreement. When parties eliminated duties and other restrictive regulations of commerce on trade between their respective territories, "substantial reduction of tariffs and other barriers to trade" was achieved. However, this subverted the underlying contractual intent of "elimination of discriminatory treatment in international trade relations".[183] Non-discrimination was a core principle of the WTO Agreement, implemented in GATT through the twin rules of MFN and national treatment. Nevertheless, Article XXIV allowed the formation of customs unions and, as an exception to MFN, tolerated the resultant discrimination, but subject to compliance with certain conditions. Article XXIV could therefore only be construed strictly and narrowly, and all doubt resolved against the perpetuation of discrimination. A Member invoking Article XXIV had the burden of establishing strict compliance with the terms and conditions stated thereunder.

7.37 The Philippines noted that, in the examination of an arrangement purporting to be a customs union, it was pivotal to establish the specific date when it qualified, if at all, as a customs union. An agreement might have some of the features of a customs union as of any given date, but unless it fully qualified as such, the parties could not implement the (permitted) discriminatory aspects of the customs union without according the same treatment to third parties. The most that such an arrangement could be, if at all, was an agreement necessary for the formation of a customs union (a "leading-to agreement"). Without delving into whether or not a similar requirement was imposed on a full-fledged customs union, a leading-to agreement could not be implemented without the approval of third parties and without according them the opportunity to examine the arrangement and to make recommendations to the parties.

7.38 The Philippines recalled the provisions in Article XXIV:5 and XXIV:7 of GATT relating to the distinct requirements with respect to leading-to agreements. Referring to Article XXIV:10, the Philippines noted that the phrase "proposals which do not fully comply with the requirements of paragraphs 5 to 9" applied by definition to leading-to agreements, thereby expressly made subject to the approval of two-thirds of the Members; in the process of such approval, Members were to find that "such proposals lead to the formation of a customs union" in the sense of Article XXIV.

7.39 The Philippines argued that the letter and context of those provisions prohibited parties from implementing a leading-to agreement unless they had (i) notified the third parties; (ii) consulted them in a manner consistent with their substantive right to make recommendations and (iii) modified the leading-to agreement in accordance with such recommendations.[184] Aside from the letter and context of the relevant provisions, the broader context likewise supported the conclusion that parties could not implement a leading-to agreement without giving due regard to the right of third parties to be consulted. The Philippines noted that in a leading-to agreement, the union was not complete, there was no single customs territory, and the trade-off situation for permitting the resultant otherwise prohibited discrimination was not in place. To allow parties to implement discriminatory measures under such circumstances subverted the WTO Agreement. All doubts had to be resolved against the perpetuation of discrimination. Policy reasons would also support such a rule. Otherwise, while the core principle of non-discrimination was allegedly being pursued, a back-door for its subversion would be left wide open. The system, in effect, would be working against itself.

[183] See third paragraph of the preamble of the WTO Agreement.

[184] The word "maintain" in relation to the phrase "as the case may be" in the last sentence of Article XXIV:7(a) should be taken in the context of Article XXIV:7(c). Thus, once a leading-to agreement had passed scrutiny of third parties, the parties might not introduce a substantial change in the plan or schedule without again respecting the right of the former to be consulted.

7.40 The Philippines therefore considered that in the present dispute it was vital to determine the exact status of the arrangement between Turkey and the European Communities as of 1 January 1996, when Turkey's measures took effect.[185] For purposes of determining such status, what might have transpired thereafter was not relevant.

(b) Article XXIV:4

7.41 The Philippines noted that Members had established a standard, separate and distinct from the standard imposed under Article XXIV:5, for the implementation of the phrase "not to raise barriers to the trade of other contracting parties" in Article XXIV:4, since the preamble of the Understanding on Article XXIV provided, among others, that in the formation or enlargement of RTAs "the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members".

7.42 The Philippines considered that, as a general rule, parties were free to establish the conditions under which harmonization under Article XXIV:8(a)(ii) was to be achieved. In this instance, Turkey and the European Communities opted to impose the same restrictions subsisting in the European Communities to achieve harmonization, at least in respect of textile and clothing products. In the process of harmonization, Turkey and the European Communities had opted for the most restrictive and discriminatory option when other less restrictive and discriminatory options were equally available. Among other ways to achieve harmonization, the Philippines noted (i) the possibility of the European Communities maintaining or imposing QRs against Turkey, as expressly allowed by Article XXIV:8, without adversely affecting the status of the Turkey-EC relationship as that of a customs union; or (ii) the harmonization of EC policies to those of Turkey, by abolishing its global QRs altogether. Turkey was therefore in violation of Article XXIV:4 of GATT, in relation to the Understanding on Article XXIV.

(c) Article XXIV:5

7.43 The Philippines noted that the word "[a]ccordingly" at the start of Article XXIV:5 related and linked such paragraph to Article XXIV:4. As to the phrase "the provisions of this Agreement shall not prevent" in Article XXIV:5, it could not be interpreted to mean that Members becoming parties to a customs union were absolved from all of their obligations under the WTO Agreement and that the only provision thereunder which governed their conduct as Members was Article XXIV. If interpreted in the proper context, "the provisions of this Agreement" would exclusively refer to those provisions in GATT which otherwise would have prohibited the formation of a customs union. Derogation therefrom was a matter of necessity, but did not imply that derogation might also exist in respect of other provisions, based solely on the convenience of the parties.

7.44 The Philippines also noted that in the standard imposed under Article XXIV:5(a), which seemed less stringent than that under Article XXIV:5(b), the key phrases were "general incidence", "not on the whole higher or more restrictive" and "applicable in the constituent territories".

7.45 In the Philippines view, paragraph 2 of the Understanding on Article XXIV was determinative of the issue underlying Turkey's arguments in support of its alleged compliance with Article XXIV:5 (i.e. that the effects of the QRs imposed were balanced by and more than

[185] On 22 December 1995, barely a few days prior to its entry into force, Turkey and the EC informed the Members that "the final phase of the Customs Union between Turkey and the EC will enter into force on 1 January 1996, following the decision of the EC-Turkey Association Council of 22 December 1995" (document WT/REG22/N/1). Thus, it took the parties more than nine months to notify other Members, on a date within the holiday season. The text of the Decision was circulated to the Members on 13 February 1996 (document WT/REG22/1), more than one month after its entry into force. Turkey and the EC thus presented other Members with a *fait accompli*, a fact that might not be coincidental in light of the requirement of prior approval of a leading-to agreement.

compensated for by its lower tariffs now applicable to imports as a result of the formation of the customs union), by its separate treatment of (i) duties and other charges, and (ii) other regulations of commerce for which quantification and aggregation were difficult.[186] This view was further supported by the context of other relevant provisions:

(i) According to paragraph 6 of the Understanding on Article XXIV, Turkey had no right to demand or to expect compensatory adjustment from other Members as a result of the "reduction of duties consequent upon the formation of a customs union". There was thus no basis whatsoever for Turkey to demand or to impose compensatory adjustment on other Members by way of the sufferance of the restrictions imposed.

(ii) As provided in Article XXIV:6, compensatory adjustment applied only to increases in rates of duties, and was likewise in the form of the reduction of duties. There was no basis for a compensatory adjustment for QRs and other regulations of commerce for which quantification or aggregation was difficult.

7.46 The Philippines considered that at issue in the present dispute was whether or not the general incidence of the "other regulations of commerce" was "more restrictive", in the sense of Article XXIV:5(a). Properly assessed as an individual measure pursuant to paragraph 2 of the Understanding on Article XXIV, the option chosen by Turkey and the European Communities was the most restrictive and discriminatory of the options available, since it had resulted in the extension to Turkey of the territorial application of QRs previously imposed solely in the territory of the European Communities. The reduction in the general incidence of some or even all duties which might result from the Turkey-EC customs union was irrelevant for purposes of the dispute.

7.47 The Philippines, noting that the import statistics presented by Turkey in an attempt to establish that its present regime was less restrictive were irrelevant, argued that nullification or impairment sufficed.[187]

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[186] Paragraph 2 of the Understanding on Article XXIV distinguished the assessment of the general incidence of the duties from that of the general incidence of other regulations of commerce. In its first sentence, the first part ("The evaluation....customs union") pertained to the evaluation of the "general incidence of the duties *and* other regulations of commerce" (emphasis added), with reference to the corresponding condition in Article XXIV:5(a); the second part ("shall in respect of duties and charges"), in relation to its first part, qualified the phrase thereafter as relating exclusively to the evaluation of "duties and charges"; the last part, in relation to the first two parts, prescribed the basis for the evaluation of the general incidence of duties. The second, third and fourth sentences ("This assessment ... applied rates of duty") specified detailed rules for the "overall assessment" sought. The last sentence ("It is recognized that for ... may be required") referred solely to "other regulations of commerce for which quantification and aggregation are difficult" as a category distinct from objectively quantifiable "duties and charges", and provided that in respect of such regulations, the "examination of individual measures … may be required". Ordinarily, the word "may" denoted being permissive, but when qualified by a situation or condition (in this instance, "regulations of commerce …") and that situation or condition obtained, it could acquire a mandatory tenor; in this instance, particularly more so in light of the other provisions of paragraph 2 of the Understanding on Article XXIV.

[187] "In general international law, material damage is neither a constitutive element of an internationally wrongful act nor a requirement of state responsibility. GATT dispute settlement practice likewise recognizes that the GATT inconsistency of a trade measure, and nullification or impairment in terms of GATT Article XXIII, do not depend on damage" (E.U. Petersmann, The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement, 1997, p. 136). While this is in the chapter entitled "Non-Violation and Situation Complaints in GATT/WTO Law", the quotation relative to material damage as a (non-)constitutive element of an internationally wrongful act and a non-requirement of state responsibility is nevertheless appropriate.

Prof. Petersmann further states: "As stated in the GATT panel report adopted by the GATT Council on 17 June 1987 concerning 'US Taxes on Petroleum', 'the impact of a measure inconsistent with the General Agreement is not relevant for a determination of nullification or impairment' because the function of most

7.48 The Philippines also submitted that, for purposes of determining the adverse (more restrictive) effects of Turkey's restrictions, the relevant market was that of Turkey *and* the European Communities. Turkey's restrictions were imposed purportedly as a necessary element in the formation of a customs union with the European Communities. As a result of the alleged customs union, Turkey's competitive advantage as a major exporter of textile and clothing products[188] had been unduly enhanced *vis-à-vis* other Members: while Turkey's textile and clothing products entered the European Communities duty-free and without the burden of QRs, other Members, including India and the Philippines, now had to compete with Turkey in the EC market bearing the dual burden of both duties and QRs. While the relatively lower EC tariffs for such products (independently of the customs union with Turkey) might have improved the ability of other Members to compete with EC domestic producers, the alleged customs union placed them at a disadvantage *vis-à-vis* Turkey. In the Philippines' view, such potential benefits had therefore been nullified or impaired and EC commitments in its Schedules under Article II were rendered academic *vis-à-vis* other Members, at least in respect of textile and clothing products and in light of Turkey's discriminatory advantage.

7.49 The Philippines concluded that the promulgation of the Turkish measure and imposition of the restrictions were in violation of Article XXIV:5(a) because, as a result thereof, the general incidence of regulations of commerce were on the whole more restrictive.

(d) Article XXIV:8

7.50 The Philippines noted that there were only two essential requirements in Article XXIV:8(a), to characterize an arrangement between two or more customs territories as that of being a customs union. In respect of the requirement in Article XXIV:8(a)(i), derogation from the MFN obligation under Article I was needed to allow parties to eliminate duties and other restrictive regulations of commerce among themselves without according the same treatment to third parties. In respect of the requirement in Article XXIV:8(a)(ii), derogation from the obligations under Article II was necessary to allow parties to harmonize duties and charges, subject to the provisions of Article XXIV:(6) in relation to Article XXVIII and of Article XXIV:(5)(a) in relation to paragraph 2 of the Understanding on Article XXIV.

7.51 The Philippines argued that, however, in respect of the requirement of harmonization of other regulations of commerce, derogation from Articles XI and XIII, among others, was not necessary. Even the parties, as among themselves, could impose measures authorized under the Articles bracketed in Article XXIV:8(a)(i), among which were Articles XI and XIII. If the parties could impose such measures among themselves, their imposition towards third parties in the guise of harmonization was likewise not necessary.

7.52 The Philippines therefore submitted that the phrase "the provisions of this Agreement shall not prevent" in Article XXIV:5 did not exempt parties from complying with all other relevant provisions of the WTO Agreement, including GATT, and more particularly the provisions of the Articles bracketed in Article XXIV:8(a)(i), including Articles XI and XIII.

GATT rules (such as Article I-III and XI) is to establish conditions of competition and to protect trading opportunities, and violations of GATT rules are presumed to adversely affect these conditions of competition." The footnote to the above statement reads as follows: "See the GATT panel report in BISD 34S/135, 156, 158. See also the GATT panel report adopted on 25 January 1990, on EEC Subsidies Paid to Processors of Oilseeds … (BISD 37/S86, 125) [the] panel report emphasizes 'that the CONTRACTING PARTIES have consistently interpreted the basic provisions of the General Agreement on restrictive trade measures as provisions establishing conditions of competition', and that 'nullification or impairment of benefits' depends therefore on *adverse changes in competitive conditions and not on an actual decline in volumes of trade*" (emphasis added).

[188] In 1997, textile and clothing products constituted 41.4 per cent of Turkey's entire manufacturing exports. See the *TPR Secretariat Report on Turkey*, p. 117.

7.53 The Philippines considered that the formation of a customs union did not *per se* result in the merger of the legal personalities of the parties; it did not create a *successor entity* assuming the rights and obligations of the parties as Members. Members maintained their standing as such and retained their corresponding rights and obligations.

7.54 The Philippines argued that the measures permitted under the bracketed Articles disclosed at least a common feature in that the grounds upon which the imposition of the measures was permitted were specific to the Member concerned. It illustrated its argument recalling the texts of Articles XI, XII and XX.[189] It noted, for instance, that there was no basis, in fact and in law (positive law under the WTO Agreement), for a party to a customs union to claim that, for example, the existence of a critical food shortage or a state of serious decline in monetary reserves in one of the parties likewise constituted its own critical food shortage or monetary reserves crisis. The grounds were specific to the party concerned, and the corresponding right to impose a measure permitted under the bracketed Articles, including Articles XI and XIII, likewise pertained exclusively to such party.

7.55 The Philippines therefore submitted that neither the grounds upon which the European Communities had relied in justifying its QRs,[190] nor the corresponding right to impose QRs were assignable to Turkey, whether voluntarily or by operation of law. While it might be *convenient* for parties (whether for procedural reasons or, more substantively, for purposes of securing undue advantage in competition) to adopt the same measures permitted under the bracketed Articles (including Articles XI and XIII) towards the trade of third parties, such convenience could not prevail over the specific requirements under those Articles.

7.56 The Philippines considered that, in accordance with the ordinary meaning of Article XXIV:8 (a)(i), *all* duties and other restrictive regulations of commerce (except those authorized under the Articles specified within brackets) should have been eliminated with respect to substantially all trade between Turkey and the European Communities. It noted, however, the following:

(i) Paragraph 2 of Article 44 of Decision 1/95 provided, among others, that "[t]he modalities of implementation of anti-dumping measures set out in Article 47 of the Additional Protocol remain in force". Thus, Turkey might impose anti-dumping measures against the European Communities, and vice versa.[191] Article VI of GATT, governing anti-dumping measures (i.e. restrictive regulations of commerce) was not one of the bracketed Articles.

(ii) Article 34 of Decision 1/95 in relation to Article 38 effectively allowed Turkey and the European Communities to impose countervailing measures against each other.

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[189] Article XI referred to "Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products *essential to the exporting contracting party*"; Article XII dealt with "Import restrictions instituted, maintained or intensified … *by a contracting party*... to forestall the imminent threat of, or to stop, as serious decline *in its monetary reserves* …"; and Article XX stated: "… nothing in this Agreement shall be construed to prevent the adoption or enforcement *by any contracting party* of measures … relating to the conservation of exhaustible natural resources if such measures are *made effective in conjunction with restrictions on domestic production or consumption* …" (emphasis added).

[190] Since QRs imposed by the EC were not at issue in this dispute, it could only be presumed that they were based on grounds specified under relevant provisions of the WTO Agreement, or at least were in force on the basis of the tolerance of Members. In any event, the grounds and the corresponding right to impose the appropriate measure(s) were specific to each Member. As such, they were beyond the commerce of Members, not assignable, not capable of being appropriated by others. Neither was the tolerance of Members.

[191] This was confirmed in the *TPR Secretariat Report on Turkey* (para. 11, p. xii) and in Annex II of the *Communications from the Parties to the Customs Union*, WT/REG22/5, dated 30 October 1996, containing a list of "Anti-Dumping and Countervailing Measures applied by the European Union on Turkish Products" and "Anti-Dumping Duties applied by Turkey" on products of some EC Member States (see also in p. 4 of that same document, reference by the parties to Article 44 of the Decision).

Article VI of GATT, governing countervailing measures (i.e. restrictive regulations of commerce) was not one of the bracketed Articles.[192]

(iii) Articles 32 and 33 of Decision 1/95, in relation to Article 38, effectively allowed Turkey and the European Communities to impose "appropriate measures" *vis-à-vis* each other on the basis of practices which "causes or threatens to cause serious prejudice to the interest of the other Party or material injury to its domestic industry".[193] "Appropriate measures" was broad enough as to cover any measure, including other restrictive regulations of commerce (in addition to anti-dumping and countervailing measures). It could thus include "emergency action" under Article XIX of GATT, likewise based on injury to domestic industry. Article XIX, authorizing such action (i.e. a restrictive regulation of commerce) was not one of the bracketed Articles.

(iv) In Article 63 of Decision 1/95, the parties confirmed "that the mechanism and modalities of safeguard measures provided for in Article 60 of the Additional Protocol remain[ed] valid". Turkey and the European Communities thus retained the right to impose such "safeguard measures" against each other on the grounds of serious disturbances occurring in a sector of economic activity; threat to external financial stability; or difficulties which had the effect of altering the economic situation of any of their respective areas. Such grounds were much broader than those upon which measures under the bracketed Articles might be imposed. Moreover, such "safeguard measures" were likewise broad enough to cover every conceivable restrictive regulation of commerce.

(v) According to paragraph 1 of Article 8 of Decision 1/95, Turkey should incorporate into its internal legal order the Community instruments relating to the removal of technical barriers to trade. As of 1 January 1996 therefore, Turkey had not eliminated regulations relative to technical barriers to trade *vis-à-vis* the European Communities. Regulations relative to technical barriers to trade were not among those contemplated in the bracketed Articles, but such regulations could have the effect of being restrictive regulations of commerce.

(vi) According to Article 7 of Decision 1/95, Turkey and the European Communities retained the right to impose QRs (i.e. restrictive regulations of commerce) on each other on the ground of "public security", among others. Article XXI of GATT, governing the so-called "security exemptions" was not one of the bracketed Articles.

7.57 The Philippines submitted that the arrangement between Turkey and the European Communities did not qualify as a customs union under Article XXIV:8(a)(i) because, among others, all *restrictive regulations of commerce* had not been eliminated with respect to substantially all the trade between Turkey and the European Communities. Therefore, the promulgation of the measure by Turkey and the imposition of the restrictions could not be justified because the Turkey-EC arrangement had not resulted in the formation of a customs union.

7.58 The Philippines submitted further that the arrangement between Turkey and the European Communities did not qualify as a customs union under Article XXIV:8(a)(i) because, among others,

[192] Article 37 of Decision 1/95 provided that in the absence of rules which are to be adopted by Turkey and the EC for the implementation of Articles 32, 33 and 34 and related parts of Article 35, "the provisions of the GATT Subsidies Code shall be applied as the rules for the implementation of Article 34" (see WT/REG22/1).

[193] See para. 1 of Article 32 and para. 1 of Article 33 of Decision 1/95 (WT/REG22/1).

duties had not been eliminated with respect to substantially all the trade between Turkey and the European Communities.

7.59 The Philippines considered that, in interpreting the phrase "substantially all" in Article XXIV:8 (a)(i), the "ordinary meaning … in their context and in the light of its object and purpose" was determinative, as the basic rule of treaty interpretation contained in Article 31.1 of the VCLT. It therefore noted that "substantially" was defined as "1. in a substantial manner; solidly; firmly; with strength. 2. to a substantial degree; specifically, (a) truly; really; actually; (b) largely; essentially; in the main".[194] "Substantially" thus meant "essentially" and its context was better understood in light of the object and purpose of:

(i) Article XXIV:8(a), which commenced by stating that a customs union should "be understood to mean the substitution of a single customs territory for two or more customs territories, so that …"; and

(ii) the preamble of the Understanding on Article XXIV, which contained the recognition that "… the contribution to the expansion of world trade that may be made by closer integration between the economies of the parties to such agreements … is increased if the elimination between the constituent territories of duties and other restrictive regulations of commerce extends to all trade, and diminished if any major sector of trade is excluded".

7.60 Thus, in the Philippines view, in applying the "substantially all" requirement, the focus should be more on what was excluded, since what was included should have been included *as a matter of course*. As to the exclusion, the Philippines proposed to at least test it against the criterion that it should not be indicative of the absence of the existence of a genuine substitution of a single customs territory for two or more customs territories. Otherwise, the possible contribution to the expansion of world trade that may be made by the closer integration between the economies of the parties would diminished, contrary to the underlying rationale for allowing, in this instance, exception from compliance with the MFN core principle.[195]

7.61 The Philippines also considered that, in applying the "substantially all" requirement, the meaning of the word "trade" in the phrase "the trade of the constituent territories ... all the trade in products....in such territories" was also germane. "Trade" was defined as "the act or business of exchanging commodities for other commodities or for money; the business of buying and selling; commerce; barter".[196] The synonyms of "trade" were: "business, traffic, sale, exchange".[197] "Trade" was thus used in the phrase in the broad generic sense, and there was no basis in qualifying it with

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[194] Websters, New Twentieth Century Dictionary, unabridged, 2nd edition.

[195] In this regard, "substantially all" could not necessarily be assessed quantitatively, i.e.: $100 * \frac{x}{y} = z$

where x =product lines on which duties and other restrictive regulations were eliminated in intra-trade, y=product lines in potential intra- trade, and z=resulting percentage

If z equalled 100%, it could of course be concluded that the "substantially all" requirement had been more than fully complied with. If z was less than 100%, regardless of how close it might be to 100%, it would nevertheless be proper to apply the criterion on what is excluded.

y was a sensitive factor. In the context of a genuine customs union, y was the totality of products which could *potentially* be traded between the parties, not *actual* products traded. The latter construction would perpetuate discrimination. For example, assuming that Member A produced and traded in products A-1 to A-10, and party B in products B-1 to B-10; assuming further that Member A exported only product A-1 to Member B, and that Member B exported only product B-1 to party A, if both parties were to eliminate duties and other restrictive regulations of commerce in trade between them in respect of products A-1 and B-1, the arrangement could not be characterized as a customs union; instead, it would be a "classic" discriminatory arrangement .

[196] Websters, New Twentieth Century Dictionary, unabridged, 2nd edition.

[197] Ibid..

"actual". This was the ordinary meaning in context, and in light of the object and purpose of Article XXIV (a single customs territory as trade-off for allowing exceptions from compliance with MFN obligations). Trade therefore included all *potential* trade, and was not confined to *actual* trade. Otherwise, the arrangement would not be that of a customs union; rather, it would be a classic discriminatory arrangement.

7.62 The Philippines then recalled that the European Communities was composed of three communities, namely: the ECSC, the EEC and the European Atomic Energy Community (EURATOM), each dealing with certain specific products and matters. The Treaties establishing the ECSC[198] and EURATOM[199] dealt with, among others, duties and other regulations of commerce applicable to the products they respectively covered. Turkey claimed to have entered into a customs union with the European Communities, whose Member States were, at the same time, parties to the ECSC and EURATOM. However, the ECSC and EURATOM respectively covered trade in products which were excluded from the coverage of the Turkey-EC arrangement under Decision 1/95, as the parties themselves disclosed.[200] The Philippines further noted that Decision 1/95 itself excluded agricultural products and the agricultural component of processed agricultural products from its coverage.[201]

7.63 The Philippines considered that it was unquestionable that agriculture was a major sector,[202] that the ECSC also covered a major sector,[203] and that products covered by the EURATOM Treaty also comprised a major sector.

7.64 The Philippines therefore submitted that the arrangement between Turkey and the European Communities did not qualify as a customs union under Article XXIV:8(a)(i) because, among others, all duties had not been eliminated with respect to substantially all the trade between Turkey and the European Communities.

7.65 It also submitted that the arrangement between Turkey and the European Communities did not qualify as a customs union under Article XXIV:8(a)(ii) because, among others, Turkey and the European Communities did not apply "substantially the same duties and regulations of commerce" to the trade of third parties in the categories of products covered by the ECSC and the EURATOM Treaties, and in agricultural products.

7.66 The Philippines added that even with respect to products which were supposedly part of the customs union, Turkey and the European Communities did not apply "substantially the same duties

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[198] The ECSC Treaty was signed in Paris on 18 April 1951 (Paris Treaty establishing the European Coal and Steel Community). Its Article 4 provided, among others: "The following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: (a) import and export duties, or charges having equivalent effect, and QRs on the movement of products; …".

[199] Article 93 of the EURATOM Treaty provided, among others, for the abolishment of "all customs duties on imports and exports or charges having equivalent effect, and all QRs on imports and exports" in respect of selected listed products.

[200] See WT/REG/22/5, para. I:3. A Free Trade Agreement between Turkey and the ECSC entered into force on 1 August 1996 (WT/REG22/1/Add.1).

[201] The provisions of Decision 1/95 on the elimination of customs duties and charges and the elimination of QRs or measures having equivalent effect apply only to goods in Chapter I. Agricultural products were dealt with in Chapter II (see WT/REG22/1). In this regard, the *TPR Secretariat Report on Turkey* (para. II(I) 1., p. 16) confirmed that "there is no firm timetable of the integration of agriculture" in the Turkey-EC arrangement.

[202] "The agriculture sector accounts for 14% of GDP and employs about half of the labour force" of Turkey (*TPR Secretariat Report on Turkey*, para. 17, p. xiii).

[203] See Annex I of WT/REG22/1/Add.1, for the list of products covered. See also paras. 42, 44, 45, 76 and 77 of the *TPR Secretariat Report on Turkey*, as illustrative of the product coverage.

and regulations of commerce" to third parties' trade in certain products, i.e. 290 items.[204] In addition, under Article 15 of Decision 1/95, Turkey (in agreement with the European Communities) retained the right to impose higher duties on third parties' trade and in respect of potentially all products covered by the alleged customs union.

7.67 The Philippines submitted that, therefore, the promulgation of Turkey's measures and the imposition of the restrictions could not be justified because the Turkey-EC arrangement *had not* resulted in the formation of a customs union.

7.68 On the question whether the territory of Turkey and the territory of the European Communities constituted a single customs territory, as provided for in Article XXIV:8(a), the Philippines noted that "single customs territory" implied genuine economic integration. It was only under this circumstance when exception from compliance with the MFN obligation was permissible. In the absence of genuine economic integration, an arrangement characterized by the elimination of some but less than all or substantially all duties and regulations of commerce on trade between the parties and/or harmonization in respect to some but less than all or substantially all of their trade regimes *vis-à-vis* third parties was merely a preferential trading arrangement in violation of MFN, regardless of the manifested intention of the parties. [205]

7.69 In regarding the Turkey-EC arrangement in perspective, the Philippines noted that Turkey and the European Communities had maintained the right to impose restrictive regulations of commerce on each other beyond the measures authorized under Article XXIV:8(i), including anti-dumping, countervailing, and safeguard measures, which were similarly based on the concept of injury to domestic industry (or serious injury in the case of safeguard measures). However, not a single measure permissible under any of the bracketed Articles was based on such concept.[206] It was thus conceptually irreconcilable that a part of a single customs territory could impose restrictive regulations of commerce on other parts on that basis, since a single customs territory could not impose anti-dumping duties, countervailing measures, and safeguard measures on its own self.

7.70 The Philippines noted further that, while the reasons why the products covered by the ECSC and EURATOM Treaties were not covered by the alleged customs union between Turkey and the European Communities were not material in this dispute, perhaps more revealing was the reason cited by Turkey and the European Communities for the non-inclusion of agricultural products in the alleged customs union, that is:

> "The Decision envisages an additional period for the achievement of free movement of agricultural products between the Parties, on account of the different policies and trade regimes pursued by each. The adoption of the Common Agricultural Policy measures of the EC by Turkey was determined as a prerequisite condition for the establishment of free movement of such products…"[207]

7.71 The Philippines was of the view that the formation of a customs union between two sovereign states certainly did have economic consequences, the parties usually expecting that it would likewise be of benefit to their respective economies. However, compliance with Article XXIV was

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[204] This was confirmed by the *TPR Secretariat Report on Turkey*, para. 22.

[205] "The pivotal requirement of Article XXIV is that *the union be complete, freeing substantially all internal trade.* The main reason for that requirement is non-economic. The requirement exists primarily to discourage governments from using 'customs unions' as an excuse to engage in ad hoc discriminations for short-run advantage. It also seeks to create a stable end situation upon which other governments can plan, and can negotiate." (emphasis added), in Robert E. Hudec, GATT Legal System and World Trade Diplomacy, (Butterworth Legal Publishers), 2nd edition, p. 221.

[206] This is but a logical and necessary consequence of the formation of a customs union. In a genuine customs union, there is only one domestic industry - that of the Parties', collectively.

[207] WT/REG/22/5, para. 8.

inextricably based on the political will to establish a genuine single customs territory, regardless of the economic consequences. However, in this regard, the Philippines submitted that the attendant circumstances analyzed in the preceding paragraphs and the joint Turkey-EC declaration just quoted above were (perhaps) indicative of the deficiency of genuine political will to establish a likewise genuine single customs territory between Turkey and the European Communities, notwithstanding manifested intentions.

4. Conclusions

7.72 The Philippines submitted that the promulgation of the measure by Turkey and the imposition of the restrictions were in violation of Articles XI and XIII of GATT and of Article 2.4 of the ATC, and were not justified under Article XXIV of GATT.

7.73 The *prima facie* violation of Articles XI and XIII of GATT and of Article 2.4 of the ATC was not disputed by Turkey. The Philippines considered that Turkey's defense was based on the argument that the territories of Turkey and the European Communities formed one single customs union and that the promulgation of the measure by Turkey was but part of the process of harmonization under Article XXIV:8(a)(ii). In the Philippines' view, even assuming that the Turkey-EC arrangement qualified as a customs union under Article XXIV:8, the promulgation of the measure and the imposition of the restrictions were in violation of Article XXIV:4, in relation to the Understanding on Article XXIV,[208] since other less restrictive and less discriminatory options were available to Turkey and the European Communities to achieve such harmonization. Furthermore, such promulgation and imposition were likewise in violation of Article XXIV:5, in relation to the Understanding on Article XXIV, as the general incidence of regulations of commerce applicable in the constituent territories were on the whole more restrictive compared to that prevailing prior to the formation of the alleged customs union.

7.74 The Philippines considered that, in any event, Turkey could not invoke (the excuse of) harmonization under Article XXIV:8(a)(ii), because the territory of Turkey and the territory of the European Communities did not constitute a genuine single customs territory, the Turkey-EC arrangement having not established the existence of a customs union between the parties, neither in relation to the required elimination of duties and other restrictive regulations of commerce on intra-trade nor the application of substantially the same duties and other regulations of commerce to the trade of third parties.

D. THAILAND

1. Arguments

7.75 Thailand submitted that the imposition of the QRs by Turkey was inconsistent with its obligations under the provisions of Article 2.4 of the ATC and under the provisions of Article I:1, Article XI:1 and Article XIII:1 of GATT. Thailand submitted further that these inconsistencies could not be justified by the provisions of Article XXIV:5(a) and/or Article XXIV:8(a)(ii).

7.76 Thailand noted that the imposition of QRs by Turkey pursuant to Decision 1/95 were new restrictions prohibited by Article 2.4. Turkey's measures did not fall within the exception provisions of the ATC to the prohibition of new restrictions, namely the "transitional safeguard" (Article 6), since Turkey did deliberately not invoke this mechanism for its justification. Turkey, instead, invoked the provisions of Article XXIV:5(a) and Article XXIV:8(a)(ii) of GATT as its defense. The question

[208] Such harmonization was contrary to the standard "not to raise barriers to the trade of other contracting parties with such territories" in Article XXIV:4. Turkey and the EC did not likewise "to the greatest possible extent avoid creating adverse effects on the trade of other Members" (see preamble of the Understanding on Article XXIV).

to be considered in this regard was therefore whether those provisions fell within the meaning of the "relevant GATT 1994 provisions" provided for in Article 2.4.

7.77 Thailand submitted that the terms "relevant GATT 1994 provisions" in Article 2.4 of the ATC related only to the provisions of the GATT that pertained to permissible QRs, such as Article XII and Article XX. By virtue of footnote 3 to Article 2.4 of the ATC, however, the phrase did not include the provisions of Article XIX in respect of the products not yet integrated into GATT. It had nothing to do nor did it cover the provisions of Article XXIV. The imposition of QRs by Turkey, therefore, did not fall within the exception provisions of the relevant GATT provisions.

7.78 Thailand considered that provisions of the ATC and the GATT had to be interpreted "in accordance with customary rules of interpretation of public international law", as instructed by the provisions of Article 3.2 of the DSU, of which the cardinal rule of interpretation was enshrined in Article 31 of the VCLT.

7.79 In this regard, Thailand noted that the context of Article 2.4 was Article 2 itself and the ATC as a whole. Article 2 dealt with the elimination of existing QRs and the prohibition against the introduction of new ones in textile and clothing products as specified in the ATC Annex, which were in the transitional process of being integrated into GATT. As to the ATC, it was the international agreement "to be applied by Members during a transition period for the integration of the textiles and clothing sector into GATT 1994".[209] Article 2 and the ATC itself did not at all deal with nor had anything to do with customs unions or free trade areas as contained in GATT.

7.80 Thailand noted further that the primary object and purpose of the ATC were the integration of textiles and clothing sector into the GATT, the strengthening of GATT rules and disciplines, and trade liberalization, as evident from the preambular first paragraph of the ATC.[210] Consequently, unless otherwise clearly provided for by the ATC or the GATT as permissible, any new QRs on any other basis, including on the basis of the formation of customs unions under Article XXIV of GATT, could not legitimately be made. To allow any other different interpretation would impair or nullify the objects and purposes of the ATC.

7.81 Thailand added that this interpretation was consistent with the purpose of a customs union or of a free trade area as provided for in Article XXIV:4, of , *inter alia*, "not to raise barriers to the trade of other contracting parties with such territories". Even assuming, *arguendo*, that the terms "relevant GATT 1994 provisions" included Article XXIV, this Article did not authorize QRs in violation of Articles I, XI, and XIII of GATT.

7.82 Thailand noted that Turkey's had asserted that its imposition of QRs for the furtherance of its objective of the formulation of the customs union with the European Communities was allowed by Article XXIV:5(a) and Article XXIV:8(a)(ii) of GATT, in particular the terms "other regulations of commerce". This assertion was in part based on the allegation that Turkey's association with the European Communities had never been challenged in the GATT or the WTO, and no recommendation was addressed to the parties to the Agreement under Article XXIV:7(b).

7.83 Thailand considered such arguments as factually incorrect, without a basis under the GATT, and contrary to the GATT jurisprudence. The consistency of the Treaty of Rome and the Ankara Agreement with the provisions of Article XXIV had continually been contested by contracting parties to the GATT and Members of the WTO since the initial examination of the Treaty of Rome in 1957.

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[209] Article 1.1 of the ATC.

[210] "... negotiations in the area of textiles and clothing shall aim to formulate modalities that would permit the eventual integration of this sector into GATT on the basis of strengthened GATT rules and disciplines, thereby also *contributing to the objective of further liberalization of trade*" (emphasis added).

7.84 In this respect, Thailand submitted that GATT jurisprudence, as reflected by a number of reports of Working Parties and of panels examining issues pertaining to Article XXIV, clearly substantiated that the provisions of Article XXIV were not the exception to, nor the justification or waiver for the institution or maintenance of any form of QRs. This point was illustrated by the following examples:

(i) During the examination of the conformity of the Treaty of Rome with the provisions of Article XXIV, in Sub-Group B (QRs) of the relevant Committee, the representatives of the parties asserted that they could, by virtue of the provisions of Article XXIV:5(a) in combination with the provisions of Article XXIV:8(a)(ii), impose QRs for balance of payment reasons against other contracting parties while impose none of such restrictions among themselves. However, most members of the Sub-Group opposed strongly to such assertion and interpretation.[211]

Sub-Group C (Trade in Agricultural Products) came to the conclusion that in the view of the majority of members of the Sub-Group the Treaty of Rome was not consistent with the provisions of Article XXIV and noted that the failing of making recommendations did not mean or could be interpreted to mean that the Treaty of Rome and the measures thereof were consistent with those provisions.[212]

(ii) In discussions within the Working Party on the Accession of Greece to the European Communities, the question of the compatibility of the Treaty of Rome was again raised.[213] In addition, a large number of delegations had raised several questions and strongly objected to the actions of Greece which, as a result of the accession liberalized the existing QRs to EC members only (without extending the benefits of such liberalization to any other contracting parties), while at the same time imposing new QRs to these contracting parties. In the view of these delegations, the said actions of Greece were in contravention with the provisions of Article XI and XIII, and were not in conformity with the provisions of Article XXIV since these provisions were not at all the exception of nor the justification or waiver for the GATT prohibition of QRs.[214]

(iii) During the discussions within the Working Party on the Accession of Portugal and Spain to the European Communities, many delegations expressed the view that Article XXIV was at most an MFN exception and, in particular, not an exception to provisions concerning QRs, namely Articles XI, XII and XIII. They also stated that Article XXIV, being the exception to the cardinal MFN principle, had to be interpreted very restrictively. It was important to note at this juncture that the European Communities themselves did not deny the validity of those delegations' view.[215]

7.85 From the above examples, Thailand inferred that it was generally accepted, even by the European Communities, that the provisions of Article XXIV were not the exception to nor the justification or waiver for the institution or maintenance of any form of QRs.

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[211] See *Reports on the European Economic Community*, adopted on 29 November 1957, BISD 6S/76-81, paras. B.4 to B.8.

[212] See BISD 6S/88-89, para. 14 and especially para. 15.

[213] See BISD 30S/174, para. 14.

[214] The questions and objections referred to above were evident in many paragraphs of the Report. See, for instance, BISD 30S/190, paras. 51, 55 and 60.

[215] See BISD 35S/318, *inter alia* paras. 19, 35, 39 and 45.

7.86 Thailand stressed that, even if Turkey itself had on several occasions, including the present case, claimed that it could impose or maintain QRs on any other contracting parties except the European Communities by virtue of the provisions of Article XXIV, such a claim had never been accepted; on the contrary, it had been strongly objected to by virtually all the contracting parties. Thus, for example, in the context of the examination of the Ankara Agreement, the Report of the Working Party concluded, *inter alia*, that "[s]ome members of the Working Party … criticized the discriminatory removal of QRs and import deposits".[216] Another example could be seen in the Working Party which examined the Additional Protocol to the Ankara Agreement, where Turkey claimed that it had the right to maintain the existing QRs or to impose new ones by virtue of the provisions Article XXIV in combination with the consideration that Turkey was the developing country and thereby should be provided with special leniency.[217]

7.87 Thailand observed in this context that none of Turkey's Agreements with the European Communities had been approved by the examining Working Parties as consistent with the provisions of Article XXIV. The legal status of these Agreements and their conformity with the provisions of Article XXIV remained open in the same manner as the Treaty of Rome and its related Agreements. Therefore, the examination of whether the Agreement for the formation of a Customs Union between Turkey and the European Communities was in accord with the provisions of Article XXIV had not only to be considered in the light of the provisions of Article XI, XIII and XXIV, but also be measured in view of the fact that the legal status of the previous Turkey-EC Agreements and their conformity with the provisions of Article XXIV remained inconclusive.

7.88 Thailand noted that, in the present case, despite the GATT rules and the GATT jurisprudence delineated above, Turkey still claimed that it could impose or maintain quantitative restrictions to the importation of textiles and clothing from any other contracting parties except the European Union by virtue of the provisions of Article XXIV and the GATT jurisprudence, and that the practice of the contracting parties in the GATT had widened the scope of the terms "other regulations of commerce" in Article XXIV.5(a) and Article XXIV.8(a)(ii) to include quantitative restrictions. In Thailand's view, this claim was unfounded, and in fact a distortion of the GATT rules and jurisprudence. The GATT rules and jurisprudence were completely opposite to what Turkey had claimed.

7.89 Thailand also noted that the practice was not uniform in respect of the widening of the scope of the terms "other regulations of commerce" in Article XXIV:5(a) and XXIV:8(a)(ii). The European Communities and its partners once in a while had claimed that the terms covered QRs. However, a larger number of the contracting parties opposed to such a claim. In the view of the latter, the terms signified only to the matters such as customs procedures, grading and marketing requirements, and similar routine controls in international trade. In the Report of the Sub-Group B of the Committee on the EEC, it was clearly stated as follows:

> "Most members of the Sub-Group could not accept of the interpretation of the Six of paragraph 5(a). In their view the use of the term "regulations" in this paragraph and in paragraph 8(a)(ii) does not include QRs imposed for balance-of-payments reasons. An examination of the provisions of the Agreement indicates that the term "regulations" is consistently used to describe such matters as customs procedures, grading and marketing requirements, and similar routine controls in international trade. This interpretation is reinforced by the fact that in paragraph 8(a)(i) the term "regulation" is qualified by the word "restrictive" in the one instance where Article XXIV specifically refers to the balance-of-payments Articles. Moreover, the term "regulation" does not appear in the balance-of-payments Articles of the General Agreement. The General Agreement prohibits the use of QRs for protective purposes and permits their use only in exceptional circumstances and mainly to deal with balance-of-payment difficulties. Accordingly, the

[216] See BISD 19/108, para. 14.
[217] See BISD 21S/110-112, paras. 12 and 17.

> notion that paragraph 5(a) would require that temporary QRs should be treated in the same way as normal protective measures such as tariffs in determining the trade relations between countries in a customs union and third countries would be contrary to the basic provisions of the Agreement which preclude the use of QRs as an acceptable protective instrument."[218]

7.90 In this connection, Thailand emphasized that the GATT being an international agreement, it thereby was subject to the rules and principles of public international law, as instructed by the DSU Article 3.2. The VCLT Article 31 provided, *inter alia*, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose". In the light of these rules of interpretation, it was clear that the primary objective and purpose of the GATT, and in particular Article XXIV, was trade liberalization not trade restrictions, especially QRs. Therefore, if two or more interpretations of the GATT in general and Article XXIV in particular were possible, the one favouring trade liberalization should prevail.

7.91 Thailand added that in the presence of clear provisions of the GATT to the contrary, and in the absence of uniform interpretation and practice of the terms "other regulations of commerce ", subsequent interpretation and practice of a few countries which would benefit from such interpretation and practice was meaningless and completely lacked any legal validity. In addition, the said practice could in no way be treated as the customary rules under the GATT, since the two fundamental prerequisites for the formation of a customary rule, namely (i) the consistent and uniform practice of states and (ii) the psychological element that the practice is necessitated by the requirement of law ("*opinio juris sive necessitatis*") were lacking. The strong protest to such practice by many contracting parties of the GATT and Members of the WTO was clearly evident. For the same reasons, the lack of or infrequent protest to such interpretation and practice in the dispute settlement body of the GATT by the contracting parties could not be regarded as tacit agreement or acceptance of such interpretation and practice by all the contracting parties.

7.92 In this context, Thailand recalled a number of panel decisions supporting the assertions that Article XXIV provisions were not the exception to nor the justification or waiver for QRs; that the lack of or infrequent protest to the European Communities and associated members' interpretation and practice of the term "other regulations of commerce" did not mean or imply tacit agreement or acceptance of such interpretation and practice; and that QRs were possible only when they fully conformed to the permissible provisions of the GATT, such as Article XI, XII, and XIII.

7.93 Citing the case on *EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*,[219] Thailand recalled that the European Communities argued that the United States could not contest its preferential trade treatment on citrus products given to certain countries in the Mediterranean Region because the Working Parties which had examined the Treaty of Rome itself and other related agreements never gave any recommendation that these agreements were not in conformity with the provisions of Article XXIV, such non-recommendation constituting a tacit acceptance by the CONTRACTING PARTIES as a whole as well as the individual contracting parties that these agreements were in conformity with the provisions of Article XXIV. Such acceptance, in other words, applied *erga omnes*, and the United States could not circumvent its validity by means of the dispute settlement procedures under the provisions of Article XXIII. In response to this argument, the United States stated in paragraph 3.12 of the Report, *inter alia*, the following:

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[218] BISD 6S/78-79, para. 5.

[219] Panel Report (not adopted) on *EC - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region*, GATT document L/5776, of 7 February 1985.

> "... In no case did a working party unanimously agree that any agreement in question was compatible with the General Agreement. It was clear that the Council had been aware of the strong divergence of views within the working parties, and its adoption of the report should be viewed from this perspective. The failure of the CONTRACTING PARTIES to reject the agreements did not imply acceptance nor did it constitute a legal finding of GATT consistency with Article XXIV. The fact that the CONTRACTING PARTIES were aware that the EEC was going to implement the agreements could not be equated with approval. Similarly, the fact that these agreements had been in place for a number of years did not confer legitimacy. The pragmatic attitude the CONTRACTING PARTIES had adopted in their treatment of free-trade areas and customs unions did not envisage a loss of the right to subsequently challenge the legal validity of such agreements. The implication of the decision of the CONTRACTING PARTIES with respect to the Treaty of Rome was that, while the legal issues could not be fruitfully discussed at that stage, such legal issues could be raised at a later point in time. Moreover, as the EEC had pointed out itself, the decisions on customs unions and free-trade areas had been adopted on the explicit understanding that the legal rights of contracting parties under the General Agreement would not be affected. This clearly implied that the CONTRACTING PARTIES meant the right of individual contracting parties to challenge the consistency of the agreement with the requirements of Article XXIV to remain intact."[220]

7.94 The United States further argued, *inter alia*, that:

> "... it was customary in the GATT to refrain from raising legal principles in cases where a contracting party after taking into account overall economic interests and political concerns, was unsure that its trade interests would be adversely affected. Given this customary practice and the history of GATT consideration of these agreements, one could not characterize the failure to make recommendations under paragraph 7(b) as constituting approval by the CONTRACTING PARTIES."[221]

7.95 In so far as the right of a contracting party to challenge the conformity of the Treaty of Rome and its related agreements with the provisions of Article XXIV by the dispute settlement procedures under Article XXIII, the United States added, *inter alia*, as follows:

> "The United States replied that the consequence of the EC position was that a failure to assert legal rights immediately constituted a permanent bar to future legal challenge. It would penalize those contracting parties that waited to assert their legal rights until a specific trade problem occurred. If the EEC view was accepted, the result would be an immediate termination of the pragmatic approach which had been characteristic of the GATT. The GATT would not be well-served by the approach suggested by the EEC…"[222]

> "The United States argued that, whatever the scope of the Article XXIV: 7 procedures for the examination of interim agreements, the existence of these procedures in no way curtailed the general right of contracting parties to challenge the GATT-consistency of any measure under the procedures of Article XXIII. Neither the wording of Article XXIII nor the Understanding on Article XXIV Regarding Notification, Consultation, Dispute Settlement and Surveillance adopted by the CONTRACTING PARTIES in 1979 (BISD 26S/210) limited in any way the right of contracting parties to bring complaints under

[220] Ibid., para. 3.12, p. 38.
[221] Ibid., para. 3.94, p. 70.
[222] Ibid., para. 3.22, p. 40.

> Article XXIII, nor suggested that the applicability of Article XXIV was meant to be excluded."[223]

7.96 With respect to the cited arguments, Thailand noted that although the panel made an implicit conclusion to the effect that the legal status of the agreements in question remained open; however, it did not make a ruling on the arguments because the complainant, the United States, had not requested it to do so, nor was it proper for it to do so by itself, as can be seen, *inter alia*, in the conclusions of the Report:

> "Given the lack of consensus among contracting parties, there had been no decision by the CONTRACTING PARTIES on the conformity with Article XXIV of the agreements under which the EC grants tariff preferences to certain citrus products originating from certain Mediterranean countries, and therefore the legal status of the agreements remained open; …"

7.97 Thailand recalled in this connection the wording of paragraph 12 of the Understanding on Article XXIV and argued that, although the panel report in the above-referred case was not adopted by the CONTRACTING PARTIES as a whole due to the objection of certain contracting parties as could be expected, the juridical value of the panel's findings as well as the legal validity of the principles and rules of the GATT and international law behind and underpinning those findings on this particular point had not been impaired.

7.98 Thailand also mentioned that many GATT panels in the past, such as those on *Japan - Leather*[224] and in *EEC - Imports from Hong Kong*,[225] had confirmed that the fact that for a long time illegitimate practices of the contracting parties in violation of Article XI:1 of the GATT were not challenged under the GATT dispute settlement procedures, did not make them consistent with the GATT. In the latter case, the panel stated explicitly that:

> "... It recognized that restrictions had been in existence for a long time without Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties..."

7.99 Thailand also referred to the arguments of the parties to the dispute the *EEC - Bananas I*, noting that the findings of the panel in that case was important and pertinent to the present dispute. In that case, the legal regimes of the EEC Member giving preferential trade treatments to the African, Caribbean and Pacific Countries ("ACPs") were challenged by a number of Latin American contracting parties, on the grounds that, by imposing a zero per cent duty and no quota to the importation of bananas from the ACPs while imposing a 20 per cent duty and a range of quotas (or in some cases complete prohibition) to the importation of bananas from them, such regimes were in contravention with several provisions of the GATT, including in particular Article I, Article II, Article XI, Article XIII, and Article XXIV.[226]

7.100 Thailand noted that in that case the complainants argued in essence that Article XI was one of the cardinal principles of the GATT. It prohibited all forms of QRs not only because of their damaging effects on the quantities of the importation of certain goods, but also because of their distorting impacts upon the present and future markets of the importing contracting parties. The

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[223] Ibid., para. 3.26, p. 41.
[224] See Panel Report on *Japan - Leather*, para. 44.
[225] See Panel Report on *EEC - Imports from Hong Kong*, para. 28.
[226] See Panel Report on *EEC - Bananas I*.

effects and impacts of such QRs should not be gauged only from their names and appearances, but should also be measured from their practical and damaging effects on the importation of the goods. Therefore, it had always been upheld by many panels in the past that there were presumption against the legality of QRs, and it was the onus of the contracting parties who had undertaken such actions to rebut the presumption, such as by proving that these actions fell within the exceptions of the Article itself. In addition, economic, social, and historical factors were extraneous to the consideration of a panel established in accordance with the provisions of Article XXIII which had to consider only the relevant provisions of the GATT.

7.101 Thailand further noted that in that case the panel found the EEC Member States's QRs contrary to the provisions of Article XI:1 and not justified by the provisions of Article XI:2(c), and, more importantly, confirmed the GATT jurisprudence regarding the relationship between Article XI and Article XXIV, when it stated:

> "The Panel noted the argument of the EEC that the restrictions and prohibitions on imports of bananas, even if inconsistent with Article XI:1, were nonetheless consistent with the General Agreement because they were covered under the provisions of Article XXIV. The Panel noted that Article XXIV:5 to 8 permitted the contracting parties to deviate from their obligations under other provisions of the General Agreement for the purpose of forming a customs union or free-trade area, or adopting an interim agreement leading to the formation of a customs union or free-trade area, but not for any other purpose. *Article XXIV:5 to 8 therefore did not provide contracting parties with a justification for restrictive import measures as such*; it merely provided them - within the limits set out in this provision - with a justification for not applying to imports originating in such a union or area the restrictive import measures that they were permitted to impose under other provisions of the General Agreement. *The Panel therefore considered that the import restrictions on bananas could not be justified by Article XXIV*."[227]

2. Conclusions

7.102 Accordingly, Thailand submitted that the imposition of the QRs by Turkey was inconsistent with its obligations under the provisions of Article 2.4 of the ATC, the provisions of Article I:1, Article XI:1 and Article XIII:1 of GATT, and that these inconsistencies could not be justified by the provisions of Article XXIV:5(a) and/or Article XXIV:8(a)(ii) of GATT.

7.103 Consequently, in the light of the provisions of Article 19 of the DSU, Thailand requested that the Panel recommend that Turkey bring its measures into conformity with the above-mentioned provisions of the ATC and GATT, and that it might also suggest the ways in which Turkey could implement the recommendations.

E. UNITED STATES

7.104 The United States stated that Turkey had asserted no substantive defense under the ATC or Article XI of GATT for the QRs at issue in this dispute. The only legal basis that Turkey claimed for its unilateral imposition of new QRs was that measures whose application constituted a requirement of the Turkey-EC customs union were deemed to be justified under Article XXIV of GATT. The United States was unable to agree with Turkey on that point.

7.105 Turkey claimed that Article XXIV provided a derogation from all the provisions of the GATT, and that that derogation in turn justified Turkey's new QRs. Turkey said that, as applied to customs unions and free trade areas, Article XXIV permitted deviation from the MFN obligations of

[227] Panel Report on *EEC - Bananas I*, para. 358 (emphasis added).

Article I:1. The United States agreed with Turkey, up to a point. Article XXIV:8 provided that to constitute a customs union (or a free-trade area) duties and other regulations of commerce had to be eliminated as between the constituent members of that customs union (or free-trade area). The United States agreed that, in light of Article XXIV, the provisions of Article I:1 did not require the constituent members of the customs union (or free-trade area) to offer such elimination of duties and restrictive regulations of commerce to non-originating goods. Turkey went on to suggest, however, that *all* the provisions of GATT were overridden by Article XXIV, and at that point the United States disagreed with Turkey.

7.106 The object and purpose of Article XXIV were authoritatively given in Article XXIV:4. In light of the second sentence of that provision, it was difficult to see how Turkey's action in this case was justifiable. In fact, the GATT generally prohibited QRs entirely, as an especially serious barrier to trade. Therefore, it was hard to see how a customs union could introduce new QRs consistently with Article XXIV:4, unless some other provision of the WTO Agreement independently justified those restrictions.

7.107 The United States recalled that the argument that Turkey was now advancing had been made before, but had not been accepted. In 1957, when the CONTRACTING PARTIES were considering the consistency with the GATT of the Treaty of Rome, the six members of the EEC proposed that Article XXIV:5 authorized those six members to deviate from the provisions of the GATT concerning QRs. The report of the Sub-Group considering the Community's QRs recorded the following:

> "Most members of the sub-group could not accept the interpretation of the Six of paragraph 5(a). ... The General Agreement prohibits the use of QRs for protective purposes and permits their use only in exceptional circumstances and mainly to deal with balance-of-payments difficulties. Accordingly, the notion that paragraph 5(a) would require that temporary QRs should be treated in the same way as normal protective measures such as tariffs in determining the trade relations between countries in a customs union and third countries would be contrary to the basic provisions of the Agreement which preclude the use of QRs as an acceptable protective instrument."[228]

7.108 More recently, the European Communities, Turkey's partner in the Ankara Agreement, had taken the opposite position to Turkey on this issue. During the examination of the Accession of Spain and Portugal to the European Communities, several GATT contracting parties claimed that, as a result of the accession, Spain and Portugal had imposed new restrictions that violated Articles XI and XIII. The Working Party report recorded the EC response as follows:

> "On the question of other regulations of commerce, *and in particular QRs*, the Communities agreed that Article XXIV did not provide a waiver from other provisions of the GATT."[229]

7.109 Furthermore, in 1993, the *EEC - Bananas I* panel confirmed the point when it found that "Article XXIV:5 to 8 ... did not provide contracting parties with a justification for restrictive import measures as such ..."[230]

7.110 For all these reasons, Turkey's contention that its customs union with the European Communities allowed it to maintain new QRs on imports from third countries in derogation from the provisions of the Article XI of GATT should be rejected.

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[228] *Reports on the European Economic Community*, adopted on 29 November 1957, BISD 6S/70, para. B.5.

[229] *Report of the Working Party on the Accession of Portugal and Spain to the EC*, adopted on 19-20 October 1988, BISD 35S/293, para. 45 (emphasis added).

[230] Panel Report on *EEC - Bananas I*, para. 358.

7.111 The United States also disagreed with Turkey's interpretation of Article XXIV:8(a)(ii). Article XXIV:8(a) was a definitional paragraph. It described the characteristics of a customs union, one of which was that the constituent Members applied substantially the same regulations of commerce to trade from outside the union. However, Article XXIV:8 did not require or authorize the customs union to adopt any *particular* set of such external regulations. Most importantly, Article XXIV:8(a)(ii) nowhere provided that the external regulations that the customs union chose to apply could be inconsistent with WTO requirements. (Of course, if Turkey wished to act inconsistently with its WTO obligations it was always free to seek a waiver.)

7.112 A customs union could, in principle, meet the requirements of Article XXIV in different ways. In fact, the Panel could decide this dispute on straightforward grounds. As the delegation of the Philippines had pointed out, it was clear that the European Communities and Turkey could just as easily have chosen to remove the QRs that either one of them previously imposed against Indian textile and clothing products. The delegation of Hong Kong, China, had pointed out that the European Communities and Turkey could have chosen to implement a certificate of origin system to ensure that goods entering the European Communities from Turkey were in fact of Turkish origin. Had the European Communities and Turkey taken either of these approaches, they could still have continued to apply the same regulations of commerce externally. And, they would not have raised the trade barriers that Turkey had with its new QRs.

7.113 Because these alternatives were open to them, Turkey could not claim that the provisions of the WTO Agreement (and in particular, the provisions of the ATC) were preventing the formation of a customs union with the European Communities. For that reason, as well as the others outlined, Turkey was incorrect in claiming that Article XXIV:5 and 8(a) authorized these measures.

7.114 The United States noted that Turkey appeared to pre-suppose that the agreement between Turkey and the European Communities met the requirements of Article XXIV. After all, Turkey's entire defense relied on the assumption that its relationship with the European Communities qualified under Article XXIV as a customs union. It was important to recall, however, that the Ankara Agreement, and the Turkey-EC customs union, had never been found to be consistent with the requirements of Article XXIV. They were still under examination by the CRTA. Turkey itself acknowledged this fact. The Panel should therefore not conclude that the Turkey-EC agreement was a customs union consistent with the requirements of Article XXIV of GATT.

7.115 The United States also noted that Turkey argued that the reduction in average tariffs resulting from the customs union agreement meant that the agreement could not be described as having raised barriers to trade with Turkey. In the first place, the evaluation under Article XXIV of the level of trade barriers went beyond an evaluation of tariffs, and therefore Turkey's statement was not correct. Secondly, this claim was a variation of the "reverse compensation" argument that had been raised but never accepted in the past; the argument was that contracting parties that reduced duties in forming a customs union were entitled to compensation for that reduction. Paragraph 6 of the Understanding on Article XXIV expressly eliminated that argument, however. Turkey's claim in this case that the agreement had not raised barriers to trade was just another version of that old argument and should not be accepted.

7.116 Turning to some procedural matters, the United States expressed its concern over Turkey's requested finding that, *because Turkey has made the argument* that its QRs were a requirement of the customs union, *therefore* the Panel could not rule on the legality of its QRs in the absence of agreed conclusions on the consistency of the Turkey-EC customs union with GATT. Turkey did not appear to have supplied any argument in support of this request.

7.117 In fact, the suggestion that this Panel could not rule on the legality of Turkey's measures was inconsistent with the WTO Agreement in several ways. First of all, nothing in the text of GATT or any other part of the WTO Agreement supported the notion that measures could be excluded from

dispute settlement merely because a Member *made an argument* about the justification of a measure. Quite the reverse: Article XXIII did not exclude any measures from its scope. Furthermore, Appendix 2 to the DSU did not list Article XXIV as one of the special or additional rules and procedures to which the DSU was subject. Moreover, Turkey's suggestion contradicted the provisions of paragraph 12 of the Understanding on Article XXIV. Of course, it could not be otherwise. If a Member could prevent a panel from issuing rulings merely by making arguments about its measures, then dispute settlement would grind to a halt. This point was made clear by the panel in the *EEC - Bananas I* case:

> "If preferences granted under *any* agreement for which Article XXIV had been invoked could not be investigated under Article XXIII, any contracting party, merely by invoking Article XXIV, could deprive other contracting parties of their rights under Article XXIII."[231]

7.118 The United Stated noted that Turkey had even gone so far as to suggest that the present case should not proceed in the absence of *agreed* conclusions in the CRTA. Such a procedure would subject WTO dispute settlement to the ability of any Member to block consensus; and the central feature of the WTO dispute settlement system was the inability of any Member to prevent dispute settlement by consensus blocking. In short, this Panel should reject Turkey's suggestion that it lacked the power to decide the question of the consistency of Turkey's measures with the requirements of the WTO Agreement.

7.119 The United States further noted that Turkey's argument that India's supposed failure to engage in meaningful consultations should deprive India of the right to pursue this dispute was unfounded. Article 3.7 of the DSU made clear that the dispute settlement mechanism was available in absence of a mutually agreed solution. And, Article 4.7 of the DSU made it quite clear that the complaining party was entitled to request a panel if the dispute had not been settled within 60 days after the date of receipt of the request for consultations.

7.120 The United States also noted Turkey's statement that there was no difference in WTO terms between an EC enlargement and the formation of a new customs union. It was not clear how this statement advanced Turkey's arguments in this dispute. Perhaps Turkey was attempting to bolster its observation that no Member had initiated a dispute as a result of the extension of the EC textiles and clothing restrictions to Sweden, but the Swedish analogy did not help the Turkish position. As a previous GATT panel made clear, "... it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties".[232] Another panel pointed out that "[t]he decision of a contracting party not to invoke a right *vis-à-vis* another contracting party at a particular point in time can therefore, by itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement".[233] Therefore, the fact that no Member objected to the new Swedish restrictions did not mean that either those restrictions or the ones challenged in this case were consistent with the requirements of the WTO Agreement. In any event, the United States concurred with India's observation that this Panel need not make any findings on the complex issues relating to the extension of the WTO Agreement to the territory of states that acceded to the European Communities.

7.121 The United States also noted that India had submitted that the only provision of the ATC under which a Member could introduce new QRs on imports of textile and clothing products was under the transitional safeguard mechanism set out in Article 6 of the ATC. That statement was not entirely accurate; the United States recalled that other provisions of the ATC, such as Article 5.4, also

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[231] Ibid., para. 367.
[232] Panel Report on *EEC-Imports from Hong Kong, para. 28*.
[233] Panel Report on *EEC-Bananas I*, para. 362.

allowed for the introduction of new restrictions in specified circumstances. But India was correct to draw attention to the Article 6 safeguard mechanism, because - assuming that the customs union as a whole could demonstrate the serious damage or threat thereof required by Article 6 (and footnote 5) of the ATC - it could provide the Turkey-EC customs union with cover, once the European Communities removed its textiles and clothing restrictions to match the earlier Turkish regime.

7.122 The United States also noted that Japan had proposed "the need for strict interpretation of the provisions for exception clauses" and that a previous panel "concluded that the parties invoking the exception must bear the burden of proof that it has fulfilled the conditions for invoking the exception." However, the interpretation of the *US - Underwear* panel (referred to by Japan) had been superseded by the Appellate Body discussion in *US - Shirts and Blouses*, where the question also arose. The Appellate Body disagreed with the notion that Article 6 of the ATC was an exception in the same sense as provisions such as Article XX of GATT and stated that "[t]he ATC is a transitional arrangement that, by its own terms, will terminate when trade in textiles and clothing is fully integrated into the multilateral trading system. Article 6 of the ATC is an integral part of the transitional arrangement manifested in the ATC and should be interpreted accordingly".[234]

7.123 In conclusion, the United States urged the Panel to decide this dispute, notwithstanding Turkey's claim that it could not do so. The United States further urged the Panel not to accept the various justifications that Turkey had advanced for the QRs that India had challenged. In particular, Article XXIV of GATT should not be read to permit Members to introduce QRs that were not consistent with their obligations under the WTO Agreement.

F. COMMENTS BY THE PARTIES

7.124 **Turkey** did not intend to take a position on each of the issues raised by the third parties. To the extent that they would have been raised by India, these issues would be addressed in Turkey's own submissions. Turkey stressed, however, that third parties were neither complainants nor respondents and had therefore to intervene in the matter as defined by the terms of reference, limited to the claims of the complaining party. Noting that, in the present case, there had been such a situation, Turkey stated that a third party could not be permitted to raise new issues, as otherwise the whole dispute settlement procedure would be subverted and disputes would become open-ended, which could not be the purpose of the dispute settlement mechanism.

7.125 **India** responded that it conceptually agreed with Turkey that third parties were not expected to add new claims to those made by the complaining party. In its view, however, the third parties had basically rebutted Turkey's claim that the measures at issue were justified under Article XXIV of GATT.

VIII. INTERIM REVIEW[235]

8.1 On 12 March 1999, Turkey and India requested the Panel to review, in accordance with Article 15.2 of the DSU, certain aspects of the interim report that had been transmitted to the parties on 3 March 1999. No request for a further meeting with the Panel was received from either party.

8.2 We have reviewed the arguments and suggestions presented by the parties, and finalized our report, taking into account those comments by the parties which we considered justified. In this

[234] Appellate Body Report on *US - Shirts and Blouses*, p. 16.

[235] Pursuant to Article 15.3 of the DSU, the findings of the panel report shall include a discussion of the arguments made at the interim review stage. Consequently the following section entitled Interim Review is part of the Findings of this Panel report.

context we have made small changes, including those to paragraphs 9.148, 9.151 and 9.191. In addition, we have made other minor linguistic and typographical corrections.

8.3 Turkey submits that, contrary to the Panel's view, it never claimed that the measures which form the object of India's complaint had been taken by another entity than itself. Turkey therefore requests the Panel to modify paragraphs 9.33 to 9.43 of the Interim Panel Report. We note that in its very first submission Turkey wrote: "Given this situation, the Panel should reject India's claim on the basis that India's choice of the respondent in this dispute is incorrect. … The situation here is in fact comparable with a situation where the complainant directs its complaint against country A for a measure taken by country B. … In Turkey's view the same rule must apply in the present case … There is no basis in fact or in law, for the assumption … that Turkey is individually responsible for acts that are collectively taken by the members of the Turkey-EC customs union through the institutions created by the custom union agreement."[236] As we mention in paragraph 9.33 we have examined all alternatives possible to cover Turkey's argument that the measure had been taken by an entity other than Turkey. We were of the view that there were only two other alternatives: the measures could have been those of the Turkey-EC customs union or those of the European Communities. We find that the measures at issue were clearly Turkish measures. We then proceed further (paragraph 9.38) to examine whether the measures at issue could be measures of the Turkey-EC customs union or measures of the European Communities and we find that we have no alternative but to conclude that the measures at issue are only Turkish measures (paragraph 9.40). Having noted that the Turkey-EC customs union is not a Member of the WTO, we also examine the rules of state responsibility in public international law public, and find that in the absence of a specific treaty provision (in the DSU as drafted) individual states remain responsible for any wrongful act committed by their common organ. We see no reason to change these findings. We reach the conclusion that the measures under examination were those of Turkey itself and Turkey alone, and only Turkey could therefore be defendant to this dispute, especially as the Panel was not assessing the WTO compatibility of the Turkey-EC customs union.

8.4 Turkey also reiterates that its position is that such measures are the basic requirements of the customs union into which it has entered with the European Communities, and as long as the European Communities itself maintains similar measures with their imports of the same products from a number of countries. We refer to our considerations and findings in paragraphs 9.140 to 9.182. We find that there are WTO compatible alternatives for Turkey to form a customs union or an interim agreement leading to a customs union with the European Communities or others. We also find that even if the Turkey-EC customs union agreement did require Turkey to adopt all EC trade policies, an issue that we do not have to address, we consider that such a requirement would not be sufficient to exempt Turkey from its obligations under the WTO Agreement.

8.5 India requests the Panel to review its interpretation of Article XXIV:8(a)(ii) because, according to India it is not based on the language of this provision. The Panel finds that the phrase "substantially the same duties and other regulations of commerce" does not impose an absolute

[236] See para. 3.33 above which refers to page 14 of Turkey's request for preliminary ruling: " Given this situation, the Panel should reject India's claim on the basis that India's choice of the respondent in this dispute is incorrect. In order to pursue its claims properly, India should have *chosen both parties to the Turkey-EC customs union* as respondents, not just one of them. The situation here is in fact comparable with a situation where the *complainant directs its complaint against country A for a measure taken by country B.* In such a situation, the complaint would have to be turned down for lack of standing due to the obvious absence of international liability. In Turkey's view, the same rule must apply in the present case, since Turkey alone is not internationally answerable for acts adopted by the *institutions created by the agreement creating the Turkey-EC customs union*. There is no basis, in fact or in law, for the assumption - on which however India's complaint appears to be founded - that Turkey is individually responsible for acts that are collectively taken by the members of the Turkey-EC customs union through the institutions created by the customs union agreement." (emphasis added).

standard and that not "all" the constituents' duties and not all the constituent members' regulations of commerce shall be the same. We find that this standard leaves an element of flexibility to the constituent members. India argues that when the Panel finds that "a situation where the constituent members have comparable trade regulations having similar effects with respect to trade with third countries, would generally meet the requirements of Article XXIV:8(a)(ii)" the Panel is effectively turning the requirement to apply "substantially the same regulations" into "the same regulations on substantially all the trade". We are of the view that the wording of Article XXIV:8(a)(ii) makes it clear that the term "substantially the same" qualifies both the "duties" and the "other regulations of commerce". In other words, we consider that the ordinary meaning of the term "substantially the same … regulations of commerce" in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components; we also consider that in many cases, when constituent members adopt comparable trade regulations having a similar effect, they will be in compliance with the provisions of sub-paragraph 8(a)(ii) whereby constituent members are required to adopt "substantially the same … regulations of commerce". We also consider that the greater the degree of policy divergence, the lower the flexibility as to the areas in which this can occur; and vice-versa. We find as well that this degree of flexibility does not provide Turkey with the right to impose otherwise WTO incompatible quantitative restrictions. On the contrary, we find that Turkey's conditional right to form a regional trade agreement compatible with Article XXIV, without violating Articles XI and XIII and Article 2.4 of the ATC, is confirmed by the flexibility offered by the wording of Article XXIV.

8.6 Finally, in response to India's claim, in its request for review of the interim report, that the Panel should not reach any conclusion on the alternatives open to Turkey when forming a "fully fledged" customs union since Turkey could always have claimed before the CRTA that its customs agreement with the European Communities was not a complete customs union, we would like to reiterate[237] that we are not assessing the nature of the regional trade agreement between the EC and Turkey, nor its stage of integration. In this report, we simply respond to Turkey's defense based on Article XXIV:8(a) and find that even if the Turkey-EC customs union is to be considered a complete customs union as alleged by Turkey, in the present dispute there are alternatives open to Turkey to form a customs union where measures adopted by constituent members would not violate other provisions of the WTO. In the context of an interim agreement leading to a custom union, Turkey would have further flexibility, since compliance with Article XXIV:8(a) is required only at the end of the transitional period leading to the formation of a customs union.

IX. FINDINGS

A. PRELIMINARY RULINGS RECALLED

9.1 On 14 August 1998 Turkey requested the Panel to make three preliminary rulings *in limine litis*. On 28 August 1998 we invited India and the third parties to comment in writing on Turkey's request. The Panel held a meeting with the parties only on 19 September 1998 to consider the request and on 25 September 1998, the Panel issued its rulings on the issues raised by Turkey. In its first submission, Turkey also requested the Panel to reject India's complaint on the grounds that the consultations preceding the request for establishment of a panel were defective. In this section, as foreshadowed in our rulings of 25 September 1998, we recall and expand on those rulings rejecting Turkey's first three preliminary objections and then analyze Turkey's claim concerning the inadequacy of the consultations.

[237] See our statement to this effect in footnotes 241 and 285 hereafter.

1. Article 6.2 of the DSU

9.2 Firstly, in its request for preliminary rulings, Turkey claimed that India's request for the establishment of a panel did not respect the specificity requirements of Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes ("DSU") in that it failed to identify specifically the measures at issue and the products subject to those measures and that its basic rights of defense and due process were impaired.[238]

9.3 On 25 September 1998 the Panel issued the following ruling on this point:

> "In assessing Turkey's claim that India's request for the establishment of a panel was not sufficiently precise, we consider that it is important that a panel request, which defines the terms of reference, meets this criterion so as to inform the defending party and potential third parties both of the measures at issue, including the products they cover, and of the legal basis of the complaint. This is necessary to ensure due process and the ability of the defendant to defend itself.
>
> We have examined India's request for establishment of the panel (WT/DS34/2). While not identified by place and date of publication, the measures are specified by type (i.e. quantitative restrictions), by effective date of entry into force (1 January 1996) and by product coverage (textiles and clothing, a well defined class of products in the WTO).[239] In our view the panel request meets the minimum requirements of specificity of Article 6.2 of the DSU as interpreted by the Appellate Body in Bananas III and LAN.[240] Even if we agree that India's request could have been more detailed, we conclude that Turkey is sufficiently informed of the measures at issue and the products they cover, and that our terms of reference are sufficiently clear. Consequently, we reject Turkey's claim that the Panel should refuse to accept India's request *in limine litis* for its failure to respect the basic requirements of Article 6.2 of the DSU."

2. Necessity of Participation of the European Communities

9.4 Secondly, in its request for preliminary rulings, Turkey claimed that the Panel should dismiss India's claims because they are directed only against Turkey while the measures at issue were taken pursuant to a regional trade agreement between Turkey and the European Communities[241], and according to Turkey, the European Communities should also have been a party to the dispute.[242]

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[238] Turkey's arguments are further detailed in paras. 3.6 to 3.8, 3.13 to 3.15, 3.19 and 3.21, India's arguments are in paras. 3.9 to 3.12, 3.16 to 3.18, 3.20, 3.22 and 3.23 and the third parties' arguments are in paras. 3.24 and 3.25 above.

[239] [Footnote original]We note also that during the period of consultations Turkey and the EC jointly sent notifications and other communications to the CRTA (WT/REG22/5, WT/REG22/7) and, pursuant to Article 3.3 of the ATC, to the TMB (G/TMB/N/308), in which Turkey lists the new textile import restrictions it adopted following the conclusion of the agreement between the EC and Turkey. In addition, during the meetings of the CRTA (WT/REG22/M1 and M2), and the TMB (meetings of 11-12 December 1997), which preceded the request for the establishment of a panel, the parties discussed the issues relating to this dispute. This confirms to us that Turkey is sufficiently informed of the measures challenged by India in this dispute and the products covered by the measures at issue. Moreover, we note that no comments were made on this issue at any of the meetings of the DSB where the present dispute was discussed (WT/DSB/M13, 15, 42 and 43) and that no Member questioned the scope of the terms of reference in this regard.

[240] Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/AB/R ("*EC-Bananas III*") and *European Communities – Customs Classification of Certain Equipment* adopted on 22 June 1998, WT/DS62, 67, 68/AB/R, ("*EC - Computer Equipment*" or "*EC – LAN*").

[241] The official title of that agreement is the Customs Union between Turkey and the Community (see WT/REG22/1). The European Communities is a WTO Member. In this Panel report we shall refer to the

9.5 On 25 September 1998, the Panel issued the following ruling on this point:

> "Turkey states that the measures at issue were introduced in the context of the trade agreement concluded with the EC, which Turkey and the EC notified to the CRTA as a customs union (WT/REG/22/1). The Panel will obviously have to assess whether such import restrictions introduced by Turkey in the context of that trade agreement are compatible with the WTO Agreement and its related instruments.
>
> We note that the EC has decided not to participate as a third party in this dispute. We note that the DSU does not allow for any other form of participation in favour of a Member, not party to the dispute, other than the third-party rights under Article 10 of the DSU, which, we also note, have been extended in previous cases to meet the specific circumstances of the case. In the absence of any relevant provision in the DSU, in light of international practice[243], and noting the position of the EC to this point, we consider that we do not have the authority to direct that a WTO Member be made third-party or that it otherwise participate throughout the panel process.
>
> We can find no provision in the DSU that would prevent India from initiating a panel procedure against measures imposed by Turkey in these circumstances. Moreover, we are not aware of any general rule applicable to cases in which disputed measures arise from a bilateral or multilateral agreement, that would prohibit a Member from initiating a dispute settlement procedure against one party to such agreement. Accordingly, we do not accept Turkey's claim that India's request should be rejected at this stage of the panel process because India's request was not directed against all parties to the trade agreement which, according to Turkey, forms the basis for the introduction of the measures at issue. This is without prejudice to our decision whether the said measures are WTO compatible. We would like also to emphasise that we shall ensure due process throughout these panel proceedings and that in this context we are aware of the means existing under the DSU for panels to obtain technical advice and information from any relevant source."

9.6 In terms of Article XXIII of the 1994 General Agreement on Tariffs and Trade ("GATT") and the DSU any Member may initiate a dispute settlement procedure against any other Member if it considers that its rights have been nullified or impaired by this other Member. We note that there is no special provision in the DSU for dispute settlement proceedings involving customs unions or any other type of regional trade agreements. We note also that the Turkey-EC customs union itself is not a Member of the WTO and therefore cannot be the subject of any DSU procedure, as it lacks WTO legal personality.[244]

Turkey-EC customs union without any assessment of the WTO nature of this Article XXIV type of arrangement.

[242] Turkey's arguments are further detailed in paras. 3.26, 3.28, 3.30, 3.33 and 3.34, India's arguments are in paras. 3.27, 3.29, 3.31, 3.32, and 3.35 to 3.37 and the third parties' arguments are in paras. 3.38 to 3.40 above.

[243] [Footnote original]The Panel examined relevant principles of international law, including the practice of the International Court of Justice in the *Military and Paramilitary Activities in and Against Nicaragua* case ([1984], ICJ Reports, pp.430-431) and the *Phosphate Lands in Nauru* case([1992], ICJ Reports, p.259-262) cases (preliminary objections).

[244] We recall that in its Report on *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products* adopted on 16 January 1998, WT/DS50/AB/R ("*India – Patent*"), the Appellate Body stated: "Although panels enjoy some discretion in establishing their own working procedures, this discretion does not extend to modifying the substantive provisions of the DSU. (…) Nothing in the DSU gives a panel the authority either to disregard or to modify other explicit provision of the DSU", para. 92.

9.7 We also recall that in the *EC - Bananas III*[245] dispute the Panel and the Appellate Body addressed the compatibility of EC measures adopted pursuant to the Lomé Convention with the WTO Agreement, notwithstanding the EC claim that it was required to adopt the measures pursuant to that Convention and notwithstanding the fact that its Lomé partners were not parties to the dispute.

9.8 It is relevant to recall the case law of the International Court of Justice (ICJ). The ICJ has not declined to exercise jurisdiction in cases similar to this one. For example in the ICJ *Military and Paramilitary Activities in and Against Nicaragua* case, the US argued that the application brought by Nicaragua was inadmissible because Nicaragua had not also impleaded third countries whose participation was essential. The ICJ dismissed this argument, saying:

> "There is no doubt that in appropriate circumstances the Court will decline, …, to exercise the jurisdiction conferred upon it where the legal interests of a State not party to the proceedings "would not only be affected by a decision, but would form the very subject-matter of the decision". … Where however claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has in principle merely to decide upon those submissions, with binding force for the parties only, and no other State… Other States which consider that they may be affected are free to institute separate proceedings, or to employ the procedure of intervention. *There is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties" rule* of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings."[246]

9.9 The ICJ *Phosphate Lands in Nauru* case concerned a proceeding initiated by Nauru against Australia alone in respect of the administration of a fund in favour of Nauru. The case was based on an international treaty whereby Australia, New Zealand and the United Kingdom were co-administrators of the fund. The ICJ exercised jurisdiction despite the absence of the two other administering authorities since the legal interest of those third countries (which could be affected by the result of the dispute) did not form the subject-matter of the dispute which was the legal relationship between Australia and Nauru. The ICJ stated:

> "In the present case, a finding… regarding the existence or the content of responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction."[247]

In its separate opinion, Judge Shahabuddeen added:

> "To return to the question under examination, as to whether Australia may be sued alone, I consider that an affirmative answer is required for three reasons. First, the obligations of the three Governments under the Trusteeship Agreement were joint and several. Second, assuming that the obligations were joint, this did not by itself prevent Australia from being sued alone. Third, a possible judgment against Australia will not amount to a judicial determination of responsibility of New Zealand and the United Kingdom."[248]

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[245] Appellate Body Report on *EC - Bananas III*, , paras. 164 -188.

[246] *Military and Paramilitary Activities in and Against Nicaragua* [1984] at 431.

[247] *Certain Phosphate Lands in Nauru* ("*Nauru*"), [1992] ICJ Reports, 240 (June 26); p. 261-262.

[248] *Nauru* case; Separate Opinion of Judge Shahabuddeen, at 271, italics added. A separate opinion is not a dissenting opinion but reflects the additional discussion of one of the Judge of the ICJ.

9.10 The practice of the ICJ indicates that if a decision between the parties to the case can be reached without an examination of the position of the third state (i.e. in the WTO context, a Member) the ICJ will exercise its jurisdiction as between the parties. In the present dispute, there are no claims against the European Communities before us that would need to be determined in order for the Panel to assess the compatibility of the Turkish measures with the WTO Agreement.[249]

9.11 It should be noted that there is no WTO concept of "essential parties". Based on our terms of reference and the fact that we have decided (as further discussed hereafter) not to examine the GATT/WTO compatibility of the Turkey-EC customs union, we consider that the European Communities was not an essential party to this dispute; the European Communities, had it so wished, could have availed itself of the provisions of the DSU, which we note have been interpreted with a degree of flexibility by previous panels[250], in order to represent its interests. We recall in this context that Panel and Appellate Body reports are binding on the parties only.[251]

9.12 Under WTO rules, the European Communities and Turkey are Members with equal and independent rights and obligations. For Turkey, it is not at all inconceivable that it adopted the measures in question in order to have its own policy coincide with that of the European Communities. However, in doing so, it should have been aware, in respect of the measures it has chosen, that its circumstances were different from those of the European Communities in relation to the Agreement on Textiles and Clothing ("ATC") and thus could reasonably have been anticipated to give rise to responses which focussed on that distinction.

9.13 In the context of our concern for due process and pursuant to Article 13 of the DSU, we put a series of questions to the European Communities and invited it to comment on any matter it considered relevant. The European Communities, while responding to the specific questions, did not avail itself of the latter opportunity.[252]

3. The Need to Exhaust TMB Procedures

9.14 Thirdly, in its request for preliminary rulings, Turkey claimed that India was required to exhaust the special dispute settlement procedures under the ATC first before it could refer the matter to the DSB and that consequently, this Panel had not been established properly.[253]

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[249] We are aware that the ICJ has declined to exercise its jurisdiction when it concluded that the real "subject-matter of the dispute" is the legal position of a third country which is not before it. In the *Monetary Gold Removed from Rome in 1943* case, Italy brought a case against the United Kingdom claiming it had priority over both the British and Albanian claims to the gold in question. However, Albania took no part in the dispute. The ICJ declined to exercise its jurisdiction because it would have been necessary to decide upon the international responsibility of Albania - the very subject-matter of the dispute - without her consent. (See [1954] ICJ Reports, p. 32). In the *Case of East Timor*, Portugal complained against Australia concerning a treaty between Australia and Indonesia for the delimitation of the continental shelf between Australia and Indonesian-occupied East Timor. Indonesia had not been impleaded by Portugal and had not applied for permission to intervene as a third party. The ICJ declined to exercise its jurisdiction because it would have had to rule, as a prerequisite, on the lawfulness of the possession of East Timor by Indonesia, which was not present in the case. (See [1995] ICJ Reports, pp. 90-106)

[250] See for instance the Panel Reports on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, adopted on 25 September 1997, WT/DS27/Rs ("*EC - Bananas III*"), paras. 7.4-7.9 and on *European Communities – Measures Concerning Meat and Meat Products (EC - Hormones*), adopted on 13 February 1998, WT/DS26, 48/R, paras. 8.12-8.15.

[251] Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, adopted on 1 November 1996 ("*Japan – Alcoholic Beverages*"), p. 13.

[252] For further information on the details of this procedure and the Panel's invitation to the European Communities, see paras. 4.1 to 4.3 above.

[253] Turkey's arguments are further detailed in paras. 3.41 to 3.44 , India's arguments are in paras. 3.45 to 3.49 and the third parties' arguments are in para. 3.50 above.

9.15 On 25 September 1998, the Panel issued the following ruling on this point:

> "We note that the special and additional dispute settlement procedures before the Textile Monitoring Body (TMB) apply when measures are imposed pursuant to the ATC and that Article 8.1 of the ATC provides that the TMB is established to examine measures taken under the ATC and their conformity therewith.
>
> We note that Turkey, in its own notifications to the Committee on Regional Trade Agreements (CRTA) and to the TMB (pursuant to Article 3.3 of the ATC), stated that the import restrictions at issue were justified and had been introduced pursuant to its agreement with the EC and in conformity with Article XXIV of GATT 1994. For instance, in its 7 November 1997 notification to the TMB (G/TMB/N/308), Turkey wrote that it was notifying the TMB of the "details of certain quantitative limits introduced by Turkey in respect of imports of certain textile and clothing products into Turkey from certain WTO Members, and necessary to give effect to the Customs Union in conformity with the provisions of Article XXIV of GATT 1994". We also note that the notification to the TMB, for its information, was made pursuant to Article 3.3 of the ATC, which refers to "any new restrictions (…) taken under any GATT 1994 provision".
>
> In our view India's claim under Article 2.4 of the ATC is a reflection of its claims under GATT 1994. This is to say that India does not claim a violation of the ATC except in so far as the ATC, in Article 2.4, prohibits the imposition of restrictions inconsistent with GATT 1994. Article 2.4 of the ATC provides that all new import restrictions on textile and clothing products are prohibited, except if justified under the ATC or under GATT 1994.
>
> As noted above, Turkey itself has indicated that its new restrictions on textile and clothing products are justified under and have been imposed pursuant to Article XXIV of GATT 1994, and as such can be exempted from the general prohibition against new restrictions mentioned in Article 2.4 of the ATC.
>
> Since the measures at issue are alleged to have been imposed pursuant to GATT 1994 (and India's claim relates to Turkey's alleged justification pursuant to GATT 1994), we reject Turkey's *in limine litis* request that the TMB should have been seized of the matter under Article 8 of the ATC prior to its referral to the DSB. This ruling is without prejudice to our eventual decision on whether the said measures at issue constitute a WTO compatible justification pursuant to Article 2.4 of the ATC and other WTO rules."

9.16 In our view, the determination of this case depends on the Panel's assessment of Turkey's defense that its measures were taken in the context of its customs union with the European Communities, and so for Turkey, were authorized by Article XXIV of GATT. We consider that this is not a matter for the TMB, whose jurisdiction is limited by Article 8.1 of the ATC to the examination of measures taken under the ATC and their conformity therewith. (We address further the relationship between the role of the TMB and that of panels in paragraphs 9.82 to 9.85).

9.17 In reconsidering our rulings of 25 September 1998, we find no substantive basis to call them into question.

4. Inadequacy of the Consultations

9.18 Turkey also raised a fourth procedural exception for which it did not request an immediate *in limine litis* ruling by the Panel. In its first submission, Turkey asserts that India has not sufficiently

exhausted the consultations requirements of Article XXII of GATT 1994 and Article 4 of the DSU in order to bring about a mutually acceptable solution to the dispute.[254]

9.19 For Turkey, the principle of procedural economy as well as the spirit of the WTO dispute settlement mechanism require that panel procedures be considered as *ultima ratio* means to solve conflicts between Members for which they are unable to find a negotiated solution. For Turkey, India failed to comply with this principle and the spirit of the DSU. While Turkey offered to enter into negotiations on the issues in dispute with India, India refused to enter into such negotiations, in as much as it refused to deal with the issues in dispute in consultations under Article XXII of GATT.

9.20 India responded[255] that on 21 March 1996, it requested formal consultations with Turkey under the DSU regarding the matter of the unilateral imposition of quantitative restrictions by Turkey on imports of a broad range of textile and clothing products from India as from I January 1996. This request was accepted by Turkey on 1 April 1996. In a letter confirming this, Turkey stated that it had agreed to enter into consultations "on textiles and clothing restrictions applied by Turkey" at a mutually acceptable time and venue. Further, Turkey considered that "the European Communities as our partner in the customs union should also be represented in the consultations". On 4 April 1996, India proposed that consultations should be held in Geneva on 18-19 April 1996, and stated that India could not accept Turkey's view that the European Communities should participate in these consultations since, under GATT and WTO practice, consultations under Article XXIII:1 of GATT 1994 were bilateral in nature. India requested that Turkey confirm the venue and time proposed for consultations to be held without the participation of the European Communities. On 16 April 1996, Turkey replied that "the Turkish authorities would be prepared to hold with their Indian counterparts the consultations requested by India ... on the understanding that representatives of the European Communities would also be participating. This meeting could be held on 18 April 1996 from 3:30 p.m. to 6:00 p.m. as suggested by India". India stated that despite this very short notice, it ensured the presence of its delegation at the consultations but the delegation of Turkey did not attend the scheduled meeting nor did it provide an explanation for its absence. India submitted that it sent another communication to Turkey, on 18 April 1996, proposing to enter into bilateral consultations on 19 April 1996. When India endeavoured to confirm the date and venue of the consultations, it was informed that Turkey was not in a position to enter into these consultations without the participation of the European Communities, and that this would be conveyed to India in writing by close-of-business on 19 April 1996. India submits that the communication from Turkey, dated 19 April 1996, was received on 22 April 1996.

9.21 India argued that its recourse to the provisions of GATT 1994 and the DSU regarding consultations was frustrated. Its request for bilateral consultations had been made in good faith, in full transparency and with a view to reaching a mutually satisfactory solution. For India, since Turkey did not enter into these consultations within the 30-day period provided for in Article 4.3 of the DSU, Turkey violated Articles 3 and 4 of the DSU, and in particular contravened the provisions of Article 3.10 of the DSU, and therefore the dispute remained unresolved.[256]

9.22 Firstly, we note that in *EC – Bananas III* the panel concluded that the private nature of the bilateral consultations means that panels are normally not in a position to evaluate how the consultations process functions, but could only determine whether consultations, if required, did in fact take place.[257] In this case, the parties never consulted, as Turkey declined to do so without the presence of the European Communities.

9.23 In *Korea – Taxes on Alcoholic Beverages* the panel concluded that:

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[254] Turkey's arguments are further detailed in paras. 6.1, 6.2, 6.5 and 6.6 above.
[255] India's arguments are further detailed in paras. 6.3, 6.4, 6.7 to 6.10 above.
[256] India added that the DSB was informed of this situation on 24 April 1996; WT/DSB/M/15, para. 3.
[257] Panel Report on *EC - Bananas III*, paras. 7.18-7.19 (not appealed).

> "… the WTO jurisprudence so far has not recognized any concept of "adequacy" of consultations. The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. … We do not wish to imply that we consider consultations unimportant. Quite the contrary, consultations are a critical and integral part of the DSU. But, we have no mandate to investigate the adequacy of the consultation process that took place between the parties and we decline to do so in the present case."[258]

9.24 We concur with this statement. We note also that our terms of reference (our mandate) are determined, not with reference to the request for consultations, or the content of the consultations, but only with reference to the request for the establishment of a panel.[259] Consultations are a crucial and integral part of the DSU and are intended to facilitate a mutually satisfactory settlement of the dispute, consistent with Article 3.7 of the DSU. However, the only function we have as a panel in relation to Turkey's procedural concerns is to ascertain whether consultations were properly requested, in terms of the DSU, that the complainant was ready to consult with the defendant and that the 60 day period has lapsed before the establishment of a panel was requested by the complainant. We consider that India complied with these procedural requirements and therefore we find it necessary to reject Turkey's claim.

B. MAIN CLAIMS OF THE PARTIES

9.25 India claims that the quantitative restrictions imposed by Turkey on imports of textile and clothing products from India since 1 January 1996 are inconsistent with Articles XI:l and XIII of GATT and with Article 2.4 of the ATC. India also claims that Article XXIV does not constitute a defense to such violations.

9.26 Turkey, in response, claims that the restrictions it applies on imports of nineteen categories of certain textile and clothing products from India are justified under Article XXIV of GATT, as these measures were adopted pursuant to (and on the occasion of the formation of) its customs union with the European Communities.

9.27 Turkey considers that Article XXIV of GATT recognizes that WTO Members have a right to form customs unions and that this right provides such a regional trade agreement with a "shield" from all other WTO obligations. In the context of invoking Article XXIV of GATT, Turkey argues that its customs union with the European Communities is consistent with Article XXIV in that 1) the new regime is overall less restrictive than its previous one, 2) the restrictions challenged by India are of a temporary nature, 3) the customs union has liberalized Turkey's trade with third countries, and 4) the customs union will be deepened further including in the area of trade legislation. In particular with reference to import restrictions, Turkey argues that 1) Article XXIV:5 provides a derogation from other GATT provisions in the case of the formation of a customs union, and 2) GATT does not prohibit all new restrictions which may be required by customs unions.

9.28 In addition, Turkey argues 1) that these measures constitute a "requirement" (by the European Communities and also of Article XXIV); that it adopt the European Communities' common commercial policy, including the arrangements relating to trade in textiles and clothing; 2) that there is no GATT-consistent alternative to these restrictions if it wants to include textile and clothing products (which constitute 40 per cent of Turkey's exports to the European Communities) in the

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[258] Panel Report on *Korea – Taxes on Alcoholic Beverages*, upheld by the Appellate Body, adopted on 17 February 1999, WT/DS75, 84/R ("*Korea – Alcoholic Beverages*"), paras. 10.19, (not appealed).

[259] See for instance the Appellate Body Report on *EC - Bananas III*, paras. 139-144; the Appellate Body Report on *Brazil - Measures Affecting Desiccated Coconut*, adopted on 20 March 1997, WT/DS22/AB/R ("*Brazil – Desiccated Coconut*"), page 22; and the Appellate Body Report on *India – Patent*, paras. 86-96.

customs union; and 3) that in this context, the WTO Agreement makes no distinction between the formation of a new customs union and accession to an existing customs union.

9.29 Turkey argues that, since it has formed a customs union with the European Communities which, under the ATC, is entitled to maintain import restrictions on the same 19 categories of textiles and clothing, Turkey's parallel import restrictions are not new restrictions in the sense of Article 2.4 of the ATC, being justified by Article XXIV. For Turkey, the said measures are therefore not inconsistent with Article 2 of the ATC. Finally, in its second submission, Turkey claims that India has not suffered any nullification of benefits, as its exports to Turkey have generally increased since the entry into force of the customs union.

9.30 In response to Turkey's argument that the provisions of Article XXIV constitute a derogation or complete defense (possibly as *lex specialis*) to all claims, India argues that the obligations under Articles XI:1 and XIII of GATT and 2:4 of the ATC are not modified by Article XXIV:5(a) of GATT 1994, which, according to India, requires Members forming a customs union not to raise the general incidence of regulations of commerce imposed on trade with third Members. As to Turkey's arguments that it was required to follow the EC commercial policy in the sector of textiles and clothing and that it had no alternative but to do so, India responds that the prohibitions of Articles XI and XIII of GATT and Article 2.4 of the ATC are not modified by Article XXIV:8(a)(ii) of GATT. For India, pursuant to Article XXIV:8(a)(ii), the European Communities and Turkey could have maintained different external textile policies at least for a certain period since their agreement is only an interim agreement and Turkey has not become a member of the European Communities. Turkey claims that its customs union with the European Communities was complete as of 1 January 1996 and is not an interim agreement or any form of transitional agreement, as defined by Article XXIV.

9.31 In response to Turkey's argument that the Panel should not substitute itself for the CRTA by examining the WTO compatibility of the Turkey-EC customs union, India agrees that it is not challenging the consistency of the Turkey-EC trade agreement with Article XXIV. Instead India states that it is requesting this Panel to rule that Turkey does not have the right to impose discriminatory restrictions on imports of textiles and clothing from India, irrespective of whether Turkey's agreement with the European Communities is consistent with Article XXIV. In response to Turkey's allegation that India's rights have not been nullified or impaired by its textile and clothing policy, India challenges the accuracy of the statistics submitted by Turkey and argues that, in any case, Article 3.8 of the DSU establishes that any breach of a GATT obligation constitutes *prima facie* impairment and nullification of benefits, which have been considered to include benefits denied due to changes in competitive opportunities.

C. MEASURES AT ISSUE

1. Identification of the Measures at Issue

9.32 India claims that the import restrictions in place since 1 January 1996 on 19 categories of textile and clothing products violate the provisions of Articles XI and XIII of GATT and Article 2.4 of the ATC.[260] We invited Turkey to confirm that the quantitative restrictions at issue are those listed in India's first submission and to provide us with the Official Gazette which published the establishment of such quantitative restrictions for the years 1996, 1997 and 1998. In response to a question from the Panel at the second substantive meeting, Turkey acknowledged that the quantitative restrictions in place correspond to the measures referred to by India in its first submission. Turkey noted that those quantitative restrictions had been notified to the WTO, i.e. to the CRTA and to the TMB. We conclude that the parties agree that the quantitative restrictions at issue are those listed by

[260] Turkey, in its *in limine litis* preliminary request, claimed that the product coverage of India's request was not sufficiently detailed and precise. In our preliminary ruling of 25 September 1998 we rejected this claim by Turkey as further detailed in paras. 9.2 and 9.3 above.

Turkey in its responses to the Panel's various questions on this issue and annexed to the present findings (see Annex to this report, Appendix 1).

2. Attribution to Turkey of the Measures at Issue

9.33 Although Turkey does not deny the existence of such quantitative restrictions on imports, it argues that since it duly notified its various trade agreements with the European Communities to the appropriate bodies of the GATT 1947 and of the WTO, it cannot be held individually liable for these quantitative restrictions as they result from the implementation of its customs union with the European Communities. Turkey argues that India has directed its complaint against Turkey concerning a measure taken by another entity (the Turkey-EC customs union or the European Communities). In Turkey's view, it is not individually responsible for acts that were collectively taken by the members of the Turkey-EC customs union through the institutions created by the agreement.

9.34 Turkey submits that the "nationality" of the measures at issue also relates to a fundamental aspect of the nature of a customs union. For Turkey, when two Members enter into a customs union, there is a fundamental change in the relationship between them and in their relationship with other WTO Members.

9.35 We comment briefly below on the issue of the responsibility of parties to a customs union *vis-à-vis* third countries. As to the question of "whose measures these import quantitative restrictions are?", three answers are possible: they are either Turkey's measures, the European Communities' measures, or the Turkey-EC customs union's measures.

9.36 As to whether the measures at issue are Turkish measures, we note that the measures were implemented through formal action by Turkey and that the measures were published by Turkey in its Official Gazette. The first Turkey-EC joint notification to the TMB refers to "details of certain quantitative limits introduced by Turkey"[261] and the second one to "details of changes in respect of quantitative limits applied by Turkey"[262] and both notifications list the measures at issue, i.e. restrictions imposed on 19 categories of textile and clothing products. In other words, the measures under examination were enacted, implemented and are now applied, by the Turkish government and do not impose any obligation on any other national or supranational authorities. Thus, on their face, the measures at issue appear to be measures taken by Turkey and enforceable on Turkish territory only.

9.37 We also note that the measures are applied by Turkey and that they are mandatory, i.e. they leave no discretion to Turkish authorities but to enforce the measure. It is customary practice of GATT/WTO dispute settlement procedures to address applied measures. In addition, previous adopted GATT panels have always considered that mandatory legislation of a Member, even if not yet in force or not applied[263], can be challenged by another WTO Member.

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[261] G/TMB/N/308. In the notification to the WTO the terms used are "details of the quantitative limits applied by Turkey in respect of imports of certain…", WT/REG22/7.

[262] G/TMB/N/326. In the notification to the WTO the terms used are "details of the quantitative limits applied by Turkey in respect of imports of certain…"; WT/REG22/8.

[263] See for instance the Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136 ("*US - Superfund*"), paras. 5.2.1-5.2.2; Panel Report on *EEC – Regulation on Imports of Parts and Components*, adopted on 16 May 1990, BISD 37S/132, paras. 5.25-5.26; Panel Report on *United States – Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206, para 5.39.

9.38 However, in view of Turkey's contention that these import restrictions are measures of another entity,[264] we proceed to address the issue of whether such measures can be those of the European Communities or of the Turkey-EC customs union.

9.39 While the European Communities also maintains restrictions against imports from India on the same 19 categories at issue, it does so pursuant to its "Council Regulation (EEC) 3030/93 on common rules for imports of certain textile products from third countries", adopted by the Council of the European Communities on 12 October 1993.[265] This regulation applies only to the European Communities' customs territory.[266] It is not enforceable in Turkey as an EC measure as such. On 7 January 1997 the European Communities notified the second stage of its integration programme to take effect by 1 January 1998; such notifications were made only with reference to the European Communities' quota levels (based on their previous 1990 level).[267] Thus, the measures at issue cannot be considered to be EC measures. Moreover, the European Communities itself stated that the measures had been adopted by Turkey, that Turkey itself was ensuring the surveillance of such quotas at its borders, and that the European Communities and Turkey have their respective systems of border control.[268]

9.40 As to the issue of whether the measures at issue should be considered to be measures of the Turkey-EC customs union as such, we note that according to the Permanent Court of International Justice[269], the assessment whether any customs union (or another legal entity) has a legal personality distinct from that of its constituent countries is to be based on an examination of the treaty forming such customs union and the relevant circumstances. Such determination will therefore always be made on a case by case basis. We note that the Turkey-EC customs union agreement does not have any legislative body which would have the constitutional authority to enact laws and regulations that

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[264] See paras. 3.33 and 8.3 above.

[265] That regulation was adopted in the context of the MFA; this regulation was later amended in 1995, Regulation (EC) No. 1616/95 (OJ No. L154, 5.7.1995, p.3) to take into account Council regulation (EC) No 3036/94 establishing economic outward processing arrangements applicable to certain textiles and clothing products reimported into the Community after working or processing in certain third countries. See footnote 14 of Decision 1/95 (see WT/REG22/1).

[266] See documents G/TMB/N/60, notified on 28 February 1995.

[267] In its notification (G/TMB/N/207), the European Communities consistently refers to categories of product that represent 17.99 per cent of 1990 EC imports (by volume) and therefore does not include any quantity covering the territory of Turkey. We note that the letter from European Communities Permanent Representative stated that "The European Community and Turkey form a customs union and have consulted prior to notifying their second stages of integration". This appears to refer to the consultation process under the Turkey-EC customs union prior to the identification of which products are to be integrated. It is also a recognition that each party to the customs union must adopt its own measures. (The European Communities' first integration process stage was notified as G/TMB/N/1.)

[268] See para. 4.3 above, third response of the European Communities to the Panel's questions: "There is thus no specific EC border control in respect of goods for which Turkey has quantitative restrictions, *the Turkish authorities having effected such control on entry of the goods* into free circulation in Turkey" (emphasis added). To the Panel's fourth question, the European Communities answered: "Turkey has adopted all the European Communities' relevant regulations concerning imports of textiles … Thus the *basic administrative principles* are the same in *both parts of the customs union*. … Thus, there is no administration or control of the overall EC/India and Turkey/India textile and clothing quotas at the EC/Turkey's borders. Once goods enter the customs *union pursuant to the parties' respective systems*, they are in free circulation… "(emphasis added). Since Turkey has its own specific quotas and so does the European Communities, Turkey and the European Communities must control their own import restrictions. This is to say that Indian textile and clothing products are not imported into Turkey on the basis of the European Communities' quantitative restrictions on Indian products, but rather only on the basis of the Turkish quantitative restrictions on Indian products (through the issuance of export licenses by India and import licenses by Turkey against the Turkish quota levels). Once entered into the customs union, say at the India/Turkey border, the products are described as being able to move freely into the EC, the same as Turkish products.

[269] *Customs Regime between Germany and Austria*, PCIJ, Series A/B, No. 41, at 49.

would be, as such, applicable to the territory of the customs union. Under the Turkey-EC customs union, the only institutional body with legislative features is the Association Council, the powers of which were first defined in the Ankara Agreement.[270] Paragraph 1 of Article 22 of the Ankara Agreement states that the Association Council shall have the power to take decisions. Although each of the two parties are "bound to take the steps involved in the execution of the decisions adopted", these decisions "shall be taken unanimously" (Article 23 of the Ankara Agreement) and there is no further enforcement process. The Turkey-EC Customs Union Joint Committee can only "carry out exchange of views and information, formulate recommendations to the Association Council and deliver opinions with a view to ensuring the proper functioning of the Customs Union" (Article 52 of the Decision 1/95 of the Turkey-EC customs union).[271] Article 55 imposes on Turkey and the European Communities the obligation to notify each other of the adoption of any new legislation that may affect each other or the functioning of the customs union. Article 58 also envisages the situation of "discrepancies between Community and Turkish legislation". This is a recognition that each party to the customs union may adopt measures, to some extent different, and which may not be fully consistent with one another; it provides confirmation of the ability of the parties to act independently and that Turkey maintains that sovereign right.[272] Since the actions of the Association Council require independent implementation by the parties to the customs union without any enforcement process either individually or jointly; since the Association Council cannot force the parties to act[273]; and since there is no other provision that would lead us to conclude that either of the two parties, or some collective entity on behalf of them, could enact legislation applicable to both of them; we consider the measures at issue taken, implemented and enforced by the Turkish government itself, applied on Turkish territory only, can only be Turkish measures.

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[270] Paragraph 1 of Article 22 of the Ankara Agreement reads as follows: "For the achievement of the aims laid down in the agreement and in the cases covered by the latter, the Association Council shall have the power to take decisions. Each of the two parties shall be bound to take the steps involved in the execution of the decisions adopted. The Association Council may also formulate any necessary recommendations" (GATT document L/2155/Add.1, p. 13). Article 23 of the Ankara Agreement specifies that both parties are represented in the Association Council and that its decisions "shall be taken unanimously".

[271] See WT/REG22/1.

[272] The Permanent Court of International Justice (PCIJ) concluded in *the Customs Regime between Germany and Austria*, that the wording of the customs union was determinant as to whether a member lost its sovereignty. An example of a customs union where member states appear to have retained full sovereignty and independence *vis-à-vis* third countries is the customs union between the Czech Republic and the Slovak Republic. It can be noted that in such a customs union, the parties have not created any autonomous institution capable of enacting legislation or providing for the legal personality of the customs union, independent and autonomous from that of each member state. Consequently, to take one example, when the Czech Republic and the Slovak Republic wanted to enter into a free trade agreement with Slovenia, Poland, Hungary and Romania, each of them (the Czech Republic and the Slovak Republic) signed individually and independently the so-called CEFTA. It is not the Czech-Slovak customs union, as an entity, which did so. The same is also true for the recent free trade agreement between Turkey and Lithuania, which is parallel to the EC-Lithuania free trade agreement. Again it is not the Turkey-EC customs union which concluded one single free trade agreement with Lithuania, but the EC and Turkey, individually, signed separate agreements. As far as the Turkey-EC custom union treaty is concerned, we have already concluded above, that the institutions existing in the context of the customs union do not have the legal capacity to legislate (there is only a provision that any legislation or measure adopted by either party (the EC or Turkey) must be notified to the other party and consulted upon.) The terms of the Turkey-EC customs union agreement provide no indication of a transfer of sovereignty of the member states either to an institution established under the customs union, nor to the EC. In WTO terms, unless a customs union is provided with distinct rights and obligations (and therefore some WTO legal personality, such as the European Communities) each party to the customs union remains accountable for measures it adopts for application on its specific territory. See also Jennings, R., Watts, A., Oppenheim's International Law (1996), 9th ed., Vol. 1 (Peace), Introduction and Part 1, p. 255.

[273] In the *Reparations for Injuries* case, the ICJ stated that, where a group of states claims to be a legal entity distinct from its members, the test is whether it was in "such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect."(See ICJ Rep (1949), p. 178 and also *Western Sahara* case (1975), p. 63; see Jennings, R., Watts, A., Oppenheim's International Law (1996), *Op.cit.*, p. 119.)

9.41 Importantly, we note that the WTO dispute settlement system is based on Member's rights; is accessible to Members only; and is enforced and monitored by Members only.[274] The Turkey-EC customs union is not a WTO Member, and in that respect does not have any autonomous legal standing for the purpose of WTO law and therefore its dispute settlement procedures. Moreover, the European Communities' import restrictions appear *a priori* to be WTO compatible and could not be the object of any panel recommendation that the European Communities brings its measure into conformity with the WTO Agreement, as required by Article 19 of the DSU.

9.42 Finally, we note that in public international law, in the absence of any contrary treaty provision, Turkey could reasonably be held responsible for the measures taken by the Turkey-EC customs union. In the *Nauru* case one of the conclusions of Judge Shahabuddeen's separate opinion was:

> "… the [International Law Commission] considered, that *where States act through a common organ, each State is separately answerable for the wrongful act of the common organ*. That view, it seems to me, runs in the direction of supporting Nauru's contention that each of the three States in this case is jointly and severally responsible for the way Nauru was administered on their behalf by Australia, whether or not Australia may be regarded as technically as a common organ. …".[275] (Emphasis added.)

9.43 The International Law Commission (ILC) had stated in its commentaries to its adopted report:

> "A similar conclusion is called for in cases of parallel attribution of single course of conduct to several States, as when the conduct in question has been adopted by an organ common to a number of States. According to the principles on which the articles of chapter II of the draft are based, *the conduct of the common organ cannot be considered otherwise than as an act of each of the States whose common organ it is. If that conduct is not in conformity with an international obligation, then the two or more States will concurrently have committed separate, although identical, internationally wrongful acts*. It is self-evident that the parallel commission of identical offences by two or more States is altogether different from participation by one of those States in an internationally wrongful act committed by the other."[276] (Emphasis added.)

3. Conclusion

9.44 In light of the foregoing, we conclude that the measures at issue are quantitative restrictions adopted by the Turkish government in 1996, 1997 and 1998 (and listed in the Annex to this report, Appendix 2) against 19 categories of textile and clothing products imported from India. Even if these measures are taken in the ambit of a customs union, they are implemented, applied and monitored by Turkey, for application in the Turkish territory only. Therefore they are Turkish measures.

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[274] See Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, adopted on 6 November 1998, WT/DS58/AB/R ("*US – Shrimp*"), para. 101.

[275] *Nauru* case, Separate Opinion of Judge Shahabuddeen, at 284. Clark, R., Book review of Nauru: Environmental Damage Under International Trusteeship (C. Weeramantry), *The International Lawyer* Vol. 28, No. 1, at 186.

[276] See the Yearbook of the International Law Commission, 1978, Vol.II, Part Two, at 99. These commentaries were adopted by the Commission in its session of 8 May to 28 July 1978. Article 27 on state responsibility to which these commentaries refer was adopted at the ILC session of 6 May to 26 July 1996. These commentaries and the report were submitted in the same years to the United Nations General Assembly for its consideration.

D. SCOPE OF THE DISPUTE

9.45 We note that, at least initially, both parties argued explicitly that the Panel should not assess the compatibility of the Turkey-EC regional trade agreement with the provisions of Article XXIV. In its second submission, however, Turkey argues that the Panel cannot assess the WTO compatibility of any specific measure adopted in the context of the formation of a regional trade agreement, separately and in isolation from an assessment of the overall compatibility of this regional trade agreement with Article XXIV of GATT.

9.46 Turkey's main defense to India's claims of discriminatory quantitative restrictions is that the measures at issue were adopted as a consequence of its regional trade agreement with the European Communities which, it argues, is a fully complete customs union explicitly authorized and favoured by Article XXIV of GATT. For Turkey, Article XXIV of GATT, in allowing the formation of customs unions, necessarily authorizes measures such as those adopted by Turkey and challenged by India. For Turkey, the alignment of its textiles and trade policy with that of the European Communities is not only an integral part of such Turkey-EC customs union but is inherent and necessary for its formation in view of the important share of the textile and clothing sector in its trade with the European Communities. Turkey argues that the WTO compatibility of an Article XXIV type agreement, and all its related measures, is to be determined exclusively with reference to Article XXIV of GATT (and the 1994 Understanding on Article XXIV) and not by any other provisions of the WTO Agreement.

9.47 In response to Turkey's defense, India argues that the provisions of Article XXIV do not constitute a waiver from other WTO obligations, including the general prohibition against discriminatory import restrictions contained in Articles XI and XIII of GATT and Article 2.4 of the ATC.

9.48 Turkey's argument has both procedural and substantive aspects. Firstly, we must decide whether the WTO dispute settlement proceedings can be used to challenge measures adopted by one or more Members on the occasion of the formation of a customs union in which it (or they) participate. Secondly, if so, we must consider the extent to which a panel is authorized or needs to examine the overall consistency of the customs union with WTO provisions. Finally, we must determine whether the test for assessing the WTO compatibility of these specific measures is provided for in the provisions of Article XXIV only. If this is not the case, we will then need to examine the meaning of the provisions of Article XXIV to assess whether Article XXIV authorizes measures like those under examination. We deal with this final determination later in Section G below.

9.49 As to the first issue of whether the WTO dispute settlement procedures can be invoked to challenge a measure adopted on the occasion of the formation of a customs union, we note paragraph 12 of the Understanding on Article XXIV of GATT 1994 which provides:

> "12. The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to *any matters arising from the application* of those provisions of Article XXIV relating to customs unions, free-trade areas or interim agreement leading to the formation of a customs union or free-trade area." (Emphasis added.)

9.50 We understand from the wording of paragraph 12 of the WTO Understanding on Article XXIV, that panels have jurisdiction to examine "any matters 'arising from' the application of those provisions of Article XXIV". For us, this confirms that a panel can examine the WTO compatibility of one or several measures "arising from" Article XXIV types of agreement, as also argued by the United States in its third-party submission.[277] This indicates that, although the right of WTO Members

[277] See paras. 7.116 to 7.118 above.

to form regional trade arrangements is "an integral part" of the set of multilateral disciplines of GATT and now WTO[278], the DSU procedures can be used to obtain a ruling by a panel on the WTO compatibility of any matters arising from such regional trade arrangements. For us, the term "any matters" clearly includes specific measures adopted on the occasion of the formation of a customs union or in the ambit of a customs union.

9.51 Thus, we consider that a panel can assess the WTO compatibility of any specific measure adopted by WTO Members at any time and we cannot find anything in the DSU, Article XXIV or the 1994 GATT Understanding on Article XXIV that would suspend or condition the right of Members to challenge measures adopted on the occasion of the formation of a custom union.

9.52 As to the second question of how far-reaching a panel's examination should be of the regional trade agreement underlying the challenged measure, we note that the Committee on Regional Trade Agreements (CRTA) has been established, *inter alia*, to assess the GATT/WTO compatibility of regional trade agreements entered into by Members, a very complex undertaking which involves consideration by the CRTA, from the economic, legal and political perspectives of different Members, of the numerous facets of a regional trade agreement in relation to the provisions of the WTO. [279] It appears to us that the issue regarding the GATT/WTO compatibility of a customs union, as such, is generally a matter for the CRTA since, as noted above, it involves a broad multilateral assessment of any such custom union, i.e. a matter which concerns the WTO membership as a whole.

9.53 As to whether panels also have the jurisdiction to assess the overall WTO compatibility of a customs union, we recall that the Appellate Body stated[280] that the terms of reference of panels must refer explicitly to the "measures" to be examined by panels. We consider that regional trade agreements may contain numerous measures, all of which could potentially be examined by panels, before, during or after the CRTA examination, if the requirements laid down in the DSU are met. However, it is arguable that a customs union (or a free-trade area) as a whole would logically not be a "measure" as such, subject to challenge under the DSU.[281]

9.54 We consider that the question of whether panels have the jurisdiction to assess the overall compatibility of a customs union is not in any event an issue on which it is necessary for us to reach a decision in this case; we reach this conclusion in light of paragraphs 9.51 to 9.53 above and in recognition of the principle of judicial economy, as initially developed in the *US – Wool Shirts*[282] case and qualified by the Appellate Body in the recent *Australia – Salmon* case[283], under which panels do not need to address all the claims and arguments raised by the parties to the dispute. We recall the

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[278] See a similar parallel drawn by the Appellate Body in *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R ("*US – Shirts and Blouses*") at page 16, concerning the right to use transitional safeguard measures under the ATC.

[279] The mandate of the CRTA can be found in WT/L/127. See para. 2.7 above.

[280] Appellate Body Report on *Guatemala – Anti-Dumping Investigation regarding Portland Cement From Mexico*, adopted on 25 November 1998, WT/DS60/AB/R ("*Guatemala – Cement*"), paras. 76, 86.

[281] We are aware of the EC proposal contained in MTN.TNC/W/125 and the report of the 36th Meeting of the Trade Negotiating Committee MTN.TNC/40.

[282] Appellate Body Report on *US – Shirts and Blouses*, page 17.

[283] Appellate Body Report on *Australia – Measures Affecting Importation of Salmon*, adopted on 6 November 1998, WT/DS18/AB/R, para 223: "The principle of judicial economy has to be applied keeping in mind the aim of the dispute settlement system. This aim is to resolve the matter at issue and "to secure a positive solution to a dispute". To provide only a partial resolution of the matter at issue would be false judicial economy. *A panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of disputes to the benefit of all Members*." (emphasis added).

distinction between claims and arguments (*EC – Hormones*[284]) and understand that some latitude is left to panels to address only arguments that they consider are relevant to resolve the dispute between the parties, which is the main purpose of DSU proceedings. Accordingly, we find that, in order to address the claims of India, it will not be necessary for us to assess the compatibility of the Turkey-EC customs union agreement with Article XXIV as such (in the sense of addressing all aspects of the customs union and all the measures adopted by Turkey and the European Communities in the context of their customs union agreement).

9.55 In our view, it will be sufficient for us to address the relationship between the provisions of Article XXIV and those of Articles XI and XIII of GATT and Article 2.4 of the ATC. We shall have to do so as India's claims are based on an alleged violation of those articles, and Turkey's defense is based on the application, and, in its view, the "primacy", of Article XXIV over those provisions. Our examination will be limited to the question whether in this case, on the occasion of the formation of the Turkey-EC customs union, Turkey is permitted to introduce WTO incompatible quantitative restrictions against imports from a third country, assuming *arguendo* that the customs union in question is otherwise compatible with Article XXIV of GATT. We shall thus limit ourselves to addressing the parties' arguments submitted in this context only and refrain from any discussion as to how an overall compatibility assessment of a customs union should be performed. Our analysis of Article XXIV is limited to defining, in particular, its relationship with Articles XI and XIII of GATT (and Article 2.4 of the ATC) and to ensuring that our interpretation of the WTO provisions applicable to the present dispute, does not prevent Turkey from exercising its right to form a customs union.

9.56 We reject therefore Turkey 's argument, in paragraph 9.45 above, to the extent that it would oblige us to assess the GATT/WTO compatibility of the Turkey-EC customs union in order to assess the compatibility of the specific measures at issue.[285]

E. BURDEN OF PROOF

9.57 The rules on burden of proof are now well established in the WTO and can be summed up as follows:

(a) it is for the complaining party to establish the violation it alleges;

(b) it is for the party invoking an exception or an affirmative defense to prove that the conditions contained therein are met; and

(c) it is for the party asserting a fact to prove it.[286]

9.58 It is therefore for India to demonstrate *prima facie* that Turkey's measures violate the provisions of Articles XI and XIII of GATT and Article 2.4 of the ATC. Turkey does not deny the existence of quantitative restrictions but submits an affirmative defense based on the application of Article XXIV of GATT. In response to a direct question by the Panel, Turkey stated that it does not invoke any defense other than that based on Article XXIV in support of its claim that it is not

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[284] Appellate Body Report on *European Communities – Measures Concerning Meat and Meat Products* ("*EC – Hormones*"), adopted on 13 February 1998, WT/DS26, 48/AB/R, paras. 155-156; see also the Appellate Body Report on *EC - Bananas III*, paras. 145-147.

[285] We consider that this Turkey-EC regional trade agreement falls under the ambit of Article XXIV for the purpose of the CRTA's examination. We are of the view that, for our purposes, we do not have to assess the precise relationship of the Turkey-EC agreement with Article XXIV, e.g. whether it is a free-trade agreement or a customs union or an interim agreement leading to a free-trade area or customs union. We recall that in this report, we shall refer to the Turkey-EC customs union without any assessment of the WTO nature of this Article XXIV type of arrangement.

[286] Panel Report on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted on 22 April 1998, WT/DS56/R, paras. 6.34 - 6.40.

violating Articles XI or XIII of GATT, or Article 2.4 of the ATC. We note in this context that Hong Kong, China has argued that since Article XXIV was an exception invoked by Turkey, it was for Turkey to bear the burden of proof.[287]

9.59 Accordingly, we will first examine India's claims and the GATT/WTO treatment of import restrictions generally, and then more specifically in the sector of textiles and clothing. Secondly, we shall examine the applicability of Article XXIV and Turkey's defense based, in particular, on paragraphs 4, 5(a) and 8(a)(ii) of Article XXIV of GATT.

F. CLAIMS UNDER ARTICLES XI AND XIII OF GATT AND ARTICLE 2.4 OF THE ATC

9.60 India claims that the Turkish measures violate the provisions of Articles XI and XIII of GATT and Article 2.4 of the ATC. Turkey claims that its rights pursuant to Article XXIV of GATT prevail over any obligations contained in Articles XI and XIII of GATT and Article 2.4 of the ATC, and therefore India's claims should be rejected.

1. Articles XI and XIII of GATT

9.61 The wording of Articles XI and XIII is clear. Article XI provides that as a general rule (we note the wording of the title of Article XI: "*General Elimination* of Quantitative Restrictions"), WTO Members shall not use quantitative restrictions against imports or exports.

> "Article XI
>
> *General Elimination of Quantitative Restrictions*
>
> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any Member on the importation of any product of the territory of any other Member or on the exportation or sale for export of any product destined for the territory of any other Member."

9.62 Article XIII provides that if and when quantitative restrictions are allowed by the GATT/WTO, they must, in addition, be imposed on a non-discriminatory basis.

> "Article XIII
>
> *Non-discriminatory Administration of Quantitative Restrictions*
>
> 1. No prohibition or restriction shall be applied by any Member on the importation of any product of the territory of any other Member or on the exportation of any product destined for the territory of any other Member, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted."

9.63 The prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection. Tariffs, to be reduced through reciprocal concessions, ought to be applied in a non-discriminatory manner independent of the origin of the goods (the "most-favoured-nation" (MFN) clause). Article I, which requires MFN treatment, and Article II, which specifies that tariffs

[287] See para. 7.7 above. We note that Japan, Thailand and the Philippines also identified Article XXIV as an exception: see Japan's arguments in para. 7.23, Thailand's arguments in para. 7.100 and the Philippines' arguments in para. 7.36 above.

must not exceed bound rates, constitute Part I of GATT. Part II contains other related obligations, *inter alia* to ensure that Members do not evade the obligations of Part I. Two fundamental obligations contained in Part II are the national treatment clause and the prohibition against quantitative restrictions. The prohibition against quantitative restrictions is a reflection that tariffs are GATT's border protection "of choice". Quantitative restrictions impose absolute limits on imports, while tariffs do not. In contrast to MFN tariffs which permit the most efficient competitor to supply imports, quantitative restrictions usually have a trade distorting effect, their allocation can be problematic and their administration may not be transparent.

9.64 Notwithstanding this broad prohibition against quantitative restrictions, GATT contracting parties over many years failed to respect completely this obligation. From early in the GATT, in sectors such as agriculture, quantitative restrictions were maintained and even increased to the extent that the need to restrict their use became central to the Uruguay Round negotiations. In the sector of textiles and clothing, quantitative restrictions were maintained under the Multifibre Agreement (further discussed below). Certain contracting parties were even of the view that quantitative restrictions had gradually been tolerated and accepted as negotiable and that Article XI could not be and had never been considered to be, a provision prohibiting such restrictions irrespective of the circumstances specific to each case. This argument was, however, rejected in an adopted panel report *EEC – Imports from Hong Kong*.[288]

9.65 Participants in the Uruguay Round recognized the overall detrimental effects of non-tariff border restrictions (whether applied to imports or exports) and the need to favour more transparent price-based, i.e. tariff-based, measures; to this end they devised mechanisms to phase-out quantitative restrictions in the sectors of agriculture and textiles and clothing. This recognition is reflected in the GATT 1994 Understanding on Balance-of-Payments Provisions[289], the Agreement on Safeguards[290], the Agreement on Agriculture where quantitative restrictions were eliminated[291] and the Agreement on Textiles and Clothing (further discussed below) where MFA derived restrictions are to be completely eliminated by 2005.

9.66 The measures at issue, on their face, impose quantitative restrictions on imports and are applicable only to India.[292] We consider that, given the absence of a defense by Turkey (other than its defense based on Article XXIV of GATT) to India's claims that discriminatory import restrictions have been imposed, India has made a *prima facie* case of violation of Articles XI[293] and XIII of GATT.

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[288] Panel Report on *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, adopted on 12 July 1983, BISD 30S/129, ("*EEC – Imports from Hong Kong*").

[289] See for instance paras. 2 and 3 of the GATT 1994 Understanding on the Balance-of-Payments Provisions which provide that Members shall seek to avoid the imposition of new quantitative restrictions for balance-of-payments purposes.

[290] The Agreement on Safeguards also evidences a preference for the use of tariffs. Article 6 provides that provisional safeguard measures "should take the form of tariff increases" and Article 11 prohibits the use of voluntary export restraints.

[291] Under the Agreement on Agriculture, notwithstanding the fact that contracting parties, for over 48 years, had been relying a great deal on import restrictions and other non-tariff measures, the use of quantitative restrictions and other non-tariff measures was prohibited and Members had to proceed to a "tariffication" exercise to transform quantitative restrictions into tariff based measures.

[292] We note, however, that Turkey maintains other quantitative restrictions against textiles and clothing imports from other countries on the same and/or other products; see para. 6.12 above. See also WT/REG22/7.

[293] We note that the measures at issue do not qualify for any of the exceptions under Article XI of GATT.

2. Article 2.4 of the ATC[294]

9.67 India claims that the measures under examination violate Article 2.4 of the ATC, in that they constitute new measures not authorized by the ATC and for which there is no GATT justification. Turkey claims that the measures under examination are not new, since the European Communities had similar restrictions in place when Turkey and the European Communities formed their customs union, and such restrictions are justified by Article XXIV of GATT.

(a) Regulatory framework of the ATC

9.68 The ATC provides for a maximum transitional period of ten years for the integration of all remaining quantitative restrictions in the sector of textiles and clothing that had been maintained under the old Multifibre Arrangement ("MFA"). Article 2 is the core of the ATC[295] and contains two key requirements for the transitional process that leads to the re-integration of the textiles and clothing sector into the general rules of GATT 1994. Paragraph 1 of Article 2 of the ATC requires that all former MFA or MFA-type restraints be notified to the TMB in order to be carried over into the ATC. Article 2.6 to 2.11, sets out the procedures for the progressive integration of the products covered by the ATC into GATT 1994 rules and disciplines. The ATC provides therefore exceptions to the general prohibitions contained in Articles XI and XIII against discriminatory quantitative restrictions in allowing some Members (those who had MFA restrictions in place and who have notified the TMB within 60 days of the entry into force of the WTO Agreement) to maintain such restrictions for a maximum period of 10 years. In that sense the MFA defined the reach of the general prohibition against quantitative restrictions in the area of textiles and clothing.

9.69 The lists of restrictions notified pursuant to Article 2.1 set the starting point for the treatment of the restraints carried over from the former MFA regime. Four WTO Members notified the TMB pursuant to Article 2.1 of the ATC: Canada, the European Communities, Norway and the United States. We consider that the notification requirement of 60 days referred to in Article 2.1 of the ATC is mandatory both for formal and substantive reasons. The wording of Article 2.1 is unequivocal with the use of the term "shall". Moreover, since the purpose of the ATC is to provide exceptions to the general application of Articles XI and XIII of GATT during an integration period to be completed by 1 January 2005, these exceptions should be interpreted narrowly.[296] Stemming from this provision, only the four Members above had the right to and did notify measures which allowed them to maintain MFA-derived quantitative restrictions for a maximum period of 10 years during which import quotas must increase annually until the products they cover are integrated into GATT. In the absence of an exception under

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[294] In interpreting the ATC and its importance in the WTO Agreement, it should also be clear from the object and purpose of the ATC, and from the well-known circumstances of the conclusion of the Uruguay Round, that the phasing out of the textile and clothing restrictions was a fundamental component of the WTO Agreement for developing countries.

[295] As discussed in paras. 2.25 to 2.30 above, trade in this sector of textile and clothing products was governed by special regimes outside the normal GATT rules: the Short Term Arrangement Regarding International Trade in Cotton Textiles (STA) in 1961, the Long Term Arrangement Regarding International Trade in Cotton Textiles (LTA) from 1962 to 1973 and the Arrangement Regarding International Trade in Textiles, also known as the Multifibre Arrangement or MFA, from 1974 to 1994. These special regimes essentially allowed for an extensive and complex system of bilateral import and export restrictions. The ATC provides for a set of rules, the purpose of which is that through a transitional process, embodied in the ATC, this sector is to be fully integrated into WTO rules by 1 January 2005. The two main avenues used by the ATC are 1) mandatory annual level increases of remaining quantitative restriction and 2) and an integration process by stages of all textile and clothing products into the general GATT rules.

[296] See for instance in Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, adopted 23 July 1998, WT/DS54, 55, 59 and 64/R, ("*Indonesia – Autos*") (Not appealed), para. 14.92, where the period allowed for notification to the TRIMS Committee under Article 5 of the TRIMS Agreement, in order for a Member to benefit from the transition provisions of the TRIMS Agreement, was considered mandatory.

the ATC or a justification under GATT, no new quantitative restrictions introduced by a Member can benefit from the exceptions provided for in Article 2.1 of the ATC after this 60 day period.

9.70 Article 2.4 of the ATC provides that:

> "4. The restrictions notified under paragraph 1 shall be deemed to constitute the totality of such restrictions applied by the respective Members on the day before the entry into force of the WTO Agreement. No new restrictions in terms of products or Members shall be introduced except under the provisions of this Agreement or relevant GATT 1994 provisions.[297] Restrictions not notified within 60 days of the date of entry into force of the WTO Agreement shall be terminated forthwith."

9.71 The prohibition on "new restrictions" must be interpreted taking into account the preceding sentence: "The restrictions notified under paragraph 1 shall be deemed to constitutes the *totality of such restrictions* applied by the respective Members on the day before the entry into force of the WTO Agreement". The ordinary meaning of the words indicates that WTO Members intended that as of 1 January 1995, the incidence of restrictions under the ATC could only be reduced. We are of the view that any legal fiction whereby an existing restriction could simply be increased and not constitute a "new restriction", would defeat the clear purpose of the ATC which is to reduce the scope of such restrictions, starting from 1 January 1995 (but for the exceptional situations referred to in Article 2.4 of the ATC). Thus, we consider that, setting aside the possibility of exceptions and justifications mentioned in Article 2.4 of the ATC, any increase of an ATC compatible quantitative restriction notified under Article 2.1 of the ATC, constitutes a "new" restriction.

9.72 On 28 February 1995 (therefore within the 60 day period of Article 2.1 of the ATC), the European Communities notified its previous restrictions maintained under the MFA.[298] This notification referred to restrictions applicable only to EC territory. After the period of 60 days (under Article 2 of the ATC) the European Communities is prohibited from notifying any new restrictions or changes to existing and notified restrictions, except adopted in compliance with the ATC or any other provisions of GATT 1994. Apart from these special cases the European Communities is not entitled to notify any increase of its MFA derived restrictions. Immediately before the date of the entry into force of the ATC, Turkey was a member of the Multifibre Arrangement (as an exporting country) and did not maintain any restrictions pursuant to Article 4 of the MFA or notified under Article 7 or 8 of the MFA in force on the day before the entry into force of the WTO Agreement. Since Turkey did not have any MFA restrictions in place, it could therefore not make any notification pursuant to Article 2.1 of the ATC. Accordingly, any restrictions on textiles and clothing applied by Turkey appear on their face to be "new", as defined in Article 2.4 of the ATC with reference to those countries who had MFA restrictions and notified them within 60 days.

(b) Quantitative restrictions permitted under the ATC

9.73 The ATC allows new restrictions in the case of safeguard measures (Article 6 of the ATC) or pursuant to Articles 2.14 and 7 of the ATC when a Member does not comply with the requirements of the agreement. We note that there is no provision in the ATC for general exceptions or security exceptions nor any other provisions on regional trade agreements.

9.74 We note that on 27 February 1995[299] Turkey notified the first stage of its integration programme to the TMB; in doing so Turkey is entitled, pursuant to Article 6.1 of the ATC, to make use of the special safeguard mechanism. It should be noted that under the ATC the right to maintain MFA

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[297] [Footnote original]The relevant GATT 1994 provisions shall not include Article XIX in respect of products not yet integrated into GATT 1994, except as specifically provided in paragraph 3 of the Annex.

[298] G/TMB/N/60.

[299] G/TMB/N/44.

derived quantitative restrictions and the integration process by stages are not related. The provisions of the ATC make clear that the fact that a product has not yet been re-integrated into the general GATT rules does not in any manner imply a right to introduce new import restrictions under Article 2.1 of the ATC on such products. The main benefit for Members resulting from the notification of an integration programme within 6 months of the entry into force of the WTO Agreement, is the use of the special safeguard mechanism under the ATC. There is no relation between the safeguard provisions of the ATC and the right to introduce new quantitative restrictions under Article 2.1 of the ATC. On 27 December 1996, Turkey notified the second stage of its integration programme[300]to take effect on 1 January 1998. On the same day, Turkey also notified, early, the provisions of the third stage of its integration programme[301] to take effect on 1 January 2003. All these notifications relate to imports of textiles and clothing into Turkey only. (We also note that the products covered by the measures at issue are not listed therein.)

(c) The Turkish measures under the ATC - are these new measures?

9.75 Article 3.3 of the ATC provides for notification of "new restrictions" or "changes in existing restrictions". It reads as follows:

> "3. During the duration of this Agreement, Members shall provide to the TMB, for its information, notifications submitted to any other WTO bodies with respect to any *new restrictions or changes in existing restrictions* on textile and clothing products, taken under any GATT 1994 provision, within 60 days of their coming into effect." (emphasis added)

9.76 In their joint communication dated 7 November 1997[302], Turkey and the European Communities notified the TMB pursuant to Article 3.3 of the ATC:

> "In addition Turkey and the European Communities have the honour to copy to the Chairman of the Textiles Monitoring Body for information a communication to the Chairman of the Committee on Regional Trade Agreements (CRTA) annexed to which are details of certain quantitative limits *introduced by Turkey* in respect of imports of certain textile and clothing products into Turkey from certain WTO Members, and necessary to give effect to the Customs Union in conformity with the provisions of Article XXIV of GATT 1994." (emphasis added)

9.77 On 6 May 1998, the European Communities and Turkey sent a second notification under Article 3.3 of the ATC to the TMB,[303] which reads as follows:

> "Turkey and the European Communities … concerning details of changes in respect of the *quantitative limits applied by Turkey* in respect of imports of certain textile and clothing products from certain WTO Members in conformity with its commitments arising out of the customs union and with the provisions of Article XXIV of GATT 1994." (Emphasis added.)

9.78 In light of Article 3.3 of the ATC, Turkey (and the European Communities) must consider that these measures are either "new" or "changes" to existing restrictions. As discussed above,[304] the measures at issue can only be considered to be, in WTO terms, Turkish measures. Since Turkey did not have any restrictions in place on 1 January 1995 that it could change, any such import restriction

[300] G/TMB/N/228.
[301] G/TMB/N/240.
[302] G/TMB/N/308.
[303] G/TMB/N/326.
[304] See para. 9.44 above.

is, by definition, "new" for Turkey in the sense of the ATC. In this regard we cannot accept Turkey's argument that its measures are not new because the European Communities (its customs union partner) had a similar measure in place. Conceivably, a change of geographical coverage could constitute a "change" to an "existing" restriction (as could be the case on the occasion of an enlargement of a customs union - an issue which in this case we do not need to address). But since the measures at issue were introduced and are applied by Turkey,[305] and in view of our previous conclusion that the measures at issue are not EC measures but Turkish measures,[306] Turkey's quantitative restrictions cannot be considered to be changes to the existing EC restrictions.

9.79 We need, however, to examine the possibility of exceptions or justifications under Article 2.4 of the ATC and whether, any such Turkish measures could otherwise be legitimized in the context of the application of an Article XXIV type of agreement, escaping thereby the prohibition of Article 2.4 of the ATC against the introduction of new restrictions.

9.80 In the absence of any ATC justification claimed for the Turkish measures and given the reference to Article XXIV in the Article 3.3 notification, it would seem that any such justification must be based on Article XXIV. We address below whether the formation of a customs union presents an opportunity to adopt measures which would otherwise be WTO incompatible, (unless, as noted by India, these are inherent to the very conclusion of the customs union.) We also consider the argument that if a WTO compatible measure was already in place for one Member forming the customs union, the other constituent member(s), in an effort to harmonize their trade policies, may be authorized to introduce a similar restriction, thereby legitimizing what would otherwise constitute a new restriction in the sense of the ATC. In Section G below, we shall develop our interpretation of the language of Article XXIV and the flexibility it may provide to Members forming such a customs union, namely in their efforts to adopt "substantially the same duties and other regulations of commerce". This possibility would not, in our view, change the nature of the restrictions at issue as being "new restrictions" in the sense of Article 2.4 of the ATC, in so far as Turkey is concerned. It remains to be decided whether Article XXIV authorizes the introduction of such new ATC restrictions.

9.81 Therefore, at this stage of our analysis, we consider that the measures at issue are new measures in the sense of Article 2.4 of the ATC.

(d) Jurisdiction of the TMB versus that of the Panel

9.82 We refer to our preliminary ruling on the jurisdiction of the TMB in paragraph 9.15 above. In order to consider the claim of India under Article 2.4 of the ATC (and following our preliminary ruling of 25 September 1998), we now address further the issue of the relationship between the jurisdiction of the Panel and that of the TMB. We consider, based on the interpretation by the Appellate Body in *Guatemala – Cement*[307] with regard to the relationship between the DSU and the Antidumping Agreement, that the provisions of the ATC (providing jurisdiction to the TMB to examine measures applied pursuant to the ATC) and the provisions of the DSU (providing jurisdiction for panels to interpret any covered agreement, including the ATC) may both apply together. Therefore even if the TMB has jurisdiction to determine what constitutes a "new" measure in the sense of the ATC and whether a violation of the ATC has taken place, we remain convinced that a panel is entitled to interpret the ATC to the extent necessary to ascertain whether Turkey benefits from a defense to India's claims under Articles XI and XIII of GATT based on the provisions of the ATC.

[305] See also the European Communities' responses to the Panel's questions, referred to in footnote 268 above and paras. 4.2 and 4.3 above, where it was said by the European Communities that Turkey itself ensures the surveillance of its own quantitative restrictions at the Turkey/India border.

[306] See paras. 9.33 to 9.44 above.

[307] Appellate Body Report on *Guatemala – Cement*, para. 75.

9.83 We consider, in any case, that the measures under examination are not measures applied pursuant to the ATC itself and therefore the ATC cannot provide such a defense. As discussed above, the ATC authorizes some exceptions to the general prohibitions against import restrictions contained in Articles XI and XIII of GATT (e.g., existing MFA restrictions notified within 60 days of the entry into force of the WTO Agreement (Article 2), safeguard measures pursuant to Article 6 of the ATC and measures adopted in the context of Articles 7 and 2.14 of the ATC).

9.84 On their face, the introduction of the Turkish measures do not correspond to any of the above situations, as noted also by Thailand in its third party submission[308]. We note that the ATC does not contain any provision dealing with regional trade agreements or any other general or specific exceptions. We conclude that in the present case, as acknowledged by the parties,[309] the measures at issue do not benefit from any circumstances specified in the ATC that would prevent the application of Article 2.4 of the ATC or Articles XI and XIII of GATT. We note also that Turkey has notified the said import restrictions to the TMB under Article 3.3 of the ATC which refers explicitly to "new restrictions or changes … taken under any GATT 1994 provision". Article 3.4 of the ATC suggests that the ATC envisages that non-ATC matters (such as those notified under Article 3.3 and the reverse notification pursuant to Article 3.4) will be dealt with "under relevant GATT 1994 provisions or procedures in the appropriate WTO body". Turkey does not claim that it benefits from an exemption to the prohibitions of Articles XI and XIII of GATT that is contained in the ATC, but rather one that derives from Article XXIV. It appears to us that the matter at issue involves a GATT provision rather than the ATC. The fact that the products under examination are textiles and clothing does not imply that it is the ATC exclusively which deals with the measures at issue. In fact GATT rules are generally applicable to all textile and clothing products and the ATC is applicable by exception principally to allow the maintenance for a limited period of time of MFA-derived quantitative restrictions and the use of the special safeguard mechanism.

9.85 Turkey's main defense is that its measures were adopted in the context of the formation of a customs union and are compatible with Article XXIV which is the only applicable provision. Clearly the interpretation of Article XXIV is not a matter covered by the provisions of the ATC, and could not fall under the exclusive jurisdiction of the TMB.[310] Having decided that the measures under examination are Turkish measures and not EC measures, we find that the ATC does not provide any exception to the prohibitions against quantitative restrictions contained in Articles XI and XIII of GATT.

3. Conclusions on India's claims under Articles XI and XIII of GATT, and Article 2.4 of the ATC

9.86 Consequently, unless the measures under examination are justified by Article XXIV (Turkey's defense that we examine below) they are inconsistent with the provisions of Articles XI and XIII of GATT and they would necessarily violate also Article 2.4 of the ATC.[311]

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[308] See paras. 7.76 and 7.77 above.

[309] See para. 6.26 (for Turkey) and paras. 3.47 and 3.48 (for India) above.

[310] We recall the provisions of Article 8.1 of the ATC: " In order to supervise the implementation of this Agreement, to examine all measures taken under this Agreement and their conformity therewith, and to take the actions specifically required of it by this Agreement, the Textiles Monitoring Body ("TMB") is hereby established …".

[311] The Panel is aware of the Appellate Body statement in *EC - Bananas III* that when two provisions are both applicable, a panel should proceed to apply the more specific provision first. However, such an exercise is not necessary here as what is examined is the relationship between Article XXIV and quantitative restrictions (either under Articles XI and XIII of GATT or the ATC).

G. TURKEY'S DEFENSE BASED ON ARTICLE XXIV OF GATT

9.87 We shall now proceed to examine Turkey's defense based on the application of Article XXIV and determine whether it rebuts what appears to be *prima facie* evidence of violations of Articles XI and XIII of GATT and Article 2.4 of the ATC.

9.88 Turkey argues that the measures at issue do not violate Articles XI and XIII of GATT or Article 2.4 of the ATC because they were implemented in relation to the formation of its customs union with the European Communities, which it considers to be compatible with the provisions of Article XXIV of GATT. For Turkey, the provisions of Article XXIV are concerned with the scope of application of GATT, both generally and in particular circumstances. As such, Article XXIV should not be regarded as a "justification", a "defense", an "exception" or a "waiver". In Turkey's view, the special nature of Article XXIV is evidenced by the fact that Article XXIV is in Part III of GATT, and not in Part II together with other provisions on commercial policies. For Turkey, Article XXIV, paragraphs 5 to 9, is to be viewed as *lex specialis* for the rights and obligations of WTO Members at the time of formation of a regional trade agreement. In other words, in Turkey's view, the WTO consistency of the measures challenged by India depends on the WTO consistency of the Turkey-EC customs union (of which they are an integral part) and the WTO consistency of both the customs union and its measures is to be determined with reference to the provisions of paragraphs 5 to 9 of Article XXIV only and no other GATT provisions.

9.89 India considers that all GATT rules define the limits of applicability of the GATT. India is of the view that, if Turkey's argument were accepted, Members forming a customs union could legally circumvent the WTO procedural and substantive requirements with respect to quantitative restrictions, which the signatories of the WTO agreements agreed to permit only in exceptional circumstances. In respect of such Members, the WTO agreements could no longer operate as a legal framework providing effective assurances of market access and the WTO dispute settlement procedures would be rendered ineffective.

9.90 In order to analyze Turkey's arguments, which we consider are properly labelled a defense[312] to India's claims, we firstly recall certain basic interpretative principles applicable in WTO dispute settlement proceedings. Secondly, we examine the provisions of Article XXIV generally. Thirdly, we consider the meaning of Article XXIV:5 and, finally that of Article XXIV:8, which constitute the heart of Turkey's defense to India's claims.

1. General Interpretative Principles

(a) Vienna Convention on the Law of Treaties

9.91 In its examination of Article XXIV, the Panel is guided by the principles of interpretation of public international law (Article 3.2 of the DSU) which include Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). As provided for in these articles and as applied by panels and the Appellate Body, we interpret the provisions of Article XXIV using first the ordinary meaning of the terms of that provision, as elaborated upon by the 1994 Understanding on Article XXIV, in their context and in light of the object and purpose of the relevant WTO agreements. If need be, to clarify or confirm the meaning of these provisions, we may refer to the negotiating history, including the historical circumstances that led to the drafting of Article XXIV of GATT. We note also the prescription of Article XVI:1 of the WTO Agreement which provides that "… the WTO shall

[312] We note, from our research, that during the negotiation of Article XXIV, participants typically referred to Article XXIV as an "exception" for customs unions and free-trade areas. See also footnote 287 above.

be guided by the decisions, procedures and customary practices followed by CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".[313]

(b) WTO rules on conflicts

9.92 As a general principle, WTO obligations are cumulative and Members must comply with all of them at all times unless there is a formal "conflict" between them. This flows from the fact that the WTO Agreement is a "Single Undertaking".[314] On the definition of conflict, it should be noted that:

> "… a conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. ... There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another."[315]

9.93 This principle, also referred to by Japan in its third party submission,[316] is in conformity with the public international law presumption against conflicts which was applied by the Appellate Body in *Canada – Periodicals*[317] and in *EC – Bananas III*[318], when dealing with potential overlapping coverage of GATT 1994 and GATS, and by the panel in *Indonesia – Autos*[319], in respect of the provisions of Article III of GATT, the TRIMs Agreement[320] and the SCM Agreement.[321] In *Guatemala – Cement*[322], the Appellate Body when discussing the possibility of conflicts between the provisions of the Anti-dumping Agreement[323] and the DSU, stated: "A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them."

9.94 We recall the Panel's finding in *Indonesia – Autos*, a dispute where Indonesia was arguing that the measures under examination were subsidies and therefore the SCM Agreement being *lex specialis,* was the only "applicable law" (to the exclusion of other WTO provisions):

> "14.28 In considering Indonesia's defence that there is a general conflict between the provisions of the SCM Agreement and those of Article III of GATT, and consequently that the SCM Agreement is the only applicable law, we recall first that in public international law there is a presumption against conflict.[324] This presumption is

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[313] See Appellate Body Report on *Japan – Alcoholic Beverages*, p. 14.

[314] See the Appellate Body statement in *Brazil – Desiccated Coconut*, page 12. The WTO is a single undertaking except for the plurilateral agreements for the non-signatories.

[315] Wilfred Jenks, "The Conflict of Law-Making Treaties", The British Yearbook of International Law (1953) at p. 426-427.

[316] See para. 7.22 above.

[317] Appellate Body Report on *Canada – Certain Measures Concerning Periodicals*, adopted on 30 July 1997, WT/DS31/AB/R, ("*Canada - Periodicals*"), page 19.

[318] Appellate Body Report on *EC - Bananas III*, paras. 219-222.

[319] Panel Report on *Indonesia – Autos*, para. 14.28.

[320] The Agreement on Trade-Related Investment Measures.

[321] The Agreement on Subsidies and Countervailing Measures.

[322] Appellate Body Report on *Guatemala – Cement*, para.65.

[323] The Agreement on the Implementation of Article VI of GATT 1994.

[324] [Footnote original]In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the same parties. Second, the treaties must cover the same substantive subject matter. Were it otherwise, there would be no possibility for conflict. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. "... [T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. ... Not every such divergence constitutes a conflict, however. ... Incompatibility of contents is an essential condition of conflict". (7 Encyclopædia of Public International Law

> especially relevant in the WTO context[325] since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation[326] pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words."

9.95 In light of this general principle, we will consider whether Article XXIV authorizes measures which Articles XI and XIII of GATT and Article 2.4 of the ATC otherwise prohibit. In view of the presumption against conflicts, as recognized by panels and the Appellate Body, we bear in mind that to the extent possible, any interpretation of these provisions that would lead to a conflict between them should be avoided.

(c) Principle of effective interpretation

9.96 Finally we would also like to recall the principle of effective interpretation[327] whereby all provisions of a treaty must be, to the extent possible, given their full meaning so that parties to such a treaty can enforce their rights and obligations effectively. We note that the Appellate Body has referred to this principle on several occasions.[328] We understand that this principle of interpretation

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(North-Holland 1984), page 468). The *lex specialis derogat legi generali* principle "which [is] inseparably linked with the question of conflict"(Idem., page 469) between two treaties or between two provisions (one arguably being more specific than the other), does not apply if the two treaties ".. deal with the same subject from different points of view or [is] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with, those of the other" (Wilfred Jenks, "The Conflict of Law-Making Treaties", The British Yearbook of International Law (BYIL) 1953, at 425 *et seq.*). For in such a case it is possible for a state which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary. See also E.W. Vierdag, "The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions ", BYIL, 1988, at 100; Sir Robert Jennings/Sir Arthur Watts (ed.), Oppenheim's International Law, Vol. I., Parts 2 to 4, 1992, at 1280; Sir Gerald Fitzmaurice, "The Law and procedure of the International Court of Justice", BYIL , 1957, at 237; Sir Ian Sinclair, The Vienna Convention on the Law of Treaties, 1984, at 97.

[325] [Footnote original]In this context we note that the WTO Agreement contains a specific rule on conflicts which is however limited to conflicts between a specific provision of GATT 1994 and a provision of another agreement of Annex 1A. We do not consider this interpretative note in this section of the report because we are dealing with Indonesia's argument that there is a general conflict between Article III and the SCM Agreement, while the note is concerned with specific conflicts between a provision of GATT 1994 and a specific provision of another agreement of Annex 1A.

[326] [Footnote original]"This would correspond to the ruling of the Appellate Body when it stated that a treaty may not be interpreted so as to reduce whole clauses to "inutility". See footnote 649 *supra*."

[327] The principle of effective interpretation or "l'effet utile" or in latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty. For a discussion of this principle see also the Yearbook of the International Law Commission, 1966, Vol II A/CN.4/SER.A/1966/Add.1 p. 219 and following. See also *E.g.*, *Corfu Channel* Case, (1949) I.C.J. Reports, p. 24; *Territorial Dispute* Case (Libyan Arab Jamahiriya v. Chad), (1994) I.C.J. Reports, p. 23; Oppenheim's International Law (9th ed., Jennings and Watts eds., 1992), Volume 1, 1280-1281; P. Dallier and A. Pellet, Droit International Public, 5è éd. (1994) para. 17.2; D. Carreau, Droit International (1994), para. 369.

[328] See for instance the statement of the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline*, adopted on 20 May 1996, WT/DS2/AB/R ("*US – Gasoline*"):"An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"; also the Appellate Body Report on *Japan – Alcoholic Beverages*, p. 12; Appellate Body Report on *United States – Restrictions on Imports of Cotton and Man-Fibre Underwear*, adopted on 25 February 1997, WT/DS24/AB/R, p. 16.

prevents us from reaching a conclusion on the claims of India or the defense of Turkey, or on the related provisions invoked by the parties, that would lead to a denial of either party's rights or obligations.

2. Overview of Article XXIV of GATT

9.97 In examining of Article XXIV, we are well aware that regional trade agreements have greatly increased in number and importance since the establishment of GATT 1947 and today cover a significant proportion of world trade.[329] We have also undertaken a detailed analysis of the negotiating history of Article XXIV. We note that the wording of Article XXIV is of sub-optimal clarity and has been the object of various, sometimes opposing, views among individual contracting parties and Members and in the literature. We are also aware that the economic and political realities that prevailed when Article XXIV was drafted, have evolved and that the scope of regional trade agreements is now much broader than it was in 1948. Pursuant to the Vienna Convention on the Law of Treaties, we begin our analysis of the terms of Article XXIV together with those of GATT 1947, GATT 1994, the 1994 Understanding on Article XXIV in their context and in the light of the object and purpose of the WTO Agreement, GATT, the ATC and the relevant provisions on regional trade agreements.

9.98 As a means of increasing freedom of trade, Article XXIV recognizes that, subject to certain conditions, customs unions and free-trade areas between WTO Members are desirable. To this end Article XXIV provides for the possibility that Members forming a customs union may depart, as to the trade between themselves, from the most-favoured nation principle, in conformity with the conditions of Article XXIV.[330] There are a number of indications of the broad desirability of Article XXIV agreements as a means of increasing freedom of trade. For example, paragraph 4 of Article XXIV provides that:

> "The Members recognize the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between economies of the countries parties to such agreements."

9.99 Similarly, the preamble of the GATT 1994 Understanding on Article XXIV, which was added to GATT 1994 as a result of the Uruguay Round, reiterates that:

> "such contribution to the expansion of world trade may be made by closer integration between the economies of the parties to such agreements".

9.100 This is also reflected in paragraph 7 of the Singapore Ministerial Decision:[331]

> "7. We note that trade relations of WTO Members are being increasingly influenced by regional trade agreements, which have expanded vastly in number, scope and coverage. Such initiatives can promote further liberalization and may assist least-developed, developing and transition economies in integrating into the international trading system."

9.101 This recognition of the desirability of regional trade agreements is not without qualification, however. Article XXIV:4 appears also to recognize that some of these agreements may have detrimental effects and therefore the rest of paragraph 4 of Article XXIV provides:

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[329] We refer to our discussion in paras. 2.2 to 2.9 above.

[330] We note in this context the statement of the Appellate Body in *EC - Bananas III*, para. 191: "Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV".

[331] See WT/MIN(96)/DEC.

> "They also recognize that the purpose of a customs union and a free-trade area should be to facilitate trade between constituent territories *and not to raise barriers to the trade of other Members with such territories*." (emphasis added)

9.102 This is reiterated in the preamble of the GATT 1994 Understanding on Article XXIV which provides that:

> *"Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and *not to raise barriers to the trade of other Members with such territories*; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;" (emphasis added)

9.103 The terms of Article XXIV thus confirm that WTO Members have a right, albeit conditional, to conclude regional trade agreements.

9.104 In this regard, Article XXIV:5 provides that:

> "Accordingly, the provisions of this Agreement [GATT 1994] shall not prevent, as between the territories of Members, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that … :"

9.105 We note that, at the very beginning of Article XXIV:5, the use of the word "Accordingly" indicates that the conditional right to form a regional trade agreement has to be understood and interpreted within the parameters set out in paragraph 4, since the word "Accordingly" refers back to that paragraph, which is the only paragraph addressing customs unions and free-trade areas in Article XXIV that precedes paragraph 5. Thus, the purpose of such a regional trade agreement "should be to facilitate trade between constituent territories *and not to raise barriers to the trade of other Members with such territories*" (emphasis added). In addition, we note that paragraphs 5 (in its proviso), 6 and 8, in particular, contain requirements that such agreements must meet. We consider these requirements in more detail later.

9.106 With the intent of enabling Members as a whole to monitor the formation of such regional trade agreements, Article XXIV:7 provides that:

> "(*a*) Any Member deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the Members and shall make available to them such information regarding the *proposed* union or area as will enable them to make such reports and recommendations to Members as they may deem appropriate."[332] (emphasis added)

Paragraph 7 of the GATT 1994 Understanding on Article XXIV provides that:

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[332] The rest of paragraph 7 reads: "(*b*) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and taking due account of the information made available in accordance with the provisions of sub-paragraph (a), the Members find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the Members shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations."

"Review of Customs Unions and Free-Trade Areas

7. All notifications made under paragraph 7(a) of Article XXIV shall be examined by a working party in the light of the relevant provisions of GATT 1994 and of paragraph 1 of this Understanding. The working party shall submit a report to the Council for Trade in Goods on its findings in this regard. The Council for Trade in Goods may make such recommendations to Members as it deems appropriate."

9.107 Traditionally in GATT, regional trade agreements were examined by working parties. In the WTO, such agreements are now examined by the Committee on Regional Trade Agreements (CRTA).[333] In the history of GATT, except in the case of the 1994 customs union between the Czech Republic and the Slovak Republic, the CONTRACTING PARTIES were never able to conclude whether or not a regional trade agreement was fully compatible with GATT. Today, under the WTO, Members have yet to conclude that a regional trade agreement is in full compliance with the WTO Agreement. In short, virtually all working party reports on regional trade agreements have been inconclusive.[334]

9.108 We note also that Article XXIV:10 of GATT provides for the possibility of an approval by WTO Members of a regional trade agreement that would not be fully compatible with the provisions of Article XXIV, if such a proposed regional trade agreement respects the key provisions of Article XXIV ("provided that such proposals lead to the formation of a customs union or a free-trade area in the sense of this Article").

3. Article XXIV:5(a)

(a) Arguments of the parties

9.109 Turkey claims that Article XXIV:5 of GATT 1994 authorizes the formation of a customs union, as defined by Article XXIV:8(a), provided that the conditions of Article XXIV:5(a) are met. Turkey argues that the provisions of Article XXIV:5(a) should be read as permitting, at the time of the completion of a customs union, the introduction of restrictive regulations of commerce to the trade of third countries, provided that the overall incidence of duties and other regulations of commerce was not higher or more restrictive after the completion of the customs union than before. Turkey claims that the overall incidence of duties and other regulations of commerce of the constituent members of the Turkey-EC customs union is not higher or more restrictive after the completion of the customs union than before.

9.110 In Turkey's view, the fact that Article XXIV does not prohibit Members from introducing new restrictions is confirmed in the last sentence of paragraph 2 of the GATT 1994 Understanding on Article XXIV, which states, *inter alia*, that:

> "for the purposes of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required".

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[333] The examination of regional trade agreements is subject to the same law and similar modalities as they were under GATT; see para. 2.7 above.

[334] This is in part due to the GATT/WTO practice of decision-making by consensus whereby the consensus of contracting parties (including the parties to the regional trade agreement) was needed for a recommendation to be made in terms of Article XXIV:7(a). The impossibility for GATT CONTRACTING PARTIES and still today, WTO Members, to reach any such conclusion is also due, *inter alia*, to disagreement on the interpretation of Article XXIV.

9.111 For Turkey, if it had been the intention of Members to ban the imposition of new quantitative restrictions whenever a customs union was being instituted, the reference to "other regulations of commerce" in Article XXIV:5 would have been a redundant provision.

9.112 Turkey further argues that the derogation envisaged by Article XXIV:5 is not limited to a particular GATT rule, but encompasses all those rules from which a derogation is necessary to permit the formation of customs unions. In support of this argument, Turkey notes that the opening clause of Article XXIV:5 is drafted in language similar to the language used in the opening clause of Article XX: "the provisions of this Agreement shall not prevent the formation of customs unions provided that …". For Turkey, this wording demonstrates that the derogation refers to all the provisions of the GATT, and not just to those contained in Article II, which are more specifically mentioned in Article XXIV:6.[335]

9.113 For India, the terms of Article XXIV:5 do not provide a legal basis for measures otherwise incompatible with GATT/WTO rules. This provision merely authorizes the formation of a customs union or free-trade area, nothing else. Its terms consequently exempt from the other obligations under the GATT only measures inherent in the formation of a customs union or a free-trade area. For instance, a customs union or a free-trade area could only be formed by the granting of preferential treatment inconsistent with Article I and Article XXIV clearly provides a justification therefor. However, customs unions and free-trade areas could be formed without the introduction of new quantitative restrictions on imports from third Members inconsistent with Article XI of GATT. There is, in particular, nothing that requires Members forming a customs union to impose new restrictions on imports from one particular third Member, inconsistently with Articles XI and XIII of GATT and Article 2.4 of the ATC.

9.114 India also refers the Panel to Article XXIV:6, as part of the context of paragraph 5, which recognizes that on the occasion of the creation of a customs union, tariff bindings may be increased. India argues that there is no corresponding mechanism for renegotiation and compensation for Members affected by the introduction or increase of quantitative restrictions which are otherwise WTO incompatible. For India, this is a logical consequence of the principle that increasing tariffs is not as such WTO incompatible, as tariffs are negotiable (and renegotiable under Article XXVIII), whereas quantitative restrictions are in general prohibited and may only be imposed in circumstances narrowly defined in the WTO agreements. Given that rules governing quantitative restrictions are fundamentally different from the rules governing tariffs, there is no basis to apply Article XXIV:6 by analogy to quantitative restrictions. Moreover, for India, paragraph 4 of the GATT 1994 Understanding on Article XXIV makes it explicit that paragraph 6 of Article XXIV establishes the procedures to be followed when a Member forming a custom union proposes to increase a bound rate of duty. Had the Uruguay Round negotiators meant to extend Article XXIV:6 to quantitative restrictions, they would have formulated this provision accordingly.

9.115 According to Turkey, it could not be inferred from the fact that Article XXIV:6 only refers to increases of customs duty rates that the intention behind Article XXIV:5(a) is to prohibit the introduction of restrictive measures as part of a common regulation of commerce of a customs union. For Turkey, such an interpretation would be difficult to reconcile with Article XXIV:5(a), which provides a test for the GATT consistency of a customs union requiring, *inter alia*, that regulations of commerce of a customs union shall not on the whole be more restrictive than the regulations of commerce applicable in the constituent territories prior to the formation of the customs union. For Turkey, it would make little sense to provide for an evaluation of the overall incidence of regulations of commerce if, as India asserts, the regulations of commerce of the Turkey-EC customs union cannot be determined by pre-existing restrictive measures applied by the European Communities.

[335] In this context, Turkey recalls that it had offered to enter into negotiations to address India's concerns with regard to the change in its external trade regime, but that India had not wished to participate in such negotiations.

(b) Analysis of Article XXIV:5(a)

(i) Ordinary meaning of the terms of Article XXIV:5(a)

9.116 Article XXIV:5(a) provides as follows:

> "5. Accordingly, *the provisions of this Agreement shall not prevent*, as between the territories of contracting parties, *the formation of a customs union* or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
>
> (*a*) with respect to a customs union, or an interim agreement leading to a formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;" (emphasis added)

9.117 With respect to tariffs, paragraph 2 of the GATT 1994 Understanding on Article XXIV makes it clear that it is the level of the "applied duties" that are to be taken into account by Members in their "evaluation under paragraph 5(a) of Article XXIV":

> "For this purpose the duties and charges to be taken into consideration shall be the applied rates".

9.118 By requiring an examination of changes in applied duties, the provisions of Article XXIV:5(a) are made unambiguously distinct from those in Article XXIV:6, since the level of applied duties, unlike bound tariffs, is not regulated in the WTO framework of rights and obligations. Since the analysis of applied duties is a basic tool in appraising the impact of actual border barriers on trade opportunities, we consider that the requirement of an overall assessment of the incidence of duties based on applied duties clearly points at the economic nature of the assessment under paragraph 5(a).

9.119 The same conclusion is applicable in relation to the overall assessment of the incidence of other (non-tariff) regulations of commerce, in respect of which paragraph 2 of the Understanding on Article XXIV provides:

> "… It is recognized that for the purpose of the overall assessment of the incidence of other regulations of commerce for which quantification and aggregation are difficult, the examination of individual measures, regulations, products covered and trade flows affected may be required."

9.120 Thus, the terms of paragraph 5(a) of Article XXIV, as elaborated upon and clarified by the GATT 1994 Understanding on Article XXIV, provide for an "economic" test for assessing whether a specific customs union is compatible with Article XXIV. In the context of the overall assessment of the potential trade impact of any such customs union, (a task envisaged to be performed by the WTO membership through the CRTA[336]), duties and all regulations which existed in one or more of the constituent members and/or form part of the customs union treaty must be taken into account. While there is no agreed definition between Members as to the scope of this concept of "other regulations of commerce", for our purposes, it is clear that this concept includes quantitative restrictions. More broadly, the ordinary meaning of the terms "other regulations of commerce" could be understood to

[336] In this respect we note the standard terms of reference used by the Council for Goods for examining regional trade agreements, as set out in WT/REG3/1.

include any regulation having an impact on trade (such as measures in the fields covered by WTO rules, e.g. sanitary and phytosanitary, customs valuation, anti-dumping, technical barriers to trade; as well as any other trade-related domestic regulation, e.g. environmental standards, export credit schemes). Given the dynamic nature of regional trade agreements, we consider that this is an evolving concept.

9.121 We note that the language of paragraph 5(a) of Article XXIV is general and not prescriptive. While it authorizes the formation of customs unions, it does not contain any provision that either authorizes or prohibits, on the occasion of the formation of a customs union, the adoption of import restrictions otherwise GATT/WTO incompatible, by any of the parties forming this customs union. For example, the terms of paragraph 5(a) do not permit or prohibit or otherwise regulate increases of bound tariffs, which is an issue dealt with in paragraph 6 of Article XXIV. Rather, paragraph 5(a) provides for an economic assessment (to be performed by the WTO membership as a whole) of the overall effect of the applied tariffs and other regulations of commerce resulting from the formation of the customs union.[337] While the wording of paragraph 5(a) assumes that, as a result of a customs union, some (applied) duties may be higher, and/or other regulations of commerce may be more restrictive than before, it does not specify whether such a situation may occur only through GATT/WTO consistent actions or may occur through GATT/WTO inconsistent actions. What paragraph 5(a) provides, in short, is that the effects of the resulting trade measures and policies of the new regional agreement shall not be more trade restrictive, overall, than were the constituent countries' previous trade policies.

9.122 In other words, we consider that the terms of paragraph 5(a) do not address the GATT/WTO compatibility of specific measures that may be adopted on the occasion of the formation of a new customs union. We note that the standard terms of reference used by the CRTA for the examination of regional trade agreements confirm that the CRTA, in its overall assessment, shall not determine the WTO compatibility of specific measures.[338] The terms of Article XXIV:5(a) only provide that, for a customs union to be compatible with Article XXIV of GATT and the 1994 GATT Understanding on Article XXIV, the overall impact of the applied tariffs and other regulations of commerce resulting from the formation of the customs union must not be more restrictive than that of its constituent members prior to its formation.

9.123 It is important to emphasize that this interpretation does not render paragraph 5(a) a nullity,[339] as suggested by Turkey. In terms of our reading of paragraph 5(a), it continues to play an important role in ensuring that the occasion of the formation of a customs union is not used to increase trade barriers overall, even if the parties' previous concessions allowed such an increase (e.g., in the case of increased applied rates below tariff levels bound by all parties). Indeed, that purpose is in fact emphasized by the focus on "applied", and not on bound, tariff rates.

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[337] The assessment, with respect to applied tariffs, is based on two comparable trade-weighted averages of applied tariffs, calculated by the Secretariat in accordance with the methodology described in paragraph 2 of the Understanding: (a) an average representing the pre-customs union situation; and (b) another average reflecting the situation just after the formation of the customs union. To compute the figure under (a), all applied tariffs (by tariff line) of all parties to the customs union are averaged using - as weights - the corresponding values of their imports from non-preferential origins; the figure under (b) is obtained by averaging the tariffs (to be) applied by the customs union, using the same values as trade weights.

[338] "This implies that a working party established to examine a notification under paragraph 7(a) of Article XXIV has the mandate to examine the incidence and restrictiveness of *all duties and regulations of commerce, in particular those governed by the provisions of the Agreements contained in Annex 1A of the WTO Agreement*. However, it should be kept in mind that the purpose of an examination in the light of paragraph 5(a) of Article XXIV *would not be to determine whether each individual duty or regulation existing or introduced on the occasion of the formation of a customs union is consistent with all provisions of the WTO Agreement*; it would be to ascertain whether on the whole the general incidence of the duties and other regulations of commerce has increased or become more restrictive.", Understanding read out by the Chairman of the Council for Trade in Goods - 20 February 1995, WT/REG3/1 (emphasis added).

[339] See our discussion on the general rule of effective interpretation in para. 9.96 above.

(ii) The immediate context of Article XXIV:5(a)

9.124 Our interpretation of the terms of Article XXIV:5(a) is supported by their context. That context in the first place consists of the other provisions of Article XXIV relating to regional trade agreements.

Article XXIV:5(b)

9.125 Our interpretation of paragraph 5(a) is also supported by the similar wording contained in paragraph 5(b) in relation to free-trade areas. In paragraph 5(b), which is concerned with free-trade areas, it is stated that "… the duties and other regulations of commerce maintained in *each* of the constituent territories … shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories …" (emphasis added). We note that the terms of paragraph 5(b) are very similar to those in paragraph 5(a). In free-trade areas, however, constituent members are not required to harmonize their other trade regulations with third countries. Therefore, constituent members of a free-trade area could not argue that the terms of paragraph 5(b) would authorize them to violate other provisions of the WTO Agreement in their efforts to harmonize their external trade policies, since they are not required to do so. Consequently, we see no basis for arguing that the terms of paragraph 5(a) authorize constituent members of a customs union to adopt GATT-inconsistent measures. The same terms being used in paragraphs 5(a) and 5(b) should not lead to different interpretations.

Article XXIV:4

9.126 We also note that Article XXIV:4 provides that the purpose of a customs union should not be to raise barriers to the trade of other Members. While not expressed as an obligation, paragraph 4 (and its elaboration in the fifth paragraph of the Preamble of the GATT 1994 Understanding on Article XXIV) argues against an interpretation of paragraph 5(a) that would read into that paragraph an exception to GATT rules that prohibit specific trade barriers. This view is also expressed by Japan and Hong Kong, China in their third party submissions.[340] With the use of the term "Accordingly", the language of paragraph 4 is specially relevant to the application and interpretation of the provisions in paragraph 5, and argues against any interpretation in favour of exceptions or deviations (not elsewhere foreseen) to the general GATT prohibition against the use of quantitative restrictions. This is also noted by the Philippines.[341]

Article XXIV:6

9.127 Furthermore, Article XXIV:6 provides that if a Member "proposes to increase any rate of duty inconsistently with the provisions of Article II, the procedure set forth in Article XXVIII shall apply". Thus, in the adoption of the common external tariff of a customs union, compensation is due if a pre-existing tariff binding is exceeded. We note that there is no parallel provision to compensate Members for the introduction of quantitative restrictions. In our view, this is the case because quantitative restrictions are generally prohibited by GATT/WTO, while increases of tariffs above their bindings, if re-negotiated, are WTO compatible.

9.128 We also consider that this reference to Article XXVIII in Article XXIV provides evidence of the application of the other GATT provisions to measures adopted on the occasion of the formation of a customs union. The purpose of such specific reference to Article XXVIII, is to allow for the re-negotiation of the tariff bindings outside the time and prior notification constraints of Article XXVIII (including Article XXVIII*bis* and the GATT 1994 Understanding on Article XXVIII).

[340] See Japan's argument in para. 7.21 and Hong Kong, China's argument in para. 7.10 above.
[341] See para. 7.43 above.

Article XXIV:8

9.129 Another element relating to the context is the scope and ordinary meaning of the terms of sub-paragraph 8(a)(ii) which define how Members forming a customs union should act *vis-à-vis* third country Members. For our analysis of Article XXIV:8(a) we refer to our discussion in paragraphs 9.142 to 9.169 below, where we address Turkey's argument that it is required to adopt the EC's commercial trade policy including quantitative restrictions in the sector of textile and clothing products.

Article XXIV in Part III of GATT

9.130 An additional element relating to the context is the fact that Article XXIV is found in Part III of GATT, a section of GATT distinct from Part I and Part II. Part I contains the main foundations of GATT: the most-favoured nation clause (Article I) and the tariff commitments or bindings (Article II). Part II contains a set of disciplines, the purpose of which is mainly to ensure the effectiveness of the tariff commitments. This is evident from the prohibition against quantitative restrictions (Article XI) and the national treatment obligation (Article III). We note that Article XXIV is not listed with the general exceptions (Article XX) or the security exception (Article XXI), both of which are in Part II.

9.131 Turkey concludes from the positioning of Article XXIV in Part III, that Article XXIV constitutes a self-contained regime for the formation of regional trade agreements, i.e. if the requirements of Article XXIV are met, other GATT rules do not apply to measures related to the formation of a customs union.

9.132 We note that Part III contains different types of provisions, some of a more institutional nature (Article XXV for instance), others dealing with Members' basic rights, such as Article XXVIII, and Article XXIV. We also note that Article XXIV itself deals with various elements such as the territorial application of GATT, frontier traffic and customs unions and free-trade areas. We have examined thoroughly the negotiating history of Article XXIV which, however, is not instructive in this respect. There is no text associated with Part III that suggests that it is fundamentally different from Part II, although Parts II and III entered into force at different dates.[342] In the Havana Charter, the provisions on regional trade agreements were included in the commercial policy chapter in a section on special provisions (among which were the general exceptions found today in Article XX of GATT). Yet we are not aware that the provisions of the Havana Charter on customs unions were thought to be fundamentally different from those of GATT. We can read that the drafters were of the view that customs unions and free-trade areas (a concept that came in later in the negotiations) were of the nature of this so-called "exception" but the discussions are not illuminating on the scope or even the nature of this provision and the relevance of its "location" in the GATT. We hesitate to draw from this examination the conclusion proposed by Turkey.

9.133 Moreover, the interpretation advanced by Turkey which pertains to propose a test as to the treatment of measures that are associated with the "formation" of a customs union, is problematic. The temporal and substantive breadth of this concept would be crucial to the interpretation of Article XXIV under Turkey's argument, yet Article XXIV does not define such a concept.[343] There are important

[342] We recall also that in the *European Communities – Measures Affecting the Importation of Certain Poultry Products*, adopted on 23 July 1998, WT/DS69/7, the Appellate Body concluded that the prohibitions contained in Article XIII were applicable to negotiations taking pace pursuant to Article XXVIII, a provision also contained in Part III of GATT. Clearly provisions of Part III of GATT do not in themselves argue for a distinct regime from those contained in Part II of GATT.

[343] What would be the minimum required scope for measures to qualify as being part of the "formation"? Would all measures that lead to, or are alleged to lead to, harmonization of policies be covered? Should there be a minimum or maximum time-frame to determine such "formation" period? Should the formation be required to correspond to any announced transitional period of interim agreements?

difficulties in relation to the interpretation of the term "formation" when considered in relation to the present case.[344] For us this argument of Turkey is not substantiated and we therefore reject it.

(iii) Conclusion based on the ordinary meaning of the terms and their immediate context

9.134 We shall examine the wider context of Article XXIV:5(a) and 8(a) as well as the object and purpose of GATT and the WTO Agreement, together with the practice of GATT CONTRACTING PARTIES and WTO Members with regard to these provisions, after our examination of the wording of Article XXIV:8(a). So far, based on the ordinary meaning of the terms and their immediate context, we find that the language of Article XXIV:5(a) is not prescriptive as to whether a specific measure may be adopted on the occasion of the formation of a customs union. From the terms of Article XXIV:5(a) and their immediate context, we find that there is a basis for the provisions of the sub-paragraph 5(a) to be informed by, and interpreted consistent with, the language of paragraph 4 against the raising of trade barriers. Consequently, we find that there is no legal basis in Article XXIV:5(a) for the introduction of quantitative restrictions otherwise incompatible with GATT/WTO; the wording of sub-paragraph 5(a) does not authorize Members forming a customs union to deviate from the prohibitions contained in Articles XI and XIII of GATT or Article 2.4 of the ATC. We find that the terms of sub-paragraph 5(a) provide for a prohibition against the formation of a customs union that would be more restrictive, on the whole, than was the trade of its constituent members (even in situations where there are no WTO-incompatible measures).

4. Article XXIV:8

(a) Arguments of the parties

9.135 Turkey submits also that Article XXIV:8(a)(ii) requires it to apply to third countries the same regulations of commerce, including import restrictions as those applied by the European Communities to the same third countries, since the term *regulations of commerce* has traditionally been interpreted as incorporating quantitative restrictions.[345] For Turkey, this is precisely the reason why Article 12 of Decision 1/95 unequivocally envisages the wholesale adoption by Turkey of the European Communities' Common Commercial Policy Instruments, as well as the European Communities' Customs Code, in the area of textiles and clothing products, prior to the completion of the customs union. Article 12(1) specifies the external trade measures to be adopted by Turkey towards third countries, which constituted the critical mass of commercial policy regulations applied by the European Communities and appropriate measures are envisaged to prevent trade diversion to the European Communities over Turkey's customs territory.

9.136 In India's view, however, Article XXIV:8(a) merely defines the requirements to be fulfilled by a regional trade agreement to qualify as a customs union within the meaning of Article XXIV[346]. This provision could not reasonably be interpreted to imply that Members, in fulfilling that requirement, are entitled to ignore their WTO obligations, such as those prohibiting import restrictions from third Members. For India, Article XXIV:4 makes it clear that the purpose of a customs union is not to raise barriers to the trade of third countries.

9.137 India notes that while Turkey claims it is obliged by Article XXIV:8 to adopt common quantitative restrictions with the European Communities for textiles and clothing products, it is also claiming the right to follow divergent trade policy practices and to adopt different instruments in other

[344] We note that Turkey's first agreement with the European Communities was signed on 12 September 1963; see paras. 2.10 to 2.13 above. We note in passing that this situation is not unusual and reflects the reality of the ways in which Article XXIV type agreements are negotiated and presented to the WTO Members. But it is also evident that the present wording of Article XXIV on interim agreements is not adequate and does not reflect the present realities of the way regional trade agreements are negotiated and presented to the CRTA.

[345] See BISD 35S/293, para. 45.

[346] See India's argument in para. 6.86 and Turkey's response in para. 6.94 above.

areas. India notes in this respect differences *inter alia* in external trade policies on agriculture, steel and other sensitive industrial products, as well as in relation to anti-dumping, countervailing and safeguards measures. India also adds that there is additionally no requirement that Members fulfil the requirements of Article XXIV:8(a) immediately.

9.138 For Turkey, India's interpretation of Articles XXIV:5 and XXIV:8(a)(ii) is overly restrictive. Turkey is of the view that any interpretation of Article XXIV which could lead to the conclusion that in certain circumstances, WTO Members with diverging external trade regimes were legally inhibited from forming a customs union, is in contradiction with the objective clearly stated in Article XXIV:4.

9.139 Turkey submits further that, since, in order to qualify as a customs union, the Turkey-EC customs union must cover substantially all trade - as required by Article XXIV:8(a)(i) - it has obviously to cover trade in textiles and clothing products, which represents 40 per cent of Turkey's exports to the European Communities. For such trade in textiles and clothing to be covered, the constituent members of the Turkey-EC customs union must have common tariffs and a common foreign trade regime with other countries in accordance with Article XXIV:8(a)(ii). For Turkey, such common regulation of commerce, as determined by restrictive measures which the European Communities applies in conformity with WTO rules, must cover goods imported into the Turkey-EC customs union *via* Turkey. For Turkey, there is no alternative: in the context of the formation of its customs union with the European Communities, it was required to adopt the European Communities' external trade policy in textile and clothing products.

9.140 We understand that Turkey is referring to two different requirements: 1) the requirement that it adopt the European Communities' external textile policy in order to form a customs union compatible with Article XXIV:8(a)(ii), and 2) the requirement in its specific customs union agreement with the European Communities that it adopt that European Communities' policy. We shall examine the second requirement in paragraphs 9.178 to 9.182 of this Panel report.

(b) Analysis of Article XXIV:8(a)

9.141 We note Turkey's arguments that if it wants to exercise its right to form a customs union with the European Communities, it has no alternative but to adopt exactly the same external trade policy as that of the European Communities and consequently, if need be, it is authorized by the provisions of Article XXIV:8(a)(ii) to violate the prohibition of Articles XI and XIII of GATT (and Article 2.4 of the ATC). We shall first examine the wording of Article XXIV:8(a)(i) and XXIV:8(a)(ii) and consider whether these provisions require Turkey to do what it claims to be required to do, namely to violate Articles XI and XIII of GATT and Article 2.4 of the ATC. In this context we shall discuss the relationship between Article XXIV and Article XI of GATT. Finally, we will examine whether our interpretation of Article XXIV in the present case would prevent Turkey from exercising its right to form a customs union.

(i) The terms of paragraph 8(a)

9.142 Paragraph 8(a) of Article XXIV reads as follows:

> "8. For the purposes of this Agreement:
>
> (*a*) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that
>
> (i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at

> least with respect to substantially all the trade in products originating in such territories, and,
>
> (ii) subject to the provisions of paragraph 9, substantially the same duties and other regulations of commerce are applied by each of the members of the union to the trade of territories not included in the union;"

It is accepted that quantitative restrictions, such as the measures at issue in this case, are "restrictive regulations of commerce" for the purposes of Article XXIV:8(a).

9.143 We note the definition of a customs union as being "the substitution of a single customs territory for two or more customs territories". The term "customs territory" is defined in paragraph 2 of Article XXIV as being:

> "For the purposes of this Agreement a customs territory shall be understood to mean any territory with respect to which separate tariffs or other regulations of commerce are maintained for a substantial part of the trade of such territory with other territories."

9.144 With regard to the external dimension of any such customs union, the implied ultimate (and ideal) situation is that a complete single common foreign trade regime is adopted by the constituent members of the customs union.

9.145 We note that sub-paragraph 8(a)(i) of Article XXIV governs the internal trade between constituent members of a customs union. Sub-paragraph 8(a)(ii) governs the trade of the constituent members with third countries, and not the trade between the constituent members themselves.

9.146 The terms of sub-paragraph 8(a)(i) offer some flexibility to the constituent members of a customs union as also noted by Hong Kong, China.[347] The standard is that "substantially all the trade between the constituent territories" must be fully liberalized among the constituent Members. This, in practice, can be accomplished only by providing preferential treatment to goods originating in the constituent territories.[348] We are mindful that sub-paragraph 8(a)(i) is not directly relevant to this case, as India's claims do not concern any preferential treatment accorded by Turkey and the European Communities to each other as part of their customs union, but rather with the treatment of their trade with non-members of the customs union, i.e. Turkey's imposition of quantitative restrictions on Indian textiles and clothing.[349] This is an issue mainly for consideration in light of Article XXIV:8(a)(ii), and the relationship between the two sub-paragraphs 8(a)(i) and 8(a)(ii).

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[347] See para. 7.15 above.

[348] Thus, in our view, sub-paragraph 8(a)(i) authorizes, for example, the members of a customs union to grant each other treatment notwithstanding the provisions of Article I:1 of GATT. We note in this context the statement of the Appellate Body in *EC - Bananas III*, para. 191: "Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV". This was also recognized in a prior non-adopted Panel Report on *EEC – Member States' Import Regimes for Bananas*, DS32/R, para. 358: " … it [Article XXIV] merely provides them [contracting parties] with a justification for not applying to imports originating in such a union or area the restrictive import measures that they were permitted to impose under other provisions of the General Agreement".

[349] We are aware of the statement of the Appellate Body in the *EC – Computer Equipment* which should be understood in the context of the internal market of the EC : "96.…. However, the European Communities constitutes a customs union, and as such, once goods are imported into any Member State, they circulate freely within the territory of the entire customs union. The export market, therefore, is the European Communities, not an individual Member State." This Appellate Body statement referred to the "constant prior practice" of the European Communities. However, we are not addressing the situation of the internal market of the European Communities or the trade relations between the European Communities and Turkey.

9.147 In considering Turkey's Article XXIV:8(a) defense, we are mindful of the need to interpret Article XXIV in a manner to avoid conflicts with other WTO provisions (see paragraph 9.95 above). The issue we must consider now is whether Articles XI (and XIII) of GATT, on the one hand, and Article XXIV:8(a)(ii), on the other hand, may be interpreted so as to avoid a conflict requiring that one provision yields to the other. For the reasons explained below, we believe that, in this case, the flexibility inherent in sub-paragraph 8(a)(ii) allows for harmonious interpretation. That interpretation is in accordance with the context of the sub-paragraph 8(a)(ii) and the object and purpose of the WTO Agreement, and, at the same time, fully respects Turkey's right to enter into a customs union with other Members.

9.148 As Japan and Hong Kong, China stressed[350], we note at the outset that the terms of sub-paragraph 8(a)(ii) do not explicitly authorize Members of a customs union to violate GATT rules in their relations with non-constituent members. Nor do they implicitly require such a result. Indeed, the terms of sub-paragraph 8(a)(ii) allow for flexibility in the creation of a common commercial policy, as the standard used is that "substantially the same duties and other regulations of commerce are [to be] applied by each of the members of the [customs] union". We are aware that GATT CONTRACTING PARTIES and WTO Members have never reached agreement on the interpretation of the term "substantially" in the context of Article XXIV:8. The ordinary meaning of the term "substantially" in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression "substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union" would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.[351]

9.149 We note also that sub-paragraphs 8(a)(i) and 8(a)(ii) address distinct but inter-linked policies. Therefore, the inclusion of a sector within the coverage of a customs union, i.e. the removal of all trade barriers in respect of products of that sector between the constituent members of the customs union, does not necessarily imply that those constituent members must apply identical barriers or barriers having similar effects to imports of the same products from third countries.

9.150 We note, however, in the terms of sub-paragraph 8(a)(i), the possibility for parties to a customs union to maintain certain restrictions of commerce on their trade with each other, including quantitative restrictions ("…where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX"). This implies that even for "substantially all trade originating in the constituent countries" to be covered (here, for instance, textile and clothing products), certain WTO compatible restrictions can be maintained. This implies that internal quantitative restrictions can be used in the event that only one of the constituent territories has in place a restriction on imports from third countries. If such pre-existing import restrictions were WTO compatible, the maintenance of an internal import restriction between the two constituent countries would ensure that the protection afforded by the original WTO compatible quota would not be circumvented. The maintenance of such an internal restriction can obviate the need for identical external trade policies. We note also that the plain meaning of the wording used in these two sub-paragraphs implies a difference in approach between efforts at internal trade liberalization among constituent members of a customs union where the maintenance of some quantitative restrictions (as restrictive regulations of commerce) is explicitly permitted (see paragraph 8(a)(i)), and their respective external policies with third countries where paragraph 8(a)(ii) contains no specific authorization relating to the maintenance of quantitative restrictions.

9.151 Having said this, and recognizing such flexibility, many questions remain unanswered. We consider, however, that if the ideal situation were to be one where the policies of the constituent members are identical, there is nevertheless a wide range of possibilities left for Members to identify

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[350] See Japan's argument in para. 7.25 and Hong Kong, China's argument in para. 7.16 above.

[351] We have also examined the French and Spanish versions of Article XXIV which confirm that flexibility is left to the constituent members.

how they can form their customs union and to what extent and how, they should put in place their internal trade and their common foreign trade polices. Considering this wide range of possibilities, we are of the view that, as a general rule, a situation where constituent members have "comparable" trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii). The possibility also exists of convergence across a very wide range of policy areas but with distinct exceptions in limited areas. The greater the degree of policy divergence, the lower the flexibility as to the areas in which this can occur; and vice-versa. In our view, our interpretation of sub-paragraph 8(a)(ii) allows Members to form a customs union, as in this case, where one constituent member is entitled to impose quantitative restrictions under a special transitional regime and the other constituent member is not.[352]

9.152 This interpretation seems to be confirmed by the effective practice of the Turkey-EC customs union. We note that in some sectors such as those relating to agriculture, steel etc, identical trade policies are not being applied by the constituent members. We note also that Decision 1/95 envisages that the European Communities may continue to apply its system of certificates of origin should Turkey fail to conclude agreements with third countries, similar to the agreements already in place between those countries and the European Communities.[353] Thus, there are administrative means, as stated by the United States[354], available to the European Communities and Turkey, and in particular rules of origin, as suggested by Hong Kong, China[355], in order to ensure that no trade diversion occurs, while respecting the parameters of sub-paragraph 8(a)(i) and at the same time of sub-paragraph 8(a)(ii), recalling that the two sets of policies under sub-paragraphs 8(a)(i) and 8(a)(ii) are distinct and the relationship between them is a flexible one.

9.153 Our interpretation of Article XXIV:8(a) is not such as to render Turkey's right to form a customs union a nullity. We note that Turkey's exports of textiles and clothing to the European Communities represent 40 per cent of its total exports to the European Communities. If Turkey wants to cover such trade and to ensure that it benefits from the advantages of the customs union, it can do so and comply with sub-paragraph 8(a)(i). In its discussion of the interpretation and application of sub-paragraph 8(a)(ii), Turkey's reference to the fact that textiles and clothing represents 40 per cent of its trade with the European Communities, is therefore of no relevance. With regard to its external trade policies, calculations based on import statistics provided by Turkey to the Panel show that, in 1995, 1996 and 1997, (a) textile and clothing imports from all non-EC countries (including WTO Members and non-Members) into Turkey represented between 8 and 9 per cent of Turkey's total imports from those countries[356]; (b) imports from non-EC countries of the products covered by all categories under restriction by Turkey represented 4.5 per cent of Turkey's total imports from those countries[357]; and (c) imports from non-EC countries of the products covered by the 19 categories under restriction from India represented less than 3 per cent of Turkey's total imports from those

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[352] Our discussion of the flexibility offered by Article XXIV:8(a) is without prejudice to the further flexibility that may exist during the transition period of an interim agreement leading to a customs union.

[353] Article 12 of Decision 1/95 (WT/REG22/1) provides that: "2. In conformity with the requirements of Article XXIV of the GATT Turkey will apply as from the entry into force of this Decision, substantially the same commercial policy as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing. The Community will make available to Turkey the cooperation necessary for this objective to be reached. 3.Until Turkey has concluded these arrangements, the present system of certificates of origin for the exports of textile and clothing from Turkey into the Community will remain in force and such products not originating from Turkey will remain subject to the application of the Communities Commercial Policy in relation to the third countries in question… In the absence of such modalities, the Community reserves the right to take, in respect of imports into its territory, any measure rendered necessary by the application of the said Arrangement."

[354] See the United States' argument in para. 7.112 above

[355] See Hong Kong, China's argument in para. 7.18 above.

[356] See Table II.2 above.

[357] See paras. 2.41 and 2.42 above.

countries.[358] It should be noted that the figures in (b) and (c) above, include both imports from WTO Members and non-Members. Thus, a variation in policy relevant to WTO Members on at most 4.5 per cent of Turkey's external trade, in any event of a temporary nature,[359] could not be considered in this case to jeopardise the requirement of Article XXIV:8(a)(ii) that substantially the same regulations of commerce are to be applied by Turkey and the European Communities to third countries. The fact that this proportion of trade is regulated in a different way by Turkey, cannot be seen to contradict the requirements of Article XXIV:8(a)(ii). As noted above, we consider that it is for the CRTA to assess the GATT/WTO compatibility of customs unions such as the Turkey-EC customs union and that in any case our terms of reference do not request us to do so. We, for our part, have endeavoured to ensure that our interpretation is not such as to prevent Turkey from exercising its WTO right to form a customs union.

9.154 Independently of the fact that constituent members could agree that some of their foreign trade policies may not be identical, we consider that the terms of sub-paragraph 8(a)(ii) do not address the issue of whether an otherwise WTO incompatible import restriction could be introduced among the identical or different trade policies on formation of a customs union. In our view, the terms of Article XXIV:8(a)(ii) do not provide any authorization for Members forming a customs union to violate the prescriptions of Articles XI and XIII of GATT or Article 2.4 of the ATC.

(ii) Immediate context

9.155 The conclusion that Article XXIV:8(a)(ii) should be read as not authorizing the violation of Articles XI and XIII of GATT or Article 2.4 of the ATC in the circumstances of this case is supported by the same contextual analysis that we developed relating to paragraph 5(a) (see paragraphs 9.124 to 9.133 above), and in particular, our analysis of paragraphs 4 and 6 of Article XXIV.

(iii) Conclusion

9.156 We conclude, based on the ordinary meaning of its terms and their immediate context, that Article XXIV:8(a) does not address explicitly the issue of the GATT/WTO compatibility of the measures adopted by constituent members of a customs union in their effort to align substantially all their duties and regulations of commerce *vis-à-vis* third countries. In any case, we consider that, in this case, Article XXIV:8(a)(ii) does not authorize Turkey, in forming a customs union with the European Communities, to introduce quantitative restrictions on textile and clothing products that would be otherwise incompatible with GATT/WTO, nor does it require that Turkey introduce restrictions on imports of textiles and clothing which would be inconsistent with other provisions of the WTO Agreement.

(c) The wider context of Article XXIV:5 and 8 and the object and purpose of the agreements

9.157 We consider that the wider context of sub-paragraphs 5(a) and 8(a) and Article XXIV generally, as well as the object and purpose of the WTO Agreement, and GATT 1994, including the GATT 1994 Understanding on Article XXIV, are also relevant to the interpretation of Article XXIV and confirm our interpretation of the provisions of sub-paragraphs 5(a) and 8(a) of Article XXIV.

9.158 We note that the Preamble to the GATT 1947 (now GATT 1994) provides that:

> "Recognizing that their relations in the field of trade …should be conducted with a view to … and *expanding the production and exchange of goods*," (emphasis added)

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[358] This results from the fact that, Turkey as an important clothing manufacturer, imports mainly textile products and these are only partially represented in the restricted categories (only 6, out of the 19 categories, refer to textile yarn or fabrics). (See para. 2.46 above and Annex to this report, Appendix 1.)

[359] The European Communities' MFA-derived quantitative restrictions must be eliminated by 1 January 2005.

9.159 Such language suggests that a global objective of GATT 1947 was, and of GATT 1994 is, to increase trade by reducing (making less restrictive) tariffs and lowering non-tariff barriers. It is a dynamic objective. The use of regional trade agreements to achieve that objective is legitimized by the first sentence of Article XXIV:4:

> "The contracting parties recognize the desirability of *increasing freedom of trade* by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements." (emphasis added)

9.160 Already then it was clear to CONTRACTING PARTIES that the overall objective of GATT and for that matter, regional trade agreements, should not be to raise barriers to trade. This is also noted in the Philippines' submission.[360] This is reflected in the wording of the second sentence of paragraph 4 of Article XXIV:

> "They also recognize that the purpose of a customs union or of a free-trade area should be to facilitate trade between the constituent territories *and not to raise barriers to the trade of other contracting parties* with such territories." (emphasis added)

and in the Preamble to GATT 1947:

> "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the *elimination of discriminatory treatment* in international commerce …"(emphasis added)

9.161 At the conclusion of the Uruguay Round Members reiterated the same general objective and principles in the GATT 1994 Understanding on Article XXIV:

> *"Reaffirming* that the purpose of such agreements should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other Members with such territories; and that in their formation or enlargement the parties to them should to the greatest possible extent avoid creating adverse effects on the trade of other Members;"

and in the Preamble to the WTO Agreement:

> "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the *elimination of discriminatory treatment* in international commerce …" (emphasis added)

9.162 We also recall the Singapore Ministerial Declaration:

> "7. … We reaffirm the primacy of the multilateral trading system, which includes a framework for the development of regional trade agreements, and we renew our commitment to ensure that regional trade agreements are complementary to it and consistent with its rules"

9.163 From the above cited provisions,[361] we draw two general conclusions for the present case. Firstly, the objectives of regional trade agreements and those of the GATT and the WTO have always been complementary, and therefore should be interpreted consistently with one another, with a view

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[360] See para. 7.41 above.
[361] We note that the wording of Article V of GATS refers to the same concepts.

to increasing trade and not to raising barriers to trade, thereby arguing against an interpretation that would allow, on the occasion of the formation of a customs union, for the introduction of quantitative restrictions. Secondly, we read in these parallel objectives a recognition that the provisions of Article XXIV (together with those of the GATT 1994 Understanding on Article XXIV) do not constitute a shield from other GATT/WTO prohibitions, or a justification for the introduction of measures which are considered generally to be *ipso facto* incompatible with GATT/WTO. In our view the provisions of Article XXIV on regional trade agreements cannot be considered to exempt constituent members of a customs union from the primacy of the WTO rules. In this context we also note the Singapore Ministerial Declaration where Members stated: "We reaffirm the primacy of the multilateral trading system…".

(d) GATT/WTO practice

9.164 Turkey also refers to the practice of the GATT CONTRACTING PARTIES to support its view that, on the occasion of the creation of a customs union, individual GATT contracting parties and now WTO Members have been authorized to introduce new, otherwise GATT/WTO incompatible, import restrictions.[362] Article 31.3(b) of the VCLT provides that the "context" of a provision to be interpreted, includes "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Article XVI:1 of the Agreement Establishing the WTO provides that the WTO shall be guided by the customary practices followed by the CONTRACTING PARTIES.

9.165 We recall the statement of the Appellate Body in *Japan – Alcoholic Beverages*:[363]

> "Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation.[364] An isolated act is generally not sufficient to establish subsequent practice;[365] it is a sequence of acts establishing the agreement of the parties that is relevant.[366]"

9.166 After examination of GATT/WTO practice, and as noted by the United States[367] and the Philippines[368], it is quite evident that no consensus was reached, nor was any practice agreed upon regarding Article XXIV of GATT. For example in 1957, the Report of the Sub-Group B (Quantitative Restrictions) of the GATT Committee on the European Economic Community,[369] which examined the conformity of the Treaty of Rome with the provisions of Article XXIV, stated that:

> "4. Most members of the Sub-Group (…) [were of the] view [that] countries entering a customs union would continue to be governed by the provisions of Article XI prohibiting the use of quantitative restrictions as well as by the other provisions of the Agreement (…). Further, adherence to these provisions would in no case prevent the establishment of a customs union. Since paragraph 8 (*a*) (i) permitted where necessary the use of quantitative restrictions for balance-of-payments reasons, it followed that the use of quantitative restrictions by individual countries within the union for these reasons

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[362] Turkey alludes to GATT practice, albeit not in great detail. See paras. 6.58 to 6.61 above.

[363] Appellate Body Report on *Japan – Alcoholic Beverages*, pp. 12-13.

[364] [Footnote original]Sinclair, The Vienna Convention on the Law of Treaties (2nd ed., 1984), p. 137; Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités" (1976-III) 151 Recueil des Cours p. 1 at 48.

[365] [Footnote original]Sinclair, *supra*., footnote 24, p. 137.

[366] [Footnote original](1966) Yearbook of the International Law Commission, Vol. II, p. 222; Sinclair, *supra*., footnote 24, p. 138.

[367] See para. 7.88 above.

[368] See para. 7.107 above.

[369] BISD 6S/68, pp. 78-79, adopted on 29 November 1957.

> could not be regarded as preventing the formation of a customs union as defined in Article XXIV. (…)
>
> 6. (…). Moreover they [most members of the Sub-Group] pointed out that if paragraph 8 (*a*) (ii) were interpreted to require a common level of quantitative restrictions against third countries, this would be incompatible with the explicit permission in paragraph 8 (*a*) (i) for the use of quantitative restrictions within the system for balance-of-payments reasons since it would appear not to be practicable to have a common level of quantitative restrictions against third countries in a situation where countries within the customs union made use of their right to impose such restrictions against their partners. Moreover, the effect of such an arrangement would be that some country or countries in the union would be imposing quantitative restrictions not required by their own individual balance-of-payments position and would, therefore, be raising barriers to trade with other contracting parties."

9.167 Upon accession to the European Communities (Denmark, Ireland and United Kingdom in1973; Greece in 1982; Spain and Portugal in 1985; Austria, Finland and Sweden in 1994), those countries imposed new quantitative restrictions in accordance with the European Communities' commercial policy. These actions were not universally accepted by GATT CONTRACTING PARTIES. For example, it was the position of some of the GATT contracting parties that:

> "… the accession [of Greece] was *not in conformity* with the relevant provisions of the General Agreement, *including those relating to the application and administration of quantitative restrictions*. Neither the EC nor Greece were waived in any respect under the provisions of Article XI and XIII of the GATT by concluding and implementing the Act." [370] (emphasis added)

9.168 In the Working Party that considered the accession of Portugal and Spain to the European Communities, some contracting parties[371] expressed their views as follows:

> "Some delegations expressed concerns which related to the introduction in Portugal and Spain of new quantitative restrictions some of which were discriminatory and inconsistent with Articles XI, XIII and XXIV: 4…
>
> …Since Article XXIV did not provide a waiver from obligations contained in Articles XI and XIII and did not allow or require a country acceding to a customs union to adopt the more restrictive trade régime of the customs union, they called on the Communities and Spain to eliminate all GATT inconsistent measures …".

9.169 In light of these positions taken by individual GATT contracting parties[372] before the entry into force of the WTO Agreement and therefore the ATC, we cannot conclude that there is

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[370] *Report of the Working Party on the Accession of Greece to the European Communities*, adopted on 9 March 1983, BISD S30/169, p. 186 (emphasis added). Reinforcing this point of view is a statement made by a member of the same Working Party Report regarding Greece's accession to the EC: "… [the] quotas [established under the EC common trade policy are] contrary to the provisions of Article XI and XIII and … neither the EC nor Greece [are] relieved of their obligations under these Articles by virtue of having concluded the Act." (p. 186). That member furthermore noted that all the "members [to that Working Party] therefore fully [reserve] their rights under the General Agreement following the accession of Greece to the European Communities" (pp. 188-189).

[371] *Report of the Working Party on the Accession of Portugal and Spain to the European Communities*, adopted on 19-20 October 1988, BISD 35S/293, p. 315.

[372] It is also worth recalling the conclusions of the following GATT Panel Report which, although not adopted, confirm that some contracting parties opposed interpretations such as those suggested by Turkey, thereby denying the existence of any international customary practice. In the non-adopted Panel Report on *EEC*

"subsequent practice" (as that term is used in the VCLT) or "customary practices" (as used in Article XVI:1 of the WTO Agreement) that could be regarded as an agreement or acceptance (even implicit) that paragraphs 5(a) or 8(a)(ii) of Article XXIV authorize or require the introduction of otherwise GATT/WTO inconsistent measures upon the formation of a customs union. We recall, as noted in paragraph 9.71 above, that the ATC has put in place new disciplines regarding the introduction of quantitative restrictions in the sector of textiles and clothing whereby, as of 1 January 1995, the global level of quantitative restrictions in that sector could only decrease (setting aside the possibility for ATC compatible safeguards measures).

(e) Temporary nature of the Turkish quantitative restrictions

9.170 Turkey also argues that because its import restrictions at issue are essentially temporary in nature, since under the ATC all quantitative restrictions should be phased out by 1 January 2005, it should be authorized to maintain them, even if they appear to be GATT/WTO incompatible.

9.171 We consider that the duration of quantitative restrictions does not alter the nature of such measures. The GATT/WTO prohibition against quantitative restrictions does not provide for any allowance for "short-time quantitative restrictions" or any similar time consideration. In the present case, a measure which is not in conformity with the WTO Agreement cannot become WTO compatible just because of its limited duration. We must therefore reject this latter argument by Turkey. Indeed, the transitional nature of the ATC and the possibility under Article XXIV to phase in a customs union argues against an exception in favour of temporary measures.

(f) The absence of recommendations pursuant to Article XXIV:7 of GATT

9.172 Turkey also argues that the fact that no Article XXIV:7 recommendation has ever been made to parties to a customs union to change or abolish any import restrictions, and in particular that no such recommendation has ever been made in respect of the previous Turkey-EC trade agreements, suggests that its measures are therefore WTO compatible. Turkey adds that up until now no contracting party or a WTO Member ever challenged measures similar to those under examination.

9.173 We recall that the European Communities made a similar argument before the panel in *EEC – Imports from Hong Kong* when it argued that quantitative restrictions had been accepted by contracting parties, that their violation had become negotiable and that this was tantamount to a tolerance:

> "15.…This proved, according to the EC, that quantitative restrictions had become a general problem and had gradually come to be accepted as negotiable, and that Article XI could not and had never been considered to be a provision prohibiting residual restrictions irrespective of the circumstances specific to each case."

This argument was rejected by the panel. It further discussed the consequences of a situation where during many years there had been no challenge to such a measure:

> "28. With regard to Article XI … The Panel acknowledged that there exist quantitative restrictions which are maintained for other than balance-of-payments reasons. It recognized that restrictions had been in existence for a long time without

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– *Tariff Treatment of Citrus Products from Certain Mediterranean Countries*, L/5776, paras. 3.12-3.22, the EEC argued that the non-recommendations by Working Parties which had examined the Treaty of Rome itself and other related agreements constituted tacit acceptance by the CONTRACTING PARTIES as a whole as well as the individual contracting parties that these agreements were in conformity with the provisions of Article XXIV, and that therefore the United States could not contest its preferential trade agreement with the Mediterranean Region. The United States' statement in response to the European Communities' argument was that the failure of the CONTRACTING PARTIES to reject the agreements did not imply acceptance nor did it constitute a legal finding of GATT consistency with Article XXIV.

> Article XXIII ever having been invoked by Hong Kong in regard to the products concerned, but concluded that this did not alter the obligations which contracting parties had accepted under GATT provisions. Furthermore *the Panel considered it would be erroneous to interpret the fact that a measure had not been subject to Article XXIII over a number of years, as tantamount to its tacit acceptance by contracting parties.* In fact, contracting parties and in particular Hong Kong have made it clear that the discussions on quantitative restrictions which have taken place in the GATT over the years were without prejudice to the legal status of the measures or the rights and obligations of GATT contracting parties. The Panel observed that, while most of the measures had been notified to the GATT in the past, the measures on watches had not been notified.
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> 29. The Panel considered the argument put forward by the European Communities that the principle referred to as "the law-creating force derived from circumstances" could be relevant in the absence of law. It found, however, that in the present case such a situation did not exist, *and the matter was to be considered strictly in the light of the provisions of the General Agreement*." (Emphasis added)

9.174 We agree with these findings. We note that until the adoption of paragraph 12 of the GATT 1994 Understanding on Article XXIV, it was not always clear whether specific measures adopted on the occasion of the formation of a customs union, could be challenged under Article XXII and XXIII of GATT. We note also that with regard to the interpretation of Article XXIV, the difficulty in securing a definitive interpretation from WTO Members because of the wide range of issues involved, and because Members are often parties to one or more regional trade agreements, and the rather unclear wording of Article XXIV, may explain the absence of challenges under GATT. However, we cannot draw any conclusion as to the GATT/WTO compatibility of the measures at issue on the basis of the absence of past challenges.

(g) Offer to negotiate

9.175 Turkey also argues that it offered compensation to India which, contrary to 24 other exporting countries, has consistently declined to accept to enter into negotiations towards a mutually agreed solution. India responds that the introduction of GATT/WTO-inconsistent quantitative restrictions is generally prohibited by the WTO Agreement, and not otherwise authorized by Article XXIV, and that it cannot be forced to accept compensation for a WTO illegal measure.

9.176 We note that Article XXIV:6 provides for a special procedure for renegotiation of tariff increases. This provision does not refer to any form of compensation for the introduction of quantitative restrictions. Indeed, we consider that members cannot be forced to negotiate or accept compensation in respect of GATT/WTO incompatible quantitative restrictions. We also recall the conclusion of the panel in *EEC– Imports from Hong Kong* that quantitative restrictions prohibited by GATT, cannot be negotiated.

9.177 Therefore the Panel considers that the refusal of India to enter into negotiations with Turkey in respect of compensation does not undermine its right to challenge Turkey's measures.

(h) The requirements of the Turkey-EC Customs Union Agreement itself

9.178 Turkey also argues that it was "required"' by the very terms of its customs union agreement with the European Communities to adopt the WTO compatible import restrictions of the European Communities in the sector of textiles and clothing. In our view, however, a bilateral agreement between two Members, such as that between the European Communities and Turkey, does not alter the legal nature of the measures at issue or the applicability of the relevant GATT/WTO provisions.

9.179 We note also that Article 12.2 of Decision 1/95 (WT/REG22/1) provides:

> "2. In conformity with the requirements of Article XXIV of the GATT, Turkey will apply as from the entry into force of this Decision, *substantially the same commercial policy* as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing. The Community will make available to Turkey the cooperation necessary for this objective to be reached."

It is clear to us that the italicised language indicates that Turkey has some flexibility under this provision.

9.180 We recall that in the *EC – Bananas III* dispute the European Communities raised similar arguments with regard to what it was required to do pursuant to the Lomé Convention with the ACP countries. The European Communities argued that the panel should not have examined the content of the Lomé Convention and should have deferred to the common understanding of the parties. In that case the panel and the Appellate Body did examine the Lomé convention (for the purpose of assessing the scope of the Lomé waiver) and concluded that unless explicitly authorized by the waiver the provisions of the Lomé convention could not alter the rights and obligations of WTO Members including those of the European Communities.

9.181 We note in this context the relevance of Article 41 of the VCLT, which provides that:

> "Two or more parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if … (b) the modification in question is not prohibited by the treaty and (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations".

9.182 Consequently, even if the Turkey-EC customs union agreement did require Turkey to adopt all EC trade policies, an issue that we do not have to address, we consider that such requirement would not be sufficient to exempt Turkey from its obligations under the WTO Agreement.

(i) Further considerations

9.183 Our analysis would not be complete without addressing the argument that when, prior to forming the customs union, a constituent member has a WTO right, that Member may, on the occasion of the formation of a customs union, "pass" or "extend" such right to the other constituent members. We find that this proposition cannot be sustained for the following reasons.

9.184 We note that such a legal fiction or concept is not referred to in Article XXIV, in the WTO Agreement or in public international law.[373] The WTO system of rights and obligations provides, in certain instances, flexibility to meet the specific circumstances of Members. For instance, the ATC has grand-fathered certain MFA derived rights regarding import restrictions for specific Members and Articles XII, XIX, XX and XXI of GATT authorize Members, in specific situations, to make use of special trade measures. We consider that, even if the formation of a customs union may be the

[373] See for instance, O'Connell, The Law of State Succession, Cambridge Press, 1956, Chapter V Extension of Treaties of the Successor State to Territory Incorporated where the author concludes that "… it would appear that treaties do not extend, as a general rule, and in the absence of clear intention to the contrary, to territories which remain after their incorporation invested with some degree or other of autonomy. The Permanent Mandates Commission reported in 1923 that 'the special international conventions entered into by a State do not apply *de jure* to territories in regard to which the state in question had been entrusted with a mandate, even when those conventions are applicable to contiguous territories placed under the sovereignty of the same state". See also Lasok, D., Lasok K., Law and Institutions of the European Union (1996), 6th ed., Vol.1; Jennings and Watts, Oppenheim's International Law (1996), 9th ed., Vol 1 (peace), Parts 2 to 4, p. 1261; Resolution on the White Paper "Preparing the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union", COM (95)0163-C4-0166/95, OJ No C141, p. 135, 1996/05/13; and Articles 15 and 29 of the VCLT.

occasion for the constituent member(s) to adopt, to the greatest extent possible, similar policies, the specific circumstances which serve as the legal basis for one Member's exercise of such a specific right cannot suddenly be considered to exist for the other constituent members. We also consider that the right of Members to form a customs union is to be exercised in such a way so as to ensure that the WTO rights and obligations of third country Members (and the constituent Members) are respected, consistent with the primacy of the WTO, as reiterated in the Singapore Declaration.

9.185 On a further matter, we have provided above our legal analysis of Article XXIV:8(a)(ii). We would add a brief general observation on Turkey's claim that it was "required" to adopt exactly the same trade policies as those of the European Communities and consequently that the provisions of Article XXIV do not leave any alternative to Members which intend to form a customs union. If we were to hypothesize such a complete lack of flexibility in the terms of Article XXIV, and that Turkey's foreign trade regime in consequence had to be completely and immediately identical to that of the European Communities, in order to comply with the provisions of Article XXIV:8(a)(ii) (and further assuming that, as in the present case, the European Communities can but is not obliged to maintain quantitative restrictions on textiles and clothing whereas Turkey cannot), it would imply that the European Communities would have to align its textiles and clothing regime to that of Turkey and immediately phase-out its import restrictions. This would go against the clear wording of Article XXIV in that it would arguably prevent Turkey from exercising its right to form a customs union with the European Communities because in practice it appears inconceivable that the European Communities would proceed with such a customs union if the "price" were to be that it must phase out its quantitative restrictions regularly notified to the TMB (and eventually, as a result, have to raise tariffs substantially in order to maintain the same overall level of protection). Turkey itself has noted[374] that such a scenario "is almost certainly not feasible". We recall the international law principle of effective interpretation whereby all provisions of a treaty must be given their full meaning and must ensure the overall consistency of the treaty and its effective application. We consider that Members have a right, albeit conditional, to form regional trade agreements. Therefore, Turkey's argument cannot be sustained since it would produce the above absurd result, i.e. that the European Communities would be forced to choose between its ATC rights and a customs union with Turkey. Consequently, there must be another realistic interpretation of Article XXIV, and there is, that reconciles the various interests of Members. In our view, the conclusion we have reached does so, and respects legal principles of 1) interpretation against conflicts and 2) for an effective interpretation of treaties.

5. Conclusion

9.186 We have considered the proposition that Article XXIV is *lex specialis* and is purported to be a self-contained regime insulated from the other provisions of GATT and the WTO Agreement. We are not convinced by this argument. The relationship between Article XXIV and GATT/WTO seems to us to be self-evident from the wording and context of Article XXIV.

9.187 The wording of Article XXIV:4 refers to the objectives of Article XXIV, in the same terms as used in the Preamble to GATT 1947 (now GATT 1994); the same objectives are repeated in the GATT 1994 Understanding on Article XXIV and in the Preamble of the WTO Agreement. Paragraph 6 also refers to the provisions of Article XXVIII and provides specific procedures for the re-negotiation of tariff bindings, confirming thereby the applicability of other GATT provisions. To us, this confirms the nature of the WTO Agreement, as a single undertaking and that the provisions of Article XXIV are to be applied together with and not separately from the rest of the WTO Agreement. The Appellate Body has indeed repeated on several occasions that the WTO Agreement contains several obligations which must be complied with simultaneously, unless there is a conflict between the said provisions. Moreover we have noted that the wording of Article XXIV:4, with its reference to "should not raise barriers to trade" which appeared in GATT 1947, has continued to be

[374] See para. 6.111 above.

determinative of the parameters of Article XXIV as evidenced by the wording of the GATT 1994 Understanding on Article XXIV and the Singapore Ministerial Declaration.

9.188 With regard to the specific relationship between, in the case before us, Article XXIV and Articles XI and XIII (and Article 2.4 of the ATC), we consider that the wording of Article XXIV does not authorize a departure from the obligations contained in Articles XI and XIII of GATT and Article 2.4 of the ATC. We base our findings on the nature of the conditional right established in Article XXIV as opposed to the clear and unambiguous obligation in Article XI prohibiting the use of quantitative restrictions, notwithstanding the specific contrary practice which has in the past existed in the sector of textiles and clothing but which the ATC represents a collective commitment to terminate. As further discussed above, we consider that it is possible, and even necessary in order to avoid a conclusion that would lead to politically and economically absurd results, to interpret the provisions of Article XXIV in such a way as to avoid conflicts with the prescriptions of Articles XI and XIII of GATT, and Article 2.4 of the ATC.

9.189 As we have noted, paragraphs 5 and 8 of Article XXIV provide parameters for the establishment and assessment of a customs union, but in doing so allow flexibility in the choice of measures to be put in place on the formation of a customs union. In this context we recall the use of the terms "substantially all the trade" and "substantially the same duties and other regulations of commerce". While the meaning of these terms is not precisely clear in relation to what and how much constitute "substantially", they do confirm clearly that in both cases the standard is not all. These provisions do not, however, address any specific measures that may or may not be adopted on the formation of a customs union and importantly they do not authorize violations of Articles XI and XIII, and Article 2.4 of the ATC. Moreover, we note that paragraph 6 of Article XXIV provides for a specific procedure for the renegotiation of tariffs which are increased above their bindings upon formation of a customs union; no such provision exists for quantitative restrictions. To the Panel, if the introduction of WTO inconsistent quantitative restrictions were intended to be negotiable on the formation of a customs union, it would seem odd to us that an explicit procedure would exist for changes in GATT's preferred form of trade barrier (i.e. tariffs), while no procedure would be provided for negotiation of compensation connected with imposition of otherwise GATT inconsistent measures. We draw the conclusion that even on the occasion of the formation of a customs union, Members cannot impose otherwise incompatible quantitative restrictions.

9.190 We have further considered, in the context of these conclusions on Turkey's defense based on Article XXIV, the scope of flexibility allowed for in Article XXIV. However, this flexibility does not allow for the introduction of measures otherwise incompatible with the WTO Agreement. We consider that means for securing the objectives of Turkey in relation to the specific circumstances of forming its customs union with the European Communities, exist in the form of alternatives (e.g. increased tariffs, rules of origin, early phase-out, tariffication) to the imposition of quantitative restrictions imposed against imports from third countries, thereby interpreting Article XXIV in such a way as to avoid such conflict with other WTO provisions. In particular, our interpretation of paragraph 8(a)(ii) allows parties to form a customs union, as in this case, where one constituent member is entitled to impose quantitative restrictions under a special transitional regime and the other constituent is not.

9.191 Finally, we recall that the prohibitions against quantitative restrictions in the sector of textiles and clothing constitute a fundamental feature of the WTO Agreement which argues strongly against the introduction of any new such restrictions in that sector. Moreover, considering the flexibility offered by the possibility of "interim agreements" under Article XXIV[375] and the inherently transitional

[375] For the purpose of this dispute we need not to address further the distinction between an "interim agreement" leading to a customs union and a completed customs union. We indeed state in footnotes 241 and 285 that we do not have to assess the precise relationship of the Turkey-EC agreement with Article XXIV, e.g. whether it is a free-trade agreement or a customs union or an interim agreement leading to a free-trade area or customs union. In this dispute, Turkey claims that its regional trade agreement with the European Communities is

nature of quantitative import restrictions in the sector of textiles and clothing, we find that Turkey was in a position to avoid the violations of Articles XI and XIII[376] of GATT, and Article 2.4 of the ATC.

9.192 Consequently, we reject Turkey's defense that Article XXIV allows it to introduce, upon the formation of its customs union with the European Communities, quantitative restrictions on 19 categories of textile and clothing products, in violation of Articles XI and XIII of GATT and Article 2.4 of the ATC.

H. THE ABSENCE OF NULLIFICATION AND IMPAIRMENT

9.193 In its second submission, Turkey also submits an additional defense to India's claims. Turkey argues that even if the Panel were to conclude that Turkey's measures violated provisions of the GATT and/or the ATC, India's claims should still be rejected as imports of textile and clothing products from India into Turkey have increased since the entry into force of the Turkey-EC customs union. For Turkey, India has, therefore, not suffered any nullification or impairment of its WTO benefits.

9.194 Turkey argues that Article 3.8 of the DSU implies (a) that a proceeding brought by a complaining party against a violation of a WTO rule is and remains based on the purpose to protect benefits against nullification or impairment and (b) that a violation of a WTO rule is not in and by itself a nullification or impairment of benefits of a Member complaining about such violation; a violation constitutes only a presumption of nullification or impairment. For Turkey, this is in line with the fact that many domestic jurisdictions require an "interest to sue", i.e. a complainant must show more than that its right was breached. Similarly in international law a complainant must show a legal interest.[377] Turkey argues that WTO law requires that an alleged breach of a Member's right must have an economic impact on the complaining Member.

9.195 Turkey urges the Panel to ignore the conclusions of the panel in *US – Superfund*, and of the Appellate Body in *EC – Bananas III*. Turkey adds that a such presumption of nullification and impairment, in case of a breach of a WTO obligation, does not exist under the GATS[378] or for prohibited subsidies under the SCM Agreement[379] and should, therefore, not be considered a general principle of WTO law.

9.196 For Turkey, India's claims must fail since, according to Turkey, the quantities that could be exported by India under the restrictions of the Turkey-EC customs union exceed, on the average by 134 per cent, India's exports to Turkey in 1994, i.e. the last full year before the tariff reductions provided by the Turkey-EC customs union took place. Turkey also submits that India's exports of the

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a completed customs union. We therefore limit our discussion to responding to Turkey's defense and, as we state in paras. 9.146 to 9.151 above even for completed customs unions, we are of the view that Article XXIV:8(a) leaves flexibility to constituent members of a customs union so that Turkey did not have to violate Articles XI, XIII of GATT and Article 2.4 of the ATC.

[376] We note that even if the quantitative restrictions imposed by Turkey were to be justified under Article XXIV, such a justification of quantitative restrictions introduced in violation of Article XI of GATT could not necessarily permit a violation of Article XIII of GATT. The ATC authorizes discriminatory quantitative restrictions (contrary to Article XIII). In this case the quantitative restrictions imposed by Turkey are not imposed pursuant to the ATC (see our conclusion in para. 9.80). They were not imposed under Article 2.1, or Article 6 as a safeguard measure, or otherwise under any other explicit provision of the ATC. Even if Article XXIV were to justify a violation of Article XI of GATT, such quantitative restrictions would still have to respect the prescriptions of Article XIII. In light of the principle of judicial economy, we consider, however, that we do not need to discuss further, India's claims pursuant to Article XIII of GATT.

[377] Turkey refers to South West Africa Cases (Second Phase) ICJ [1966], p. 47; Barcelona Traction Light and Power Co. Ltd , ICJ [1970], p. 32.

[378] The General Agreement on Trade in Services.

[379] The Agreement on Subsidies and Countervailing Measures.

textile products covered by the measures challenged, in the years 1996-1998, remained significantly below the possibilities opened under these measures. In 1996, for 12 out of the 19 categories the amounts licensed remained below 50 per cent of the quotas, and for 8 out of these 19 categories even below 10 per cent. In 1997 for 6 out of the 19 categories the amounts licensed remained below 50 per cent of the quotas. In 1998 for 9 out of 19 categories the amounts licensed remained below 50 per cent of the quotas.[380]

9.197 Finally, Turkey also argues that in rejecting Turkey's offer to negotiate a bilateral limitation on textile and clothing imports (contrary to what some other 24 countries have done), India has itself broken the chain of causation between the measures challenged and the nullification and impairment. For Turkey, there is a general principle of law according to which one may not seek redress for harm that one has brought onto oneself by not taking measures that would have prevented or at least mitigated the harm caused by another party.[381]

9.198 India challenges the accuracy and the relevance of the data submitted by Turkey. India submits that during the year that preceded the imposition of Turkey's restrictions, exports of the clothing items that are now restricted had grown by 57 per cent compared to the previous year. During the year immediately following the imposition of the measures, they declined by 74 per cent. In respect of textiles the situation is even more extreme: the growth rate in the year prior to the introduction of the measures was 200 per cent and the decline in the subsequent year 48 per cent.[382]

9.199 India also insists that the presumption mentioned in Article 3.8 of the DSU is not rebuttable by the submission of evidence alleging no actual adverse effects of the measure. India refers the Panel to the evolution of this principle in GATT law starting with the 1960 decision of the CONTRACTING PARTIES when it was decided that a GATT-inconsistent measure was presumed to cause nullification or impairment and that it was up to the party complained against to demonstrate that this was not the case.[383] This principle was taken over in the dispute settlement procedures adopted at the end of the Tokyo Round,[384] and is now reflected in Article 3.8 of the DSU. For India, the "adverse impact" of a violation cannot be determined on the basis of the actual impact of the violation on trade flows. India refers the Panel to the adopted Panel Report on *Japan – Leather* in which Japan had argued that, since the quotas had not been fully utilized, they had not restrained trade and had consequently not caused a nullification or impairment of benefits accruing under Article XI of the GATT. The panel rejected the argument on the grounds that:

> "The existence of quantitative restrictions should be presumed to cause nullification or impairment not only because of any effect it had on the volume of trade but also for other reasons, e.g., it would lead to increased transaction costs and would create uncertainties which could affect investment plans."[385]

For India, this ruling indicates that a demonstration that no adverse trade impact had as yet occurred was insufficient to rebut the presumption. In its view, the rationale of prohibiting quantitative restrictions requires a demonstration that there was no potential future impact.

9.200 India refers also to the *US – Superfund* decision, the reasoning of which, the Appellate Body in *EC – Bananas III* stated, was applicable to the European Communities' obligations under Articles III, XI and XIII of the GATT 1994. For India, the Appellate Body thereby rejected the argument of

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[380] See paras. 6.146 and 6.164 above.
[381] See para. 6.168 above.
[382] See paras. 6.148 and 6.159 above.
[383] BISD S11/99-100.
[384] Paragraph 5 of the Annex to the Understanding on Dispute Settlement adopted on 28 November 1979.
[385] Panel Report on *Japan - Measures on Imports of Leather*, adopted on 15/16 May 1984, BISD 31S/94, ("*Japan – Leather*"), p. 113.

the European Communities that the benefits accruing to the United States under these provisions had not been impaired because the United States had not exported a single banana to the European Communities, nor was in a position to do so.

9.201 Article 3.8 of the DSU provides that:

> "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

9.202 We recall that in *EC – Bananas III*,[386] the Appellate Body confirms that the principles established in *US – Superfund*:

> "… a demonstration that a measure has no or insignificant effects would not be a sufficient demonstration that the benefits accruing under that provision had not been nullified or impaired even if such a rebuttal were in principle permitted."[387]

are still most relevant to violations of provisions of GATT 1994.

9.203 We note that some of the statistics provided by Turkey appear to refer to the trade effects of Turkey's entire import policy on textile and clothing products, including the reduced tariffs on some categories. Other statistics refer to the impact of Turkey's import policy in general resulting from the creation of the customs union.[388] With reference to the specific statistics on the 19 categories under restrictions, these statistics show, and both parties agree, that imports of textiles and clothing from India into Turkey significantly declined in 1996 after a substantial increase in 1995.[389] Turkey argues, however, that the year 1995 is atypical because it had already begun to lower its import tariffs in preparation for the entry into force of the customs union.[390] India challenges this assertion[391] and argues that the level of its exports of textiles and clothing into Turkey was influenced by the evolution of the market itself as well as by the import regimes of other countries. In support of its view, India argues that for the non-restricted categories, its exports to Turkey also increased substantially in 1995 but did not decline in 1996.[392]

9.204 We are of the view that it is not possible to segregate the impact of the quantitative restrictions from the impact of other factors. While recognizing Turkey's efforts to liberalize its import regime on the occasion of the formation of its customs union with the European Communities, it appears to us that even if Turkey were to demonstrate that India's overall exports of clothing and textile products to Turkey have increased from their levels of previous years, is would not be sufficient to rebut the presumption of nullification and impairment caused by the existence of WTO incompatible import restrictions. Rather, at minimum, the question is whether exports have been what they would otherwise have been, were there no WTO incompatible quantitative restrictions against imports from India. Consequently, we consider that even if the presumption in Article 3.8 of the DSU were rebuttable, Turkey has not provided us with sufficient information to set aside the presumption that the introduction of these import restrictions on 19 categories of textile and clothing products has nullified and impaired the benefits accruing to India under GATT/WTO.

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[386] Appellate Body Report on *EC - Bananas III*, para. 253.
[387] Panel Report on *US – Superfund*, para. 5.1.9.
[388] See paras. 6.139 to 6.147 above.
[389] See paras 2.43 and 2.44, and Tables II.4 and II.5 above.
[390] See para. 6.147 above.
[391] See paras. 6.148 and 6.149 above.
[392] See para. 6.148 above and Table II.4 above.

9.205 As to Turkey's allegations that India has not fully utilized the quotas under examination[393], we recall the conclusion of the adopted panel report in *Japan – Leather* that the existence of quantitative restrictions should be presumed to cause nullification or impairment even if quotas are not fully utilized because they lead to increased transaction costs and would create uncertainties which could affect investment plans (or in this case, trade).

9.206 As to Turkey's arguments that India's refusal to accept compensation has broken the chain of causation, we consider that although parties should clearly favour a mutually acceptable settlement of their dispute as provided for under the DSU, such a solution must be one that is "mutually" acceptable. We can only take note that India considered that the offers by Turkey and the European Communities were not acceptable to it. We recall that when a WTO Member considers that its rights have been nullified by the actions of another Member it is entitled to initiate dispute settlement procedures envisaged in the DSU.[394] We reject therefore Turkey's argument that India's nullification and impairment of its WTO benefits have resulted from India's own action or absence thereof.

I. OUR MAIN FINDINGS RECALLED

9.207 Without prejudice to our detailed analysis above, it may be helpful to provide a brief overview of our main findings. We have found that the measures at issue were Turkish measures, as they were adopted by the Turkish government at a date different from the EC measures, and they were applied and enforced by Turkey alone. In this context we ruled that the European Communities was not an essential party to this dispute, although we invited it to submit to us any relevant facts or arguments that it deemed appropriate. We found that the measures at issue had not been introduced under the ATC, but rather, as submitted by Turkey, in the context of the formation of its customs union with the European Communities. Therefore the matter at issue is not for the TMB and we have jurisdiction to adjudicate on it. We have also found that the measures were "new measures" pursuant to Article 2.4 of the ATC and that, unless they could be justified under a GATT provision, the discriminatory quantitative restrictions imposed by Turkey against the imports of 19 categories of textiles and clothing imports from India, would violate Articles XI and XIII of GATT and consequently Article 2.4 of the ATC.

9.208 We then proceeded to examine Turkey's defense based on Article XXIV of GATT. In this context, we decided that we had jurisdiction to examine any specific measure adopted by a WTO Member in the context of a customs union but that, in this case, we did not need, and indeed we were asked by the parties not to assess the overall WTO compatibility of the Turkey-EC customs union. We have found that, as a general principle, Turkey was bound, at all times, by all WTO obligations, unless there was a conflict between any provisions. Since the wording of Articles XI and XIII of GATT and Article 2.4 of the ATC is clear in prohibiting the introduction of quantitative restrictions such as those at issue, we examined the terms of Article XXIV to decide whether Turkey could be exempted from the application of these prohibitions. We found that the provisions of paragraphs 5 and 8 of Article XXIV did not authorize any violation of the WTO obligations, other than the MFN obligation. Indeed, these paragraphs do not provide any indication as to the type of measure to be used in the formation of a customs union but rather provide guidelines for the overall assessment of regional trade agreements. We have therefore concluded that Article XXIV did not authorize the violation of Articles XI and XIII of GATT or Article 2.4 of the ATC. While reaching this conclusion on the basis of the wording of the provisions at issue, we have endeavoured to ensure that our interpretation did not render Turkey's right to form a customs union with the European Communities a nullity, since pursuant to Article XXIV:8(a)(ii), constituent members to a customs union are required

[393] See para. 6.164 above.

[394] See for instance the Appellate Body Report on *US – Shirts and Blouses*, p. 13, where it is stated: "If any Member should consider that its benefits are nullified or impaired as the result of circumstances set out in Article XXIII, then dispute settlement is available"; see also the Appellate Body Report on *EC - Bananas III*, paras. 136 and 252-253.

to adopt substantially the same regulations of commerce. We found that this standard leaves flexibility to the constituent members. In any event, in the present case, taking into account, *inter alia*, the share of trade affected by the type of measures at issue (quantitative restrictions on textiles and clothing), we found that there were WTO compatible alternatives available to Turkey if it wanted to conclude a customs union with the European Communities. Finally we found that even if the presumption of nullification of Article 3.8 of the DSU were rebuttable, Turkey had not submitted evidence that the benefits accruing to India under the ATC and GATT had not been reduced or nullified by the introduction of WTO incompatible quantitative restrictions.

X. CONCLUSIONS

10.1 We conclude that the measures adopted by Turkey on 19 categories of textile and clothing products are inconsistent with the provisions of Articles XI and XIII of GATT and consequently with those of Article 2.4 of the ATC. We reject Turkey's defense that the introduction of any such otherwise GATT/WTO incompatible import restrictions is permitted by Article XXIV of GATT.

10.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that, to the extent that Turkey has acted inconsistently with the provisions of covered agreements, as described in the preceding paragraph, it has nullified or impaired the benefits accruing to the complainant under those agreements.

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

ANNEX

Appendix 1 **Categories of Turkey's imports of textile and clothing products from India under restriction**

Group	Product	Description
IA	1	Cotton yarn, not put up for retail sale.
IA	2	Woven fabrics of cotton, other than gauze, terry fabrics, pile fabrics, chenille fabrics, tulle and other fabrics.
IA	2a	Of which: Other than unbleached or bleached
IA	3	Woven fabrics of synthetic fibres (discontinuous or waste) other than narrow woven fabrics, pile fabrics (including terry fabrics) and chenille fabrics
IA	3a	Of which: Other than unbleached or bleached
IB	4	Shirts, T-shirts, lightweight fine knit roll, polo or turtle necked jumpers and pullovers (other than of wool or fine animal hair), undervests and the like, knitted or crocheted
IB	5	Jerseys, pullovers, slip-overs, waistcoats, twinsets, cardigans, bed-jackets and jumpers (other than jackets and blazers), anoraks, windcheaters, waister jackets and the like, knitted or crocheted
IB	6	Men's or boys' woven breeches, shorts other than swimwear and trousers (including slacks), women's or girls' woven trousers and slacks, of wool, of cotton or of man-made fibres; lower parts of tracksuits with lining, other than category 16 or 29, of cotton or of man-made fibres
IB	7	Women's or girls' blouses, shirts and shirt-blouses, whether or not knitted or crocheted, of wool, of cotton or man-made fibres
IB	8	Men's or boys' shirts, other than knitted or crocheted, of wool, cotton or man-made fibres
IIA	9	Terry towelling and similar woven terry fabrics of cotton; toilet linen and kitchen linen, other than knitted or crocheted, of terry towelling and woven terry fabrics, of cotton
IIA	20	Bed linen, other than knitted or crocheted
IIA	23	Yarn of staple or waste artificial fibres, not put up for retail sale
IIA	39	Table linen, toilet and kitchen linen, other than knitted or crocheted, other than of terry towelling or similar terry fabrics of cotton
IIB	15	Women's or girls' woven overcoats, raincoats and other coats, cloaks and capes; jackets and blazers, of wool, of cotton or of man-made textile fibres (other than parkas) (of category 21)
IIB	24	Men's or boys', night shirts, pyjamas, bathrobes, dressing gowns and similar articles, knitted or crocheted Women's or girls' night dresses, pyjamas, negligees, bathrobes, dressing gowns and similar articles, knitted or crocheted
IIB	26	Women's or girls' dresses, of wool, of cotton or of man-made fibres
IIB	27	Women's or girls' skirts, including, divided skirts
IIB	29	Women's or girls' suits and ensembles, other than knitted or crocheted, of wool, of cotton or of man-made fibres, excluding ski suits; women's or girls' tracksuits with lining, with an outer shell of an identical fabric, of cotton or of man-made fibres

Source: Government of Turkey, Decree No. 95/6815, concerning the *Surveillance and Safeguard Measures for Imports of Certain Textile Products*, dated 30 April 1995 and published in the *Official Gazette* of 1 June 1995, Annex I.

Appendix 2 **Size of Turkey's import quotas on textile and clothing products from India, by product categories, in 1996, 1997 and 1998**

Product Category	Unit	1996	1997	1998
1	kgs	7,372,000	7,372,000	7,761,800
2	kgs	752,000	752,000	786,800
2a	kgs	104,000	104,000	121,000
3	kgs	16,000	16,000	17,800
3a	kgs	15,000	15,000	16,700
4	pieces	8,000	8,000	9,000
5	pieces	4,000	4,000	4,600
6	pieces	4,000	4,000	4,600
7	pieces	4,000	4,000	4,300
8	pieces	4,000	4,000	4,300
9	kgs	4,000	4,000	4,600
20	kgs	4,000	4,000	4,600
23	kgs	480,000	480,000	558,100
39	kgs	4,000	4,000	4,700
15	pieces	4,000	4,000	4,700
24	pieces	4,000	4,000	4,700
26	pieces	4,000	4,000	4,500
27	pieces	4,000	4,000	4,500
29	pieces	4,000	4,000	4,600

Source: *Official Gazette* of 19 December 1995, 13 March 1996, 13 June 1996, 25 September 1996, 7 December 1996, 12 June 1997 and 18 December 1997.

Appendix 3a **India's exports to Turkey, by textiles and clothing categories under restriction, in 1994-1997**

Product Category	**Value** (Thousand US$)				**Volume** (Thousand kilos/pieces)			
	1994	**1995**	**1996**	**1997**	**1994**	**1995**	**1996**	**1997**
Textiles								
1	11,380	27,270	16,050	15,790	3,840	7,291	5,074	5,197
2, incl. 2a	1,160	9,350	3,130	2,250	273	2,331	894	648
3, incl. 3a	70	230	1,200	840	6	21	143	139
9	0	2,250	590	0	0	386	140	
20	0	20	40	280	0	2	2	29
23	1,350	2,720	670	400	526	818	226	147
39	0	0	20	10	0	0	1	0
Sub-total	*13,960*	*41,840*	*21,700*	*19,570*				
Clothing								
4	0	0	0	0	0	0	0	0
5	0	0	10	5	0	0	1	0
6	1	1	1	11		1	1	3
7	3	41	21	29	1	14	8	9
8	194	18	2	16	27	4	0	2
15	3	3	3	8	1	1	0	2
24	0	0	0	0	0	0	0	0
26	16	293	28	144	2	49	10	23
27	35	36	26	62	7	14	10	23
29	0	4	13	22	0	1	3	4
Sub-total	252	396	104	297				

Source: Government of India.

Appendix 3b **Turkey's imports from India, by textiles and clothing categories under restriction, in 1994-1997**

Product Category	**Value** (Thousand US$)				**Volume** (Thousand kilos/pieces)			
	1994	**1995**	**1996**	**1997**	**1994**	**1995**	**1996**	**1997**
Textiles								
1	9,644	31,679	22,505	24,997	3,002	7,931	6,714	8,247
2, incl. 2a	1,506	6,353	5,843	3,898	344	1,390	1,372	878
3, incl. 3a	216	466	447	76	31	112	98	16
9	0	0	965	0	0	0	200	0
20	6	8	0	58	0	1	0	3
23	1,525	6,975	1,826	1,462	581	1,844	563	590
39	53	48	65	36	3	4	4	5
Sub-total	*12,949*	*45,530*	*31,651*	*30,528*				
Clothing								
4	76	1	1	0	15	1	0	0
5	0	9	8	9	0	8	0	3
6	*1*	*1*	*4*	*3*	*0*	*1*	*1*	*0*
7	*5*	*26*	*35*	*26*	*1*	*16*	*5*	*2*
8	29	14	9	31	5	4	1	1
15	7	9	21	8	2	1	1	1
24	0	0	0	0	0	0	0	0
26	1	46	156	24	0	9	21	3
27	14	42	10	21	3	13	2	3
29	0	4	108	8	0	1	15	1
Sub-total	*133*	*153*	*352*	*131*				

Source: Government of Turkey.

Appendix 4a **Share of India in Turkey's imports of textile and clothing products subject to QRs, by product category, in 1994-1997** (percentages based on import quantities)

Product category	1994	1995	Average 1994-1995	1996	1997	Average 1996-1997	Average 1994-1997
1	5.66	13.52	9.78	15.61	20.07	17.79	13
2	1.15	2.86	2.21	3.54	2.27	2.90	2.5
2a	0.78	3.83	2.81	2.02	0.81	1.38	0.4
3	0.49	0.93	0.78	0.73	0.09	0.36	0.5
3a	1.26	2.62	2.10	0.89	0	0.37	0.96
4	7.38	0.15	1.49	0.02	0	0.01	0.38
5	0	0	1.82	0	0	0.18	0
6	0.06	0.19	0.14	0.08	0.03	0.05	0.07
7	1.74	16.89	10.13	0.82	0.3	0.53	1.6
8	8.26	4	5.72	0.29	0.35	0.32	1.51
9	0	0	0.00	7.92	0	2.93	1.44
15	3.79	2.99	3.50	0.32	0.22	0.26	0.74
20	0.6	3.93	1.81	0	2.75	1.31	1.39
23	15.37	21.99	19.93	9.07	14.06	11.09	11.42
24	0	0	0.00	0	0	0.00	0
26	0.95	20.32	14.42	4.79	0.68	2.88	3.76
27	15.98	26.60	23.28	0.7	1.06	0.87	3.28
29	0.18	11.20	4.39	14.62	0.54	7.96	7.44
39	4.81	1.57	2.29	2.04	2.16	2.11	2.18

Source: Government of Turkey, Under-Secretariat for Foreign Trade.

Appendix 4b **Turkey's protection rates, for the categories of textiles and clothing products subject to restrictions *vis-à-vis* India, in 1994-1997**

Product category	Protection rates (in per cent)				Percentage change 1996/1993
	1993	1994	1995	1996	
1	25.1	19.8	13.4	5.36	-78.63
2	37.9	30.8	28.9	9.41	-75.17
3	37.9	26	20	10.12	-73.31
4	35	28	22.4	12.62	-63.95
5	35	28	22.4	13.18	-62.35
6	35	28	22.4	13.4	-61.71
7	35	28	22.4	13.4	-61.71
8	35	28	22.4	12.5	-64.29
9	36.3	26	21.5	10.43	-71.26
15	35	28	22.4	13.4	-61.71
20	35	28	22.4	12.5	-64.29
23	26	20	15.6	7.5	-71.15
24	35	28	22.4	13.09	-62.61
26	35	28	22.4	13.4	-61.71
27	35	28	22.4	13.4	-61.71
29	35	28	22.4	13.4	-61.71
39	35	28	22.4	12.5	-64.29
Av. 19	*34.31*	*26.98*	*21.66*	*11.74*	*-65.78*

Source: Government of Turkey, Under-Secretariat for Foreign Trade.