# WORLD TRADE ORGANIZATION

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**Negotiating Group on Trade Facilitation**

## ARTICLE VIII OF GATT 1994 – SCOPE AND APPLICATION

Note by the Secretariat

*This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO*

## I. INTRODUCTION

1. This paper revises an earlier note [1] on the matter, bringing it up to date with latest developments in this area and aligning it with two other Secretariat contributions on the GATT provisions currently being addressed in the Trade Facilitation negotiations. Changes to the original document (G/C/W/391) mostly relate to the organization of the paper, whilst also offering some small additions to the jurisprudence section.

## II. STRUCTURE OF THE PAPER

2. As in the case of the Secretariat's previous document on Article VIII, the current paper first introduces the text of the provision with a brief reference to its negotiating history, followed by a factual analysis of the Article's coverage and an outline of the basic obligations prescribed. It then looks at how the provision has been interpreted by GATT/WTO panels up to now.

## III. TEXT OF THE PROVISION

*1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties[2] on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.*

*(b) The contracting parties recognize the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a).*

[1] G/C/W/391, 9 July 2002.
[2] See the Explanatory Notes 2 (a) and (b) of GATT 1994.

*(c) The contracting parties also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.**

*2. A contracting party shall, upon request by another contracting party or by the CONTRACTING PARTIES, review the operation of its laws and regulations in the light of the provisions of this Article.*

*3. No contracting party shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.*

*4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:*

*(a) consular transactions, such as consular invoices and certificates;*
*(b) quantitative restrictions;*
*(c) licensing;*
*(d) exchange control;*
*(e) statistical services;*
*(f) documents, documentation and certification;*
*(g) analysis and inspection; and*
*(h) quarantine, sanitation and fumigation.*

**Interpretative note to paragraph 1 (c):*

*1. While Article VIII does not cover the use of multiple rates of exchange as such, paragraphs 1 and 4 condemn the use of exchange taxes or fees as a device for implementing multiple currency practices; if, however, a contracting party is using multiple currency exchange fees for balance-of-payments reasons with the approval of the International Monetary Fund, the provisions of paragraph 9(a) of Article XV fully safeguard its position.*

*2. It would be consistent with paragraph 1 if, on the importation of products from the territory of a contracting party into the territory of another contracting party, the production of certificates of origin should only be required to the extent that is strictly indispensable.*

## IV. NEGOTIATING HISTORY

3. The negotiating history of Article VIII:1 was considered by the panel in *US – Customs User Fee*.[3] Much of the language of Article VIII of the GATT was drawn from a proposal made by the United States in September 1946.[4] This proposal in turn had its origins in the *International Convention Relating to the Simplification of Customs Formalities* of 3 November 1923[5], and in recommendations made by the World Economic Conference of 1927.[6] The Convention and the Conference aimed to reduce the consular fees imposed in connection with the issuance of visas for

[3] Panel Report, *United States – Customs User Fee* ("*US – Customs User Fee*"), adopted 2 February 1988, BISD 35S/245.

[4] Article VIII:1(a) first appeared as Article 13, *Suggested Charter for an International Trade Organization of the United Nations*, submitted by the United States in September 1946. Department of State, Publication 2598, Commercial Policy Series 93.

[5] League of Nations Treaty Series, vol. 30, p. 372 (1925).

[6] League of Nations Document C.356.M.129.1927.II, para. 5 (1).

commercial travellers and consignments of goods, and to limit such fees to the cost of the relevant government activity performed. Thus, the World Economic Conference of 1927 recommended that:

> (1) Consular fees should be a charge, fixed in amount and not exceeding the cost of issue, rather than an additional source of revenue. Arbitrary or variable consular fees cause not only an increase of charges, which is at times unexpected, but also an unwarrantable uncertainty in trade.

4. Article VIII was neither discussed extensively nor modified significantly through the negotiations leading to the approval, at the close of the 1947 Geneva Conference, of the text that was to become the GATT.[7] In *US – Customs User Fee*, the panel explained that:

> "The criteria stated in the initial draft texts submitted to the negotiating conference were almost identical to those adopted in the final texts, with the result that the actual negotiations presented no occasions for further elaboration of their meaning."[8]

5. Although the Havana Charter never came into force, its Article 36, which dealt with the same subject matter as Article VIII of the GATT, contained certain differences from the text of Article VIII. Only one of the modifications discussed during the Havana Conference, and included in the Havana Charter, was subsequently made part of Article VIII of the GATT.[9] During the Havana Conference, it was considered important to clarify that the scope of Article VIII did not relate to import duties (regulated by Article II), to export duties, or to the type of internal taxes regulated by Article III of the GATT.[10] The Havana Charter thus revised paragraph 1 to include the phrase *"all fees and charges of whatever character (other than import and export duties, and other than taxes within the purview of Article 18)"*.[11]

6. Three noteworthy changes were made to Article VIII in the Review Session amendments to Part II of the GATT, which were adopted in March 1955 and entered into force in October 1957.[12] The first was the addition to paragraph 1 of the Havana Charter language aimed at distinguishing the scope of Article VIII from the scope of Articles II and III. The second was the replacement of the word *"should"* in paragraph VIII:1(a) with the word *"shall"* and the deletion of language stating that contracting parties need take action in accordance with that provision only "at the earliest practicable date". This modification had the effect of making the obligations in Article VIII:(1)(a) mandatory rather than simply hortatory. Third, the second interpretative note to Article VIII, which states that, in

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[7] The text of Article 13 of the *Suggested Charter for an International Trade Organization of the United Nations* is very similar to the text of Article VIII as adopted in 1947.

[8] Panel Report, *US - Customs User Fee*, BISD 35S/245, para. 73.

[9] The following modifications contained in the Havana Charter were not subsequently incorporated into Article VIII of the GATT: (i) that a Member was required to review its internal laws and regulations only if such request was made by another Member that was "directly affected" by those laws and regulations (Article 36.2 of the Havana Charter); (ii) the addition of a provision relating to tariff discrimination based on the use of regional or geographical names (Article 36.6 of the Havana Charter); (iii) the first interpretative note relating to the International Monetary Fund did not require the "approval" of the International Monetary Fund, but only that the relevant currency exchange fees "not be inconsistent with the Articles of Agreement of the International Monetary Fund" (Report of Committees and Principal Sub-committees of the UN Conference on Trade and Employment, 1948, p. 77, para. 41).

[10] Havana Report, U.N. Doc. ICITO/1/8, p. 76, para. 35.

[11] Article 18 of the Havana Charter corresponds to Article III of the GATT.

[12] See *Final Act and Instruments adopted at the Ninth Session of the* CONTRACTING PARTIES, 10 March 1955, in the *Protocol Amending the Preamble and Parts II and III of the General Agreement on Tariffs and Trade (Legal Instrument 37)*, p. 85; and BISD 3S/214.

accordance with paragraph 1, "the production of certificates of origin should only be required to the extent that is strictly indispensable", was also added in 1955.

7. In paragraph 1(c) of Article VIII, the contracting parties "recognize the need for minimizing the incidence and complexity of import formalities and for decreasing and simplifying import and export documentation requirements". To this end, the CONTRACTING PARTIES adopted a number of reports, decisions, and recommendations intended to simplify documentary requirements relating to the importation of goods, including certificates of origin; to simplify formalities associated with the administration of quantitative requirements, the importation of commercial samples, and inspections; and to abolish consular formalities.[13] Much of this work was conducted in conjunction with the International Chamber of Commerce and the Customs Co-operation Council.[14]

8. Certain subjects covered by Article VIII are also now regulated by specific Uruguay Round Agreements. For example, the *Agreement on Preshipment Inspection*, the *Agreement on Sanitary and Phyto-Sanitary Measures* and the *Agreement on Technical Barriers to Trade* impose disciplines on, *inter alia*, certain fees and formalities imposed by Members in connection with importation. The *Agreement on Rules of Origin* and the *Agreement on Import Licensing* also relate to the subject matter covered by Article VIII.

## V. COVERAGE

9. Article VIII addresses fees and formalities connected with importation and exportation. The first paragraph of Article VIII makes clear that the disciplines set forth in Article VIII apply to all "fees and charges of whatever character … imposed on or in connexion with importation or exportation" *except for*: (i) import and export duties; and (ii) internal taxes within the scope of Article III of the GATT. Thus, Article VIII applies to a residual category of fees and charges. Examples of the types of fees and charges covered by Article VIII are set forth in the fourth paragraph of Article VIII.

10. Typical fees and charges that would fall within the scope of Article VIII include licence fees, document fees, stamp fees and inspection fees. Examples of import-related formalities that would fall within the scope of Article VIII include requirements relating to the documentation needed for import, and to the procedures to be followed for customs clearance.

11. Article VIII includes specific legal obligations applicable to fees and charges and to the penalties that may be imposed for minor breaches of customs procedures, as well as hortatory statements recognizing the need to reduce the number and complexity of import and export-related fees and formalities.

### A. PARAGRAPH 1

12. In addition to defining the residual category of fees connected with importation and exportation to which Article VIII applies, paragraph 1(a) contains the principal legal obligations imposed pursuant to that provision. Members are directed to limit such fees "in amount to the approximate cost of services rendered". The phrase "services rendered" can be understood to refer to government regulatory activities performed in connection with the importation and customs entry processes, such as the processing and clearing of documents and goods, and inspections.[15]

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[13] The various actions taken by the CONTRACTING PARTIES are summarized in the *Analytical Index, Guide to GATT Law and Practice* (World Trade Organization, 1995), Vol. I, pp. 278–281.

[14] The Customs Co-operation Council is now called the World Customs Organization.

[15] See Panel Report, *US – Custom User Fee*, BISD 35S/245, paras. 76 and 77.

13. In addition, such fees and charges must not "represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes".

14. Paragraph 1(b) and (c) do not contain specific legal requirements. Rather, in these provisions, Members simply "recognize the need" for "reducing the number and diversity of fees and charges" covered by Article VIII, and "for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements".

15. In 1952, the CONTRACTING PARTIES took a Decision adopting a Code of Standard Practices for Documentary Requirements for the Importation of Goods.[16]

B. PARAGRAPH 2

16. Paragraph 2 of Article VIII requires a Member to review the operation of its "laws and regulations in the light of the provisions of this Article", at the request of another Member or the relevant WTO body.[17] In the Havana Charter, this provision included a qualification that the obligation to "review" only applied when the requesting Member was "directly affected" by the relevant laws and regulations. However, this qualification was not inserted into the GATT.[18]

C. PARAGRAPH 3

17. Paragraph 3 prohibits the imposition of "substantial" penalties for minor breaches of customs regulations or procedures. Specifically, when customs documentation contains mistakes or omissions that are easily rectifiable and were "obviously made without fraudulent intent or gross negligence", then the penalties imposed as a result of such mistakes or omissions may not exceed what is "necessary to serve merely as a warning".

18. In 1952 the CONTRACTING PARTIES issued a Recommendation on Standard Practices for Consular Formalities, suggesting that no charge, other than the regular charge for replacement of a document, should be imposed for mistakes made in good faith, and that, "within reasonable limits", corrections to the original documents should be allowed.[19]

D. PARAGRAPH 4

19. The last paragraph of Article VIII sets forth an illustrative list of the types of fees, charges, formalities and requirements that fall within the scope of Article VIII. These include fees, charges, formalities and requirements relating to:

(a) consular transactions, such as consular invoices and certificates;
(b) quantitative restrictions;
(c) licensing;
(d) exchange control;
(e) statistical services;
(f) documents, documentation and certification;
(g) analysis and inspection; and
(h) quarantine, sanitation and fumigation.

[16] BISD 1S/23 and 24.

[17] According to the Explanatory Note contained in paragraph 2(b) of the language incorporating the GATT 1994 into Annex 1A of the *WTO Agreement*, functions assigned by the GATT 1994 to the CONTRACTING PARTIES are to be allocated by the Ministerial Conference.

[18] See Article 36.2 of the Havana Charter.

[19] BISD 1S/26, para. 4.

*Interpretative notes*

20. There are two interpretative notes to Article VIII. The first states that the use of taxes or fees as a device for implementing multiple currency practices is inconsistent with Article VIII, but creates an exception, in accordance with Article XV:9(a) of the GATT [20], for circumstances in which a Member uses multiple currency exchange fees for balance-of-payments reasons with the approval of the International Monetary Fund.

21. The second interpretative note recognizes that requiring the production of certificates of origin is not, as such, inconsistent with Article VIII, but qualifies the use of such requirements by stipulating that *"the production of certificates of origin should only be required to the extent that is strictly indispensable"*.

## VI. BASIC OBLIGATIONS

22. Article VIII seeks to limit the costs and complexity of the importation and exportation process by imposing specific legal obligations on Members with respect to the fees and charges that may be charged in connection with importation and exportation and the penalties that may be imposed for minor breaches of customs procedures; as well as by explicitly recognizing the need to reduce the number and complexity of import- and export-related fees and formalities.

23. Article VIII requires each WTO Member to ensure that:

(i) the non-tariff fees and charges that it imposes on or in connection with importation or exportation: (a) are limited in their amount to the approximate cost of the regulatory activities performed by that Member in connection with such importation or exportation; and (b) do not represent indirect protection to domestic products or taxation of imports or exports for fiscal purposes (paragraph 1);

(ii) upon request by another Member or by the relevant WTO Body[21], it reviews the operation of its laws and regulation in the light of the provisions of Article VIII (paragraph 2); and

(iii) it does not impose substantial penalties for minor breaches of customs regulations or procedural requirements, in particular when such breaches are the result of mistakes that are easily rectifiable and do not result from fraud or gross negligence (paragraph 3).

24. In Article VIII, Members also "recognize", but undertake no explicit obligations with respect to:

(i) the need to reduce the number and diversity of the fees and charges addressed by Article VIII; and

(ii) the need to minimize the incidence and complexity of import and export formalities, and to decrease and simplify import and export documentation requirements.

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[20] Article XV:9(a) provides:

> Nothing in this Agreement shall preclude:
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> (*a*) the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund or with that contracting party's special exchange agreement with the CONTRACTING PARTIES.

[21] See footnote 17 above.

## VII. INTERPRETATION AND APPLICATION

25. Article VIII has been interpreted by both GATT and WTO panels, as well as by the Appellate Body. The aim of this section is to identify some of the principal findings that have been made with respect to the specific provisions of Article VIII.[22] This section begins with a brief summary of the general nature of Article VIII:1(a), and then follows the order of the text of Article VIII.

### A. GENERAL

26. In *US – Customs User Fee*, the panel summarized the nature of Article VIII:1(a) as follows:

> Article VIII:1(a) states a rule applicable to all charges levied at the border, except tariffs and charges which serve to equalize internal taxes. It applies to all such charges, whether or not there is a tariff binding on the product in question. The rule of Article VIII:1(a) prohibits all such charges unless they satisfy the three criteria listed in that provision:
>
> a) the charge must be "limited in amount to the approximate cost of services rendered";
>
> b) it must not "represent an indirect protection to domestic products";
>
> c) it must not "represent … a taxation of imports … for fiscal purposes".[23]

### B. "ALL FEES AND CHARGES … ON OR IN CONNECTION WITH IMPORTATION OR EXPORTATION"

27. In *US – Customs User Fee*, the panel considered the types of fees and charges covered by Article VIII, and determined that there was "a rather well established general understanding of this concept, demonstrated more by practice than by the actual text of the General Agreement."[24] The panel noted that the illustrative list in paragraph 4 of Article VIII "includes various aspects of the customs process such as 'consular transactions', 'statistical services', and 'analysis and inspection'." According to the panel, in practice the illustrative list has been interpreted "as a list of those customs-related government activities which the draftsmen meant when they referred to 'services rendered'".[25] The panel noted that consular fees, customs fees, and statistical fees had been treated as falling within the scope of Article VIII:1(a) or Article II:2(c).[26] That panel also found that a merchandise processing fee for imports was covered by Article VIII:1(a).

28. The panel in *EEC – Minimum Import Prices* considered whether the forfeiture of a security lodged in anticipation of importation when no importation took place within the date specified in an import certificate constituted a charge in connection with importation within the meaning of Article VIII:1(a). In the view of the panel, "such a penalty should be considered as part of an

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[22] This note is not intended to be a comprehensive analysis of *all* findings related to Article VIII that have been made by GATT/WTO dispute settlement panels and the Appellate Body.

[23] Panel Report, *US – Customs User Fee,* BISD 35S/245 , para. 69.

[24] *Ibid*., para. 76.

[25] *Ibid.*

[26] *Ibid.*

enforcement mechanism and not as a fee or formality 'in connection with importation' within the purview of Article VIII". [27]

29. The potential forfeiture of security was also at issue in *EEC – Bananas II*.[28] That panel referred to the reasoning of the panel in *EEC – Minimum Import Prices*, agreed that the potential forfeiture of a security deposit did not, as such, fall within Article VIII:1(a), and added that "it had not received sufficient evidence demonstrating that the security requirement gave rise to costs amounting to a charge prohibited by paragraph 1(a) of Article VIII".[29]

30. The relationship between *"fees and charges"* falling within the scope of Article VIII:1 and Article II was considered by the panel in *US – Customs User Fee.*[30] According to that panel, Article II:1(b) establishes a ceiling on the charges that can be levied on a product whose tariff is bound. Such product must be exempted from all tariffs in excess of the bound rate, and from all other charges in excess of those: (i) in force as of the date of the relevant tariff concession; or (ii) directly and mandatorily required by legislation in force on that date. In addition, the panel observed, Article II:2 authorizes governments to impose three types of non-tariff charges above the tariff-binding ceiling, including "fees or other charges commensurate with the cost of services rendered".[31] In the view of the panel in *US – Customs User Fee*, no difference in meaning was intended between this exception in Article II:2(c) and the phrase "fees and charges … limited in amount to the approximate cost of services rendered" in Article VIII:1(a).[32]

31. The panel in *US – Tobacco* considered the consistency of an inspection fee with Article VIII, as all the parties to the dispute had asked it to. The panel, however, noted that the question of the consistency of the inspection fees with the GATT "could present itself differently under Article III in that the focus of the examination would then be on the inspection fees as internal charges and on whether or not national treatment was accorded in respect of such charges".[33]

C. "LIMITED IN AMOUNT TO THE APPROXIMATE COST OF SERVICES RENDERED"

32. The panel in *US – Customs User Fee* observed that:

> "… [this] requirement is actually a dual requirement, because the charge in question must first involve a 'service' rendered, and then the level of the charge must not exceed the approximate cost of that 'service'".[34]

33. In discussing the meaning of *"services rendered"*, the panel noted that "the drafters … were clearly not employing the term … in the economic sense", since government regulation is not

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[27] Panel Report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* ("*EEC – Minimum Import Prices*"), adopted 18 October 1978, BISD 25S/68, para. 4.3.

[28] Panel Report, *EEC – Import Regime for Bananas* ("*EEC – Bananas II*"), 11 February 1994, unadopted, DS38/R.

[29] *Ibid.*, para. 150.

[30] Panel Report, *United States – Customs User Fee* ("*US – Customs User Fee*"), adopted 2 February 1988, BISD 35S/245.

[31] The other two types of charges authorized pursuant to Article II:2 are: (a) charges equivalent to internal taxes imposed consistently with Article III:2; and (b) anti-dumping and countervailing duties imposed consistently with Article VI.

[32] Panel Report, *US – Customs User Fee,* BISD 35S/245, para. 75.

[33] Panel Report, *United States Measures Affecting the Importation, Internal Sale and Use of Tobacco* ("*US – Tobacco*"), adopted 4 October 1994, BISD 41S/I/131.

[34] *Ibid.*, para. 69.

necessarily desired by importers and does not necessarily add value to the imported goods.[35] Rather, "services rendered" means "government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic license accorded to taxing authorities, be called a 'service' to the importer in question".[36]

34. The panel considered a variety of activities that the United States claimed were *"services"* that should be included in calculating the cost base of the merchandise processing fee. In the view of the panel, "the government imposing the fee should have the initial burden of justifying any government activity being charged for".[37] The panel examined a variety of activities to determine whether they were "both proximate enough, and of sufficiently general applicability, that their costs could be included in the fee applicable to all commercial importers".[38] The panel found that the costs of airport passenger processing, the costs of collecting and transmitting export documentation, certain costs of customs officers stationed in other countries, and the costs of customs processing for imports that were exempt from the merchandise processing fee could not be included in the cost base of the merchandise processing fee. These activities could not be considered to be government activities "serving" the commercial importers paying the merchandising free.[39] Conversely, the panel found that the costs of the following activities could be included in the cost base of the fee: investigations of customs fraud and counterfeit goods; the collection of anti-dumping and countervailing duties; technical laboratories and the provision of legal rulings on customs matters; and the clearance of carriers.[40]

35. The panel also noted that, in determining whether fees are limited in amount to the cost of services, "revenues must be measured against the costs of the period in which the revenues are collected".[41]

36. The panel in *US – Certain EC Products* expressed doubts regarding the United States' contention that "bonding requirements could be viewed as a form of fee for services rendered (the services being the 'early release of merchandise')".[42]

37. In *EC – Minimum Import Prices*[43], the panel considered the consistency with Article VIII of certain interest charges and costs in connection with the lodging of security associated with import certificates, and noted that "the incidence of these charges did not exceed 0.005 per cent". In the opinion of the panel, "these interest charges and costs were limited in amount to the approximate costs of administration", and "the term 'cost of services rendered' in Article VIII:1(a) would include these costs of administration".[44]

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[35] *Ibid.*, para. 77.
[36] *Ibid.*
[37] *Ibid.*, para. 98.
[38] *Ibid.*, para. 103.
[39] *Ibid.*, paras. 100, 101, 105, and 106.
[40] *Ibid.*, paras. 103 and 104.
[41] *Ibid.*, para. 111.
[42] The panel did not, however, need to decide the issue as it found that the European Communities had failed to satisfy its burden of proving that Article VIII was relevant to the dispute: Panel Report, *United States – Import Measures on Certain Products from the European Communities* ("*US – Certain EC Products*"), WT/DS165/R and Add.1, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS165/AB/R, paras. 6.70 and 6.71.
[43] Panel Report, *EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables* ("*EEC – Minimum Import Prices*"), adopted 18 October 1978, BISD 25S/68.
[44] *Ibid.*, para. 4.2.

38. In the same case, the panel held that the authority of EC member States to suspend totally or partially the issuance of import certificates pending Community action in response to a request for safeguard action was not inconsistent with Article VIII.[45]

39. In *US – Customs User Fee*, the United States argued that an *ad valorem* fee was the simplest and cheapest way to administer its merchandise processing fee, was not price distortive, and was predictable for traders.[46] The panel, however, found that the *ad valorem* fee was not compatible with the plain meaning of the text or with the objectives of the GATT.[47] The Panel held that the term "cost of services rendered" referred "to the approximate cost of customs processing for the individual entry in question".[48] The panel found the merchandise processing fee was inconsistent with Article VIII:1(a) "to the extent that it caused fees to be levied in excess of such costs".[49]

40. In *Argentina – Textiles and Apparel*, the panel reasoned that:

> "An *ad valorem* duty with no fixed maximum fee, by its very nature, is not "limited in amount to the approximate cost of services rendered". For example, high-price items necessarily will bear a much greater tax burden than low-price goods, yet the service accorded to both is essentially the same. An unlimited *ad valorem* charge on imported goods violates the provisions of Article VIII because such a charge cannot be related to the cost of the service rendered".[50]

## D. "AN INDIRECT PROTECTION TO DOMESTIC PRODUCTS OR A TAXATION OF IMPORTS OR EXPORTS FOR FISCAL PURPOSES"

41. In *US – Customs User Fee*, the panel raised, but did not decide, the issue of whether the prohibition on fees and charges that "represent an indirect protection to domestic products" involves a requirement to consider whether the fees and charges had adverse trade effects.[51]

42. In the same case the panel also noted that, in considering whether fees and charges represent taxation for fiscal purposes, it is relevant to consider "the question of whether total revenues exceeded total attributable costs".[52]

43. In *Argentina – Textiles and Apparel*[53] the panel observed that the statistical tax at issue "purportedly raises revenue for the purpose of financing customs activities related to the registration, computing and data processing of information on both imports and exports". The panel found the tax to be a measure designated for fiscal purposes inconsistent with Article VIII, reasoning that:

> "While the gathering of statistical information concerning imports may benefit traders in general, Article VIII bars the levying of any tax or charge on importers to support the related costs "for the

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[45] *Ibid.*, para. 4.5.
[46] Panel Report, *US – Customs User Fee,* BISD 35S/245, para. 83.
[47] *Ibid.*, paras. 80–85.
[48] *Ibid.*, para. 125. See also para. 86.
[49] *Ibid*.
[50] Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* ("*Argentina – Textiles and Apparel* "), WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R and Corr.1, DSR 1998:III, 1033, para. 6.75.
[51] Panel Report, *US – Customs User Fee,* BISD 35S/245, para. 120.
[52] *Ibid*, para. 119.
[53] See footnote 50.

> individual entry in question" since it will also benefit exports and exporters".[54]

44. In that case, Argentina also argued that it was collecting the tax for *"fiscal"* purposes in the context of undertakings it had given to the International Monetary Fund. The panel observed that:

> "… not only does Article VIII of GATT expressly prohibit such measures for fiscal purposes but that clearly a measure for fiscal purposes will normally lead to a situation where the tax results in charges being levied in excess of the approximate costs of the statistical services rendered".[55]

## E. ARTICLE VIII:1(C) – "THE CONTRACTING PARTIES ALSO RECOGNIZE THE NEED FOR MINIMIZING THE INCIDENCE AND COMPLEXITY OF IMPORT FORMALITIES AND FOR DECREASING AND SIMPLIFYING IMPORT AND EXPORT DOCUMENTATION REQUIREMENTS"

45. In *EEC – Bananas II*, the panel examined whether the banana import licensing procedures at issue were consistent with Article VIII:1(c). According to the panel:

> "Article VIII:1(c) refers to import formalities and documentation requirements, not to the trade regulations which such formalities or requirements enforce. It further noted that the complaining parties had criticized the complexity of the EEC's banana import regulations but that they had not submitted any evidence substantiating that the EEC's import formalities and import documentation requirements, by themselves, were more complex than necessary to enforce these regulations. The Panel therefore found that the complaining parties had not demonstrated that the EEC had acted inconsistently with Article VIII:1(c)".[56]

## F. RELATIONSHIP WITH OTHER AGREEMENTS

46. In *Argentina – Textiles and Apparel*, the Appellate Body held that there is nothing in the Agreement between the IMF and the WTO, the Declaration on the Relationship of the World Trade Organization with the International Monetary Fund or the Declaration on Coherence which would justify a Member's commitment to the IMF prevailing over its obligations under GATT Article VIII.[57] Argentina had argued on appeal that, in interpreting Article VIII and applying it to determine the consistency of the statistical tax with Article VIII, the panel should have taken account of a "Memorandum of Understanding" between Argentina and the IMF which, according to Argentina, included an "undertaking" to impose a statistical tax.[58]

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[54] *Ibid.*, para. 6.77.

[55] *Ibid.*, para. 6.78.

[56] Panel Report, *EEC – Import Regime for Bananas* ("*EEC – Bananas II*"), 11 February 1994, unadopted, DS38/R, para. 151.

[57] Appellate Body Report, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003, para. 70.

[58] Appellate Body Report, WT/DS56/AB/R and Corr.1, adopted 22 April 1998, DSR 1998:III, 1003, para. 65.

47. The Appellate Body ruled that:

> "Argentina did not show an irreconcilable conflict between the provisions of its "Memorandum of Understanding" with the IMF and the provisions of Article VIII of the GATT 1994. We thus agree with the Panel's implicit finding that Argentina failed to demonstrate that it had a legally binding commitment to the IMF that would somehow supersede Argentina's obligations under Article VIII of the GATT 1994."[59]

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[59] Appellate Body Report, *Argentina – Textiles and Apparel*, para. 69.