INTERNATIONAL TRADE LAW
THROUGH THE CASES

J.H.H. Weiler
NYU School of Law

Julian Arato
University of Michigan Law School

Sungjoon Cho
Chicago-Kent College of Law

Kathleen Claussen
Georgetown University Law Center

Unit II: Tariffs and Customs Law

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Supplementary Reading

Peter van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization, 5th ed. 2021, 456-521.*

Raj Bhala, *Modern GATT Law. A Treatise on the General Agreement on Tariffs and Trade, 2013, 528-674*.

Michael J. Trebilcock, Robert Howse, & Antonia Eliasson, *The Regulation of International Trade, 4th ed. 2013, 258-287*.

John H. Jackson, William J. Davey, Alan O. Sykes, *International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations, 7th ed. 2021 303-352.*

John H. Jackson, *The World Trading System, 2nd ed. 1997, 139-153*.

1. Introduction

1-1. Overview of Tariffs and Customs Law

Excerpt from the WTO publication "Understanding the WTO" (last revised February 2007)
http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm2_e.htm

Tariffs - more bindings and closer to zero

The bulkiest results of Uruguay Round are the 22,500 pages listing individual countries' commitments on specific categories of goods and services. These include commitments to cut and "bind" their customs duty rates on imports of goods. In some cases, tariffs are being cut to zero. There is also a significant increase in the number of "bound" tariffs — duty rates that are committed in the WTO and are difficult to raise.

Tariff cuts

Developed countries' tariff cuts were for the most part phased in over five years from 1 January 1995. The result is a 40% cut in their tariffs on industrial products, from an average of 6.3% to 3.8%. The value of imported industrial products that receive duty-free treatment in developed countries will jump from 20% to 44%.

There will also be fewer products charged high duty rates. The proportion of imports into developed countries from all sources facing tariffs rates of more than 15% will decline from 7% to 5%. The proportion of developing country exports facing tariffs above 15% in industrial countries will fall from 9% to 5%.

The Uruguay Round package has been improved. On 26 March 1997, 40 countries accounting for more than 92% of world trade in information technology products, agreed to eliminate import duties and other charges on these products by 2000 (by 2005 in a handful of cases). As with other tariff commitments, each participating country is applying its commitments equally to exports from all WTO members (i.e. on a most-favoured-nation basis), even from members that did not make commitments.

More bindings

Developed countries increased the number of imports whose tariff rates are "bound" (committed and difficult to increase) from 78% of product lines to 99%. For developing countries, the increase was considerable: from 21% to 73%. Economies in transition from central planning increased their bindings from 73% to 98%. This all means a substantially higher degree of market security for traders and investors. (…)

And agriculture …

Tariffs on all agricultural products are now bound. Almost all import restrictions that did not take the form of tariffs, such as quotas, have been converted to tariffs — a process known as "tariffication". This has made markets substantially more predictable for agriculture. Previously more than 30% of agricultural produce had faced quotas or import restrictions. The first step in "tariffication" was to replace these restrictions with tariffs that represented about the same level of protection. Then, over six years from 1995-2000, these tariffs were gradually reduced (the reduction period for developing countries ends in 2005). The market access commitments on agriculture also eliminate previous import bans on certain products.

In addition, the lists include countries' commitments to reduce domestic support and export subsidies for agricultural products. (S*ee section on agriculture*.)

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The Harmonized System (HS)

Excerpt From the ***World Customs Organization*** *(WCO) Website*
http://www.wcoomd.org/ie/en/topics_issues/harmonizedsystem/hsconve2.html

The Harmonized Commodity Description and Coding System, generally referred to as "Harmonized System" or simply "HS", is a multipurpose international product nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups, each identified by a six digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 190 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98 % of the merchandise in international trade is classified in terms of the HS.

The HS contributes to the harmonization of Customs and trade procedures, and the non-documentary trade data interchange in connection with such procedures, thus reducing the costs related to international trade. It is also extensively used by governments, international organizations and the private sector for many other purposes such as internal taxes, trade policies, monitoring of controlled goods, rules of origin, freight tariffs, transport statistics, price monitoring, quota controls, compilation of national accounts, and economic research and analysis. The HS is thus a universal economic language and code for goods, and an indispensable tool for international trade.

The Harmonized System is governed by "The International Convention on the Harmonized Commodity Description and Coding System". The official interpretation of the HS is given in the Explanatory Notes (4 volumes in English and French) published by the WCO. The Explanatory Notes are also available on CD-ROM, as part of a commodity

database giving the HS classification of more than 200,000 commodities actually traded internationally.

The maintenance of the HS is a WCO priority. This activity includes measures to secure uniform interpretation of the HS and its periodic updating in light of developments in technology and changes in trade patterns. The WCO manages this process through the Harmonized System Committee (representing the Contracting Parties to the HS Convention), which examines policy matters, takes decisions on classification questions, settles disputes and prepares amendments to the Explanatory Notes. The HS Committee also prepares amendments updating the HS every 4 – 6 years.

Decisions concerning the interpretation and application of the Harmonized System, such as classification decisions and amendments to the Explanatory Notes or to the Compendium of Classification Opinions, become effective two months after the approval by the HS Committee. These are reflected in the amending supplements of the relevant WCO publications and can also be found on this web site.

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Technical Information on Customs Valuation

Excerpt from the WTO Website,
http://www.wto.org/english/tratop_e/cusval_e/cusval_info_e.htm

Specific and ad valorem customs duties

Customs duties can be designated in either specific or ad valorem terms or as a mix of the two. In case of a specific duty, a concrete sum is charged for a quantitative description of the good, for example USD 1 per item or per unit. The customs value of the good does not need to be determined, as the duty is not based on the value of the good but on other criteria. In this case, no rules on customs valuation are needed and the Valuation Agreement does not apply. In contrast, an ad valorem duty depends on the value of a good. Under this system, the customs valuation is multiplied by an ad valorem rate of duty (e.g. 5 per cent) in order to arrive at the amount of duty payable on an imported item.

Definition

Customs valuation is a customs procedure applied to determine the customs value of imported goods. If the rate of duty is ad valorem, the customs value is essential to determine the duty to be paid on an imported good.

Short historical overview Article VII GATT

Article VII of the General Agreement on Tariffs and Trade laid down the general principles for an international system of valuation. It stipulated that the value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values. Although Article VII also contains a definition of "actual value", it still permitted the use of widely differing methods of valuing goods. In addition, 'grandfather clauses' permitted continuation of old standards which did not even meet the very general new standard.

(...)

The Tokyo Round Valuation Code, or the Agreement on Implementation of Article VII of the GATT, concluded in 1979, established a positive system of Customs Valuation based on the price actually paid or payable for the imported goods. Based on the "transaction value", it was intended to provide a fair, uniform and neutral system for the valuation of goods for customs purposes, conforming to commercial realities. (…)

The new Agreement

The Tokyo Round Code was replaced by the WTO Agreement on Implementation of Article VII of the GATT 1994 following conclusion of the Uruguay Round. This Agreement is essentially the same as the Tokyo Round Valuation Code and applies only to the valuation of imported goods for the purpose of levying ad valorem duties on such goods. It does not contain obligations concerning valuation for purposes of determining export duties or quota administration based on the value of goods, nor does it lay down conditions for the valuation of goods for internal taxation or foreign exchange control.

Basic principle: Transaction value

The Agreement stipulates that customs valuation shall, except in specified circumstances, be based on the actual price of the goods to be valued, which is generally shown on the invoice. This price, plus adjustments for certain elements listed in Article 8, equals the transaction value, which constitutes the first and most important method of valuation referred to in the Agreement.

The 6 Methods

For cases in which there is no transaction value, or where the transaction value is not acceptable as the customs value because the price has been distorted as a result of certain conditions, the Agreement lays down five other methods of customs valuation, to be applied in the prescribed hierarchical order. Overall the following six methods are considered in the Agreement:

* * *

1-2. Treaty Text and Relevant Provisions

Read carefully the following primary sources, excerpted below.

- Article II GATT 1994
- Interpretative note *Ad* Article II (GATT Annex I)
- Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994
- Article VII GATT 1994
- Interpretative note *Ad* Article VII (GATT Annex I)
- Introduction and Articles 1-8, 18-19 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

General Agreement on Tariffs and Trade 1994

Article II

Schedules of Concessions

1. (*a*) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(*b*) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(*c*) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III* in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*

(c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (*a*) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; Provided that the CONTRACTING PARTIES (i.e., the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(*b*) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

* * *

Interpretative Note *Ad* Article II from Annex I

Paragraph 2 (a)

The cross-reference, in paragraph 2 (a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.

Paragraph 2 (b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.

* * *

Understanding on the Interpretation of Articles II:1(b) of the General Agreement on Tariffs and Trade 1994

Members hereby agree as follows:

1. In order to ensure transparency of the legal rights and obligations deriving from paragraph 1(b) of Article II, the nature and level of any "other duties or charges" levied on bound tariff items, as referred to in that provision, shall be recorded in the Schedules of concessions annexed to GATT 1994 against the tariff item to which they apply. It is understood that such recording does not change the legal character of "other duties or charges".

2. The date as of which "other duties or charges" are bound, for the purposes of Article II, shall be 15 April 1994. "Other duties or charges" shall therefore be recorded in the Schedules at the levels applying on this date. At each subsequent renegotiation of a concession or negotiation of a new concession the applicable date for the tariff item in question shall become the date of the incorporation of the new concession in the appropriate Schedule. However, the date of the instrument by which a concession on any particular tariff item was first

incorporated into GATT 1947 or GATT 1994 shall also continue to be recorded in column 6 of the Loose-Leaf Schedules.

3. "Other duties or charges" shall be recorded in respect of all tariff bindings.

4. Where a tariff item has previously been the subject of a concession, the level of "other duties or charges" recorded in the appropriate Schedule shall not be higher than the level obtaining at the time of the first incorporation of the concession in that Schedule. It will be open to any Member to challenge the existence of an "other duty or charge", on the ground that no such "other duty or charge" existed at the time of the original binding of the item in question, as well as the consistency of the recorded level of any "other duty or charge" with the previously bound level, for a period of three years after the date of entry into force of the WTO Agreement or three years after the date of deposit with the Director-General of the WTO of the instrument incorporating the Schedule in question into GATT 1994, if that is a later date.

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

6. For the purposes of this Understanding, the provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding shall apply.

7. "Other duties or charges" omitted from a Schedule at the time of deposit of the instrument incorporating the Schedule in question into GATT 1994 with, until the date of entry into force of the WTO Agreement, the Director-General to the CONTRACTING PARTIES to GATT 1947 or, thereafter, with the Director-General of the WTO, shall not subsequently be added to it and any "other duty or charge" recorded at a level lower than that prevailing on the applicable date shall not be restored to that level unless such additions or changes are made within six months of the date of deposit of the instrument.

8. The decision in paragraph 2 regarding the date applicable to each concession for the purposes of paragraph 1(b) of Article II of GATT 1994 supersedes the decision regarding the applicable date taken on 26 March 1980 (BISD 27S/24).

* * *

General Agreement on Tariffs and Trade 1994

Article VII

Valuation for Customs Purposes

1. The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges* or restrictions on importation and exportation based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article.

2. (*a*) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values.*

(*b*) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favourable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation.*

(*c*) When the actual value is not ascertainable in accordance with sub-paragraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value.*

3. The value for customs purposes of any imported product should not include the amount of any internal tax, applicable within the country of origin or export, from which the imported product has been exempted or has been or will be relieved by means of refund.

4. (*a*) Except as otherwise provided for in this paragraph, where it is necessary for the purposes of paragraph 2 of this Article for a contracting party to convert into its own currency a price expressed in the currency of another country, the conversion rate of exchange to be used shall be based, for each currency involved, on the par value as established pursuant to the Articles of Agreement of the International Monetary Fund or on the rate of exchange recognized by the Fund, or on the par value established in accordance with a special exchange agreement entered into pursuant to Article XV of this Agreement.

(*b*) Where no such established par value and no such recognized rate of exchange exist, the conversion rate shall reflect effectively the current value of such currency in commercial transactions.

(*c*) The CONTRACTING PARTIES, in agreement with the International Monetary Fund, shall formulate rules governing the conversion by contracting parties of any foreign currency in respect of which multiple rates of exchange are maintained consistently with the Articles of Agreement of the International Monetary Fund. Any contracting party may apply such rules in respect of such foreign currencies for the purposes of paragraph 2 of this Article as an alternative to the use of par values. Until such rules are adopted by the CONTRACTING PARTIES, any contracting party may employ, in respect of any such foreign currency, rules of conversion for the purposes of paragraph 2 of this Article which are designed to reflect effectively the value of such foreign currency in commercial transactions.

(*d*) Nothing in this paragraph shall be construed to require any contracting party to alter the method of converting currencies for customs purposes which is applicable in its territory on the date of this Agreement, if such alteration would have the effect of increasing generally the amounts of duty payable.

5. The bases and methods for determining the value of products subject to duties or other charges or restrictions based upon or regulated in any manner by value should be stable and should be given sufficient publicity to enable traders to estimate, with a reasonable degree of certainty, the value for customs purposes.

* * *

Interpretative Note *Ad* Article VII from Annex I

Paragraph 1

The expression "or other charges" is not to be regarded as including internal taxes or equivalent charges imposed on or in connexion with imported products.

Paragraph 2

1. It would be in conformity with Article VII to presume that "actual value" may be represented by the invoice price, plus any non-included charges for legitimate costs which are proper elements of "actual value" and plus any abnormal discount or other reduction from the ordinary competitive price.

2. It would be in conformity with Article VII, paragraph 2 (b), for a contracting party to construe the phrase "in the ordinary course of trade … under fully

competitive conditions", as excluding any transaction wherein the buyer and seller are not independent of each other and price is not the sole consideration.

3. The standard of "fully competitive conditions" permits a contracting party to exclude from consideration prices involving special discounts limited to exclusive agents.

4. The wording of sub-paragraphs (a) and (b) permits a contracting party to determine the value for customs purposes uniformly either (1) on the basis of a particular exporter's prices of the imported merchandise, or (2) on the basis of the general price level of like merchandise.

* * *

Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994

GENERAL INTRODUCTORY COMMENT

1. The primary basis for customs value under this Agreement is "transaction value" as defined in Article 1. Article 1 is to be read together with Article 8 which provides, inter alia, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money. Articles 2 through 7 provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1.

2. Where the customs value cannot be determined under the provisions of Article 1 there should normally be a process of consultation between the customs administration and importer with a view to arriving at a basis of value under the provisions of Article 2 or 3. It may occur, for example, that the importer has information about the customs value of identical or similar imported goods which is not immediately available to the customs administration in the port of importation. On the other hand, the customs administration may have information about the customs value of identical or similar imported goods which is not readily available to the importer. A process of consultation between the two parties will enable information to be exchanged, subject to the requirements of commercial confidentiality, with a view to determining a proper basis of value for customs purposes.

3. Articles 5 and 6 provide two bases for determining the customs value where it cannot be determined on the basis of the transaction value of the imported goods or of identical or similar imported goods. Under paragraph 1 of Article 5 the customs value is determined on the basis of the price at which the goods are sold in the condition as imported to an unrelated buyer in the country of importation. The importer also has the right to have goods which are further processed after importation valued under the provisions of Article 5 if the importer so requests. Under Article 6 the customs value is determined on the basis of the computed value. Both these methods present certain difficulties and because of this the importer is given the right, under the provisions of Article 4, to choose the order of application of the two methods.

4. Article 7 sets out how to determine the customs value in cases where it cannot be determined under the provisions of any of the preceding Articles.

Members,

Having regard to the Multilateral Trade Negotiations;

Desiring to further the objectives of GATT 1994 and to secure additional benefits for the international trade of developing countries;

Recognizing the importance of the provisions of Article VII of GATT 1994 and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Recognizing the need for a fair, uniform and neutral system for the valuation of goods for
customs purposes that precludes the use of arbitrary or fictitious customs values;

Recognizing that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued;

Recognizing that customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply;

Recognizing that valuation procedures should not be used to combat dumping;

Hereby *agree* as follows:

PART I: RULES ON CUSTOMS VALUATION

Article I

1. The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided:

(a) that there that there are no restrictions as to the disposition or use of the goods by the buyer other than restrictions which:

(i) are imposed or required by law or by the public authorities in the country of importation;

(ii) limit the geographical area in which the goods may be resold; or

(iii) do not substantially affect the value of the goods;

(b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;

(c) that no part of the proceeds of any subsequent resale, disposal or use of the goods by the buyer will accrue directly or indirectly to the seller, unless an appropriate adjustment can be made in accordance with the provisions of Article 8; and

(d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related within the meaning of Article 15 shall not in itself be grounds for regarding the transaction value as unacceptable. In such case the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the importer or otherwise, the customs administration has grounds for considering that the relationship influenced the price, it shall communicate its grounds to the importer and the importer shall be given a reasonable opportunity to respond. If the importer so requests, the communication of the grounds shall be in writing.

(b) In a sale between related persons, the transaction value shall be accepted and the goods valued in accordance with the provisions of paragraph 1 whenever the importer demonstrates that such value closely approximates to one of the following occurring at or about the same time:

(i) the transaction value in sales to unrelated buyers of identical or similar goods for export to the same country of importation;

(ii) the customs value of identical or similar goods as determined under the provisions of Article 5;

(iii) the customs value of identical or similar goods as determined under the provisions of Article 6;

In applying the foregoing tests, due account shall be taken of demonstrated differences in commercial levels, quantity levels, the elements enumerated in Article 8 and costs incurred by the seller in sales in which the seller and the buyer are not related that are not incurred by the seller in sales in which the seller and the buyer are related.

(c) The tests set forth in paragraph 2(b) are to be used at the initiative of the importer and only for comparison purposes. Substitute values may not be established under the provisions of paragraph 2(b).

Article 2

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Article 1, the customs value shall be the transaction value of identical goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of identical goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of identical goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the identical goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of identical goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

Article 3

1. (a) If the customs value of the imported goods cannot be determined under the provisions of Articles 1 and 2, the customs value shall be the transaction value of similar goods sold for export to the same country of importation and exported at or about the same time as the goods being valued.

(b) In applying this Article, the transaction value of similar goods in a sale at the same commercial level and in substantially the same quantity as the goods being valued shall be used to determine the customs value. Where no such sale is found, the transaction value of similar goods sold at a different commercial level and/or in different quantities, adjusted to take account of differences attributable to commercial level and/or to quantity, shall be used, provided that such adjustments can be made on the basis of demonstrated evidence which clearly establishes the reasonableness and accuracy of the adjustment, whether the adjustment leads to an increase or a decrease in the value.

2. Where the costs and charges referred to in paragraph 2 of Article 8 are included in the transaction value, an adjustment shall be made to take account of significant differences in such costs and charges between the imported goods and the similar goods in question arising from differences in distances and modes of transport.

3. If, in applying this Article, more than one transaction value of similar goods is found, the lowest such value shall be used to determine the customs value of the imported goods.

Article 4

If the customs value of the imported goods cannot be determined under the provisions of Articles 1, 2 and 3, the customs value shall be determined under the provisions of Article 5 or, when the customs value cannot be determined under that Article, under the

provisions of Article 6 except that, at the request of the importer, the order of application of Articles 5 and 6 shall be reversed.

Article 5

1. (a) If the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported, the customs value of the imported goods under the provisions of this Article shall be based on the unit price at which the imported goods or identical or similar imported goods are so sold in the greatest aggregate quantity, at or about the time of the importation of the goods being valued, to persons who are not related to the persons from whom they buy such goods, subject to deductions for the following:

(i) either the commissions usually paid or agreed to be paid or the additions usually made for profit and general expenses in connection with sales in such country of imported goods of the same class or kind;

(ii) the usual costs of transport and insurance and associated costs incurred within the country of importation;

(iii) where appropriate, the costs and charges referred to in paragraph 2 of Article 8; and

(iv) the customs duties and other national taxes payable in the country of importation by reason of the importation or sale of the goods.

(b) If neither the imported goods nor identical nor similar imported goods are sold at or about the time of importation of the goods being valued, the customs value shall, subject otherwise to the provisions of paragraph 1(a), be based on the unit price at which the imported goods or identical or similar imported goods are sold in the country of importation in the condition as imported at the earliest date after the importation of the goods being valued but before the expiration of 90 days after such importation.

2. If neither the imported goods nor identical nor similar imported goods are sold in the country of importation in the condition as imported, then, if the importer so requests, the customs value shall be based on the unit price at which the imported goods, after further processing, are sold in the greatest aggregate quantity to persons in the country of importation who are not related to the persons from whom they buy such goods, due allowance being made for the value added by such processing and the deductions provided for in paragraph 1(a).

Article 6

1. The customs value of imported goods under the provisions of this Article shall be based on a computed value. Computed value shall consist of the sum of:

(a) the cost or value of materials and fabrication or other processing employed in producing the imported goods;

(b) an amount for profit and general expenses equal to that usually reflected in sales of goods of the same class or kind as the goods being valued which are made by producers in the country of exportation for export to the country of importation;

(c) the cost or value of all other expenses necessary to reflect the valuation option chosen by the Member under paragraph 2 of Article 8.

2. No Member may require or compel any person not resident in its own territory to produce for examination, or to allow access to, any account or other record for the purposes of determining a computed value. However, information supplied by the producer of the goods for the purposes of determining the customs value under the provisions of this Article may be verified in another country by the authorities of the country of importation with the agreement of the producer and provided they give sufficient advance notice to the government of the country in question and the latter does not object to the investigation.

Article 7

1. If the customs value of the imported goods cannot be determined under the provisions of Articles 1 through 6, inclusive, the customs value shall be determined using reasonable means consistent with the principles and general provisions of this Agreement and of Article VII of GATT 1994 and on the basis of data available in the country of importation.

2. No customs value shall be determined under the provisions of this Article on the basis of:

(a) the selling price in the country of importation of goods produced in such country;

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

(c) the price of goods on the domestic market of the country of exportation;

(d) the cost of production other than computed values which have been determined for identical or similar goods in accordance with the provisions of Article 6;

(e) the price of the goods for export to a country other than the country of importation;

(f) minimum customs values; or

(g) arbitrary or fictitious values.

3. If the importer so requests, the importer shall be informed in writing of the customs value determined under the provisions of this Article and the method used to determine such value.

Article 8

1. In determining the customs value under the provisions of Article 1, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions;

(ii) the cost of containers which are treated as being one for customs purposes with the goods in question;

(iii) the cost of packing whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:

(i) materials, components, parts and similar items incorporated in the imported goods;

(ii) tools, dies, moulds and similar items used in the production of the imported goods;

(iii) materials consumed in the production of the imported goods;

(iv) engineering, development, artwork, design work, plans and sketches, undertaken elsewhere than in the country of importation and necessary for the production of the imported goods;

(c) royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalties and fees are not included in the price actually paid or payable;

(d) the value of any part of the proceeds of any subsequent resale, disposal or use of the imported goods that accrues directly or indirectly to the seller.

2. In framing its legislation, each Member shall provide for the inclusion in or the exclusion from the customs value, in whole or in part, of the following:

(a) the cost of transport of the imported goods to the port or place of importation;

(b) loading, unloading and handling charges associated with the transport of the imported goods to the port or place of importation; and

(c) the cost of insurance.

3. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

4. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article.

PART II: ADMINISTRATION, CONSULTATIONS AND DISPUTE SETTLEMENT

Article 18

Institutions

1. There is hereby established a Committee on Customs Valuation (referred to in this Agreement as "the Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall normally meet once a year, or as is

otherwise envisaged by the relevant provisions of this Agreement, for the purpose of affording Members the opportunity to consult on matters relating to the administration of the customs valuation system by any Member as it might affect the operation of this Agreement or the furtherance of its objectives and carrying out such other responsibilities as may be assigned to it by the Members. The WTO Secretariat shall act as the secretariat to the Committee.

2. There shall be established a Technical Committee on Customs Valuation (referred to in this Agreement as "the Technical Committee") under the auspices of the Customs Co-operation Council (referred to in this Agreement as "the CCC"), which shall carry out the responsibilities described in Annex II to this Agreement and shall operate in accordance with the rules of procedure contained therein.

Article 19

Consultations and Dispute Settlement

1. Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

2. If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective of this Agreement is being impeded, as a result of the actions of another Member or of other Members, it may, with a view to reaching a mutually satisfactory solution of this matter, request consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultations.

3. The Technical Committee shall provide, upon request, advice and assistance to Members engaged in consultations.

4. At the request of a party to the dispute, or on its own initiative, a panel established to examine a dispute relating to the provisions of this Agreement may request the Technical Committee to carry out an examination of any questions requiring technical consideration. The panel shall determine the terms of reference of the Technical Committee for the particular dispute and set a time period for receipt of the report of the Technical Committee. The panel shall take into consideration the report of the Technical Committee. In the event that the Technical Committee is unable to reach consensus on a matter referred to it pursuant to this paragraph, the panel should afford the parties to the dispute an opportunity to present their views on the matter to the panel.

5. Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information.

Where such information is requested from the panel but release of such information by the panel is not authorized, a nonconfidential summary of this information, authorized by the person, body or authority providing the information, shall be provided.

2. Examples from United States Harmonized System (H.S.) Schedule

2-1. U.S. H.S. Schedule, General Rules of Interpretation (2009) (Rev. 1)

Harmonized Tariff Schedule of the United States (2009) (Rev. 1)
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GENERAL RULES OF INTERPRETATION

(…)

(b) Rate of Duty Column 2. Notwithstanding any of the foregoing provisions of this note, the rates of duty shown in column 2 shall apply to products, whether imported directly or indirectly, of the following countries (…):

Cuba North Korea

(c) Products Eligible for Special Tariff Treatment.
(i) Programs under which special tariff treatment may be provided, and the corresponding symbols for such programs as they are indicated in the "Special" subcolumn, are as follows:

Generalized System of Preferences ..... A, A* or A+
United States-Australia Free Trade Agreement ..... AU
Automotive Products Trade Act..... B
United States-Bahrain Free Trade Agreement Implementation Act ..... BH
Agreement on Trade in Civil Aircraft C
North American Free Trade Agreement:
Goods of Canada, under the terms of general note 12 to this schedule .....CA
Goods of Mexico, under the terms of general note 12 to this schedule .....MX
United States-Chile Free Trade Agreement CL
African Growth and Opportunity Act ..... D
Caribbean Basin Economic Recovery Act ..... E or E*
United States-Israel Free Trade Area IL
Andean Trade Preference Act or Andean Trade Promotion and Drug Eradication Act.....J, J* or J+
United States-Jordan Free Trade Area Implementation Act .....JO
Agreement on Trade in Pharmaceutical Products ..... K
Dominican Republic-Central America-United States Free Trade Agreement Implementation Act..... P or P+
Uruguay Round Concessions on Intermediate Chemicals for Dyes L
United States-Caribbean Basin Trade Partnership Act ..... R
United States-Morocco Free Trade Agreement Implementation Act.....MA

Harmonized Tariff Schedule of the United States (2008)

Annotated for Statistical Reporting Purposes

CHAPTER 22 BEVERAGES, SPIRITS AND VINEGAR

IV
22-1

Notes

1. This chapter does not cover:

(a) Products of this chapter (other than those of heading 2209) prepared for culinary purposes and thereby rendered unsuitable for consumption as beverages (generally heading 2103)

(b) Sea water (heading 2501);

(c) Distilled or conductivity water or water of similar purity (heading 2853);

(d) Acetic acid of a concentration exceeding 10 percent by weight of acetic acid (heading 2915);

(e) Medicaments of heading 3003 or 3004; or

(f) Perfumery or toilet preparations (chapter 33).

2. For the purposes of this chapter and of chapters 20 and 2l, the "alcoholic strength by volume" shall be determined at a temperature of 20°C.

3. For the purposes of heading 2202 the term "nonalcoholic beverages" means beverages of an alcoholic strength by volume not exceeding 0.5 percent vol. Alcoholic beverages are classified in headings 2203 to 2206 or heading 2208 as appropriate.

Subheading Note

1. For the purposes of subheading 2204.10 the expression "sparkling wine" means wine which, when kept at a temperature of 20°C in closed containers, has an excess pressure of not less than 3 bars.

Additional U.S. Notes

1. The duties prescribed on products covered by this chapter are in addition to the internal-revenue taxes imposed under existing law or any subsequent act. The duties imposed on products covered by this chapter which are subject also to internal-revenue taxes are imposed only on the quantities subject to such taxes; except that, in the case of distilled spirits transferred to the bonded premises of a distilled spirits plant under the provisions of section 5232 of the Internal Revenue Code of 1954, the duties are imposed on the quantity withdrawn from customs custody.

2. Subheadings 2202.90.30, 2202.90.35, 2202.90.36 and 2202.90.37 cover vitamin or mineral fortified fruit or vegetable juices that are imported only in non-concentrated form. Such juices imported in concentrated form are classifiable in subheadings 2106.90.48, 2106.90.52 or 2106.90.54, as appropriate.

3. Dutiable quantities of alcoholic juices (including grape must) classified in heading 2204, 2206 or 2208 shall be calculated in accordance with additional U.S. notes 1, 2 and 3 in chapter 20.

4. The term "effervescent wine" means wine other than sparkling wine which contains in excess of 0.392 grams of carbon dioxide per 100 milliliters of wine.

5. Where in heading 2204, 2206, 2207 or 2208, the rates shown in the rates of duty columns are in terms of a proof liter, proof liter shall mean a liter of liquid at 15.56°C (60°F) which contains 50 percent (100 proof) by volume of ethyl alcohol having a specific gravity of 0.7939 at 15.56°C (60°F) referred to water at 15.56°C (60°F) as unity or the alcoholic equivalent thereof.

6. Where in heading 2204, 2206, 2207 or 2208, the rates of duty are assessed on a proof liter basis, the rates shown indicate the amount of duty which shall be collected on each liter of an imported product at 100 proof. The amount of duty which shall be collected for each liter of a product which is imported at more than or less than 100 proof shall bear the same ratio to the applicable rate of duty as the proof of the imported product bears to 100 proof.

7. The standard for determining the proof of brandy and other spirits or liquors of any kind when imported is the same as that which is defined in the laws relating to internal revenue. The Secretary of the Treasury, at his discretion, may authorize the ascertainment of the proof of wines, cordials or other liquors and fruit juices by distillation or otherwise, when it is impracticable to ascertain such proof by the means prescribed by existing law or regulations.

8. Provisions for the free entry of certain samples of alcoholic beverages are covered by subheading 9811.00.20 of chapter 98.

9. For the purposes of heading 2209, the standard proof of vinegar is 4 percent by weight of acetic acid.

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2201		Waters, including natural or artificial mineral waters and aerated waters, not containing added sugar or other sweetening matter nor flavored; ice and snow:				
2201.10.00	00	Mineral waters and aerated waters	liters	0.26¢/liter	Free (A,AU,BH,CA, CL,E,IL,J,JO,MA, MX,P,SG)	2.6¢/liter
2201.90.00	00	Other	t	Free		Free
2202		Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009:				
2202.10.00		Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored		0.2¢/liter	Free (A,AU,BH,CA, CL,E,IL,J,JO,MA, MX,P,SG)	4¢/liter
		Carbonated soft drinks:				
	20	Containing high-intensity sweeteners (e.g., aspartame and/or saccharin)	liters			
	40	Other	liters			
	60	Other	liters			
2202.90		Other:				
		Milk-based drinks:				
2202.90.10	00	Chocolate milk drink	liters	17%	Free (A+,CA,D,E, IL,J,JO,MX,P,CL) 6.3% (SG) 11.9% (MA) 11.9% (BH) 13.1% (AU)	20%
		Other:				
2202.90.22	00	Described in general note 15 of the tariff schedule and entered pursuant to its provisions	liters kg	17.5%	Free (A+,AU,BH, CA,CL,D,E,IL,J, JO,MA,MX,P,SG)	35%
2202.90.24	00	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions	liters kg	17.5%	Free (A+,AU,BH, CA,CL,D, E,IL,J, JO,MA,P,SG)	35%
2202.90.28	00	Other 1/	liters kg	23.5¢/liter + 14.9%	Free (MX) 23.5¢/liter + 14.9% (P) See 9909.04.05, 9909.04.54 (JO) See 9910.04.50, 9910.04.74 (SG) See 9911.04.30, 9911.04.52 (CL) See 9912.04.30, 9912.04.54 (MA) See 9913.04.25 (AU) See 9914.04.30, 9914.04.54 (BH) See 9915.04.30, 9915.04.54, 9915.04.78 (P+)	27.6¢/liter + 17.5%

1/ See subheadings 9904.04.50-9904.05.01

Heading/ Subheading	Stat. Suf- fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2202 (con.)		Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009 (con.):				
2202.90 (con.)		Other: (con.)				
		Fruit or vegetable juices, fortified with vitamins or minerals:				
		Orange juice:				
2202.90.30	00	Not made from a juice having a degree of concentration of 1.5 or more (as determined before correction to the nearest 0.5 degree)	liters	4.5¢/liter	Free (A+,AU,BH, CA,D,E,IL,J, JO,P,SG) 0.353¢/liter (MX) 2.6¢/liter (CL) 3.6¢/liter (MA)	18¢/liter
2202.90.35	00	Other	liters	7.85¢/liter	Free (A+,CA,D,E, IL,J,JO,P,SG) 0.6¢/liter (MX) 4.5¢/liter (CL) 5.4¢/liter (BH) 6¢/liter (AU) 6.2¢/liter (MA)	18¢/liter

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2202 (con.)		Waters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009 (con.):				
2202.90 (con.)		Other (con.):				
		Fruit or vegetable juices, fortified with vitamins or minerals (con.):				
		Other:				
2202.90.36	00	Juice of any single fruit or vegetable	liters	The rate applicable to the natural juice in heading 2009	Free (BH,CA, CL,E,IL,J,JO, MA,MX,P,SG) The rate applicable to the natural juice in heading 2009 (A*,AU)	The rate applicable to the natural juice in heading 2009
2202.90.37	00	Mixtures of juices	liters	The rate applicable to the natural juice in heading 2009	Free (BH,CA,CL,E, IL,J,JO,MA,MX,P, SG) The rate applicable to the natural juice in heading 2009 (A,AU)	The rate applicable to the natural juice in heading 2009
2202.90.90		Other	0.2¢/liter		Free (A,AU,BH,CA, CL,E,IL,J,JO,MA, MX,P,SG)	4¢/liter
	10	Nonalcoholic beer	liters			
	90	Other	liters			
2203.00.00		Beer made from malt	Free 1/			13.2¢/liter 1/
		In containers each holding not over 4 liters:				
	30	In glass containers	liters			
	60	Other	liters			
	90	In containers each holding over 4 liters	liters			

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5051).

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2204		Wine of fresh grapes, including fortified wines; grape must other than that of heading 2009:				
2204.10.00		Sparkling wine		19.8¢/liter 1/	Free (A,BH,CA, CL,E,IL,J,MA,MX, P,SG) 1/ 11.8¢/liter (JO) 1/ 19.8¢/liter (AU) 1/	$1.59/liter 1/
	30	Valued not over $1.59/liter liters				
	60	Valued over $1.59/liter	liters			
		Other wine; grape must with fermentation prevented or arrested by the addition of alcohol:				
2204.21		In containers holding 2 liters or less:				
2204.21.20	00	Effervescent wine	liters	19.8¢/liter 1/	Free (A+,BH, CA,D,E,IL,J, MX,P,SG)1/ 11.8¢/liter (JO) 1/ 19.8¢/liter (AU,CL, MA) 1/	$1.59/liter 1/
		Other:				
		Of an alcoholic strength by volume not over 14 percent vol.:				
2204.21.30	00	If entitled under regulations of the United States Internal Revenue Service to a type designation which includes the name "Tokay" and if so designated on the approved label	liters	6.3¢/liter 1/	Free (A,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 3.7¢/liter (JO) 1/ 6.3¢/liter (AU) 1/	33¢/liter 1/
2204.21.50		Other		6.3¢/liter 1/	Free (A+,BH,, CA,D,E,IL,J, MX,P,SG) 1/ 3.7¢/liter (JO) 1/ 6.3¢/liter (AU,CL, MA) 1/	33¢/liter 1/
		Valued not over $1.05/liter:				
	05	Red	liters			
	15	White	liters			
	25	Other	liters			
		Valued over $1.05/liter:				
	28	Icewine	liters			
		Other:				
	30	Red	liters			
	46	White	liters			
	60	Other	liters			
		Of an alcoholic strength by volume over 14 percent vol.:				
2204.21.60	00	If entitled under regulations of the United States Internal Revenue Service to a type designation which includes the name "Marsala" and if so designated on the approved label	liters	5.3¢/liter 1/	Free (A,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 3.1¢/liter (JO) 1/ 5.3¢/liter (AU) 1/	33¢/liter 1/
2204.21.80		Other		16.9¢/liter 1/	Free (A,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 10¢/liter (JO) 1/ 16.9¢/liter (AU) 1/	33¢/liter 1/
	30	Sherry	liters			
	60	Other	liters			

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5041).

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2204 (con.)		Wine of fresh grapes, including fortified wines; grape must other than that of heading 2009 (con.):				
		Other wine; grape must with fermentation prevented or arrested by the addition of alcohol (con.):				
2204.29		Other:				
		In containers holding over 2 liters but not over 4 liters:				
2204.29.20		Of an alcoholic strength by volume not over 14 percent vol		8.4¢/liter 1/	Free (A+,BH, CA,D,E,IL,J, MX,P,SG) 1/ 5¢/liter (JO) 1/ 8.4¢/liter (AU,CL, MA) 1/	33¢/liter 1/
		Valued not over $1.05/liter:				
	05	Red	liters			
	15	White	liters			
	25	Other	liters			
		Valued over $1.05/liter:				
	30	Red	liters			
	45	White	liters			
	60	Other	liters			
2204.29.40	00	Of an alcoholic strength by volume over 14 percent vol	liters	22.4¢/liter 1/	Free (A+,BH, CA,D,E,IL,J, MX,P,SG) 1/ 13.3¢/liter (JO) 1/ 22.4¢/liter (AU,CL, MA) 1/	33¢/liter 1/
		In containers holding over 4 liters:				
2204.29.60	00	Of an alcoholic strength by volume not over 14 percent vol.	liters	14¢/liter 1/	Free (A+,CA,D,E, IL,J,MX,P) 1/ 5.2¢/liter (SG) 1/ 5.6¢/liter (BH) 1/ 8.3¢/liter (JO) 1/ 8.3¢/liter (CL) 1/ 8.3¢/liter (AU) 1/ 9.4¢/liter (MA) 1/	33¢/liter 1/
2204.29.80	00	Of an alcoholic strength by volume over 14 percent vol	liters	22.4¢/liter 1/	Free (A+,BH, CA,D,E,IL,J, MX,P,SG) 1/ 13.2¢/liter (AU) 1/ 13.3¢/liter (JO) 1/ 13.5¢/liter (CL) 1/ 15¢/liter (MA) 1/	33¢/liter 1/
2204.30.00	00	Other grape must	liters pf.liters	4.4¢/liter + 31.4¢/pf. liter 1/	Free (A+,BH, CA,D,E,IL,J, MX,P,SG) 1/ 2.6¢/liter + 18.7¢/pf. liter (JO) 1/ 4.4¢/liter + 31.4¢/pf. liter (AU,CL,MA) 1/	18.5¢/liter + $1.32/pf. liter 1/

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5041).

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2205		Vermouth and other wine of fresh grapes flavored with plants or aromatic substances:				
2205.10		In containers holding 2 liters or less:				
2205.10.30	00	Vermouth	liters	3.5¢/liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 2¢/liter (JO) 1/	33¢/ liter 1/
2205.10.60	00	Other	liters	4.2¢/liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 2.5¢/liter (JO) 1/	33¢/ liter 1/
2205.90		Other:				
		Vermouth:				
2205.90.20	00	In containers each holding over 2 liters but not over 4 liters	liters	3.5¢/liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 2¢/liter (JO) 1/	33¢/liter 1/
2205.90.40	00	In containers each holding over 4 liters	liters	3.8¢/liter 1/	Free (A+,AU,BH, CA,CL,D,E,IL, J,MA,MX, P,SG) 1/ 2.2¢/liter (JO) 1/	33¢/liter 1/
2205.90.60	00	Other	liters	4.2¢/liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 2.5¢/liter (JO) 1/	33¢/liter 1/

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5041).

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2206.00		Other fermented beverages (for example, cider, perry, mead); mixtures of fermented beverages and mixtures of fermented beverages and non-alcoholic beverages, not elsewhere specified or included:				
2206.00.15	00	Cider, whether still or sparkling	liters	0.4¢/liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 0.2¢/liter (JO) 1/	1.3¢/liter 1/
2206.00.30	00	Prune wine	liters pf.liters	3.1¢/liter + 22.1¢/pf. liter on ethyl alcohol content 1/	Free (A+,AU,BH, CA,CL,D,E,IL, J,MA,MX,P,SG) 1/ 1.8¢/liter + 13.2¢/pf. liter on ethyl alcohol content (JO) 1/	18.5¢/ liter + $1.32/pf. liter on ethyl alcohol content 1/
2206.00.45	00	Rice wine or sake	liters	3¢/liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 1.7¢/liter (JO) 1/	33¢/liter 1/
		Other:				
2206.00.60	00	Effervescent wine	liters	13.9¢/liter 1/	Free (A+,CA,CL,D, E,IL,J,MX,P, SG) 1/ 5.5¢/liter (MA) 1/ 5.5¢/liter (BH) 1/ 8.3¢/liter (JO) 1/ 8.3¢/liter (AU) 1/	$1.59/liter 1/
2206.00.90	00	Other	liters	4.2¢/liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 2.5¢/liter (JO) 1/	33¢/liter 1/
2207		Undenatured ethyl alcohol of an alcoholic strength by volume of 80 percent vol. or higher; ethyl alcohol and other spirits, denatured, of any strength:				
2207.10		Undenatured ethyl alcohol of an alcoholic strength by volume of 80 percent vol. or higher:				
2207.10.30	00	For beverage purposes	pf.liters	18.9¢/pf.liter 1/	Free (A,CA,CL,E, IL,J,MA,MX,P) 1/ 3.7¢/pf. liter (JO) 1/ 9.4¢/pf. liter (SG) 1/ 13.2¢/pf. liter (BH) 14.6¢/pf. liter (AU) 1/	$1.32/pf. liter 1/
2207.10.60	00	For nonbeverage purposes	liters	2.5% 1/ 2/	Free (A+,AU,BH, CA,D,E,IL,J,JO, MA,MX,P,SG,CL) 1/ 2/	20% 1/ 2/
2207.20.00	00	Ethyl alcohol and other spirits, denatured, of any strength	liters	1.9% 1/ 2/	Free (A+,AU,BH, CA,CL,D,E,IL,J, JO,MA,MX,P, SG) 1/ 2/	20% 1/ 2/

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5001, 26 U.S.C. 5041 or 26 U.S.C. 5051).
2/ For ethyl alcohol, see subheading 9901.00.50.

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2208		Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages:				
2208.20		Spirits obtained by distilling grape wine or grape marc (grape brandy):				
2208.20.10	00	Pisco and singani	pf.liters	Free 1/		$1.78/pf. liter 1/
		Other:				
		In containers each holding not over 4 liters:				
2208.20.20	00	Valued not over $2.38/liter	pf.liters	Free 1/		$2.35/pf. liter 1/
2208.20.30	00	Valued over $2.38 but not over $3.43/liter	pf.liters	Free 1/		$2.35/pf. liter 1/
2208.20.40	00	Valued over $3.43/liter	pf.liters	Free 1/		$2.35/pf. liter 1/
		In containers each holding over 4 liters:				
2208.20.50	00	Valued not over $2.38/liter	pf.liters	Free 1/		$1.32/pf. liter 1/
2208.20.60	00	Valued over $2.38/liter	pf.liters	Free 1/		$1.32/pf. liter 1/
2208.30		Whiskies:				
2208.30.30		Irish and Scotch	.....	Free 1/		$1.99/pf. liter 1/
	30	In containers each holding not over 4 liters	pf.liters			
	60	In containers each holding over 4 liters	pf.liters			
2208.30.60		Other	.....	Free 1/		$2.04/pf. liter 1/
		Bourbon:				
	20	In containers each holding not over 4 liters	pf.liters			
	40	In containers each holding over 4 liters	pf.liters			
		Other:				
		In containers each holding not over 4 liters:				
	55	Rye	pf.liters			
	65	Other	pf.liters			
		In containers each holding over 4 liters:				
	75	Rye	pf.liters			
	85	Other	pf.liters			

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5001, 26 U.S.C. 5041 or 26 U.S.C. 5051).

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2208 (con.)		Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages (con.):				
2208.40		Rum and other spirits obtained by distilling fermented sugar-cane products:				
		In containers each holding not over 4 liters:				
2208.40.20	00	Valued not over $3 per proof liter	pf.liters	23.7¢/pf.liter 1/	Free (A+,CA,D,E, IL,MX,P) 1/ 8.8¢/pf. liter (SG) 1/ 9.4¢/pf. liter (BH) 1/ 13.8¢/pf. liter (CL) 1/ 14.1¢/pf. liter (JO) 1/ 18.3¢/pf. liter (AU) 1/ 18.9¢/pf. liter (MA) 1/	$1.32/pf. liter 1/
2208.40.40	00	Valued over $3 per proof liter	pf.liters	Free 1/		$1.32/pf. liter 1/
		In containers each holding over 4 liters:				
2208.40.60	00	Valued not over 69¢ per proof liter	pf.liters	23.7¢/pf.liter 1/	Free (A+,CA,D,E, IL,MX,P) 1/ 11.8¢/pf. liter (SG) 1/ 13.8¢/pf. liter (CL) 1/ 14.1¢/pf. liter (JO) 1/ 16.5¢/pf.liter (BH) 1/ 18.3¢/pf. liter (AU) 1/ 18.9¢/pf.liter (MA) 1/	$1.32/pf. liter 1/
2208.40.80	00	Valued over 69¢ per proof liter	pf.liters	Free 1/		$1.32/pf. liter 1/
2208.50.00		Gin and Geneve	. . . . .	Free 1/		$1.99/pf. liter 1/
	30	In containers each holding not over 4 liters	pf.liters			
	60	In containers each holding over 4 liters	pf.liters			
2208.60		Vodka:				
		In containers each holding not over 4 liters:				
2208.60.10	00	Valued not over $2.05/liter	pf.liters	Free 1/		$1.78/pf. liter 1/
2208.60.20	00	Valued over $2.05/liter	pf.liters	Free 1/		$1.78/pf. liter 1/
2208.60.50	00	In containers each holding over 4 liters	pf.liters	Free 1/		$1.32/pf. liter 1/

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5001).

Heading/ Subheading	Stat. Suf- fix	Article Description	Unit of Quantity	Rates of Duty 1 General	1 Special	2
2208 (con.)		Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages (con.):				
2208.70.00		Liqueurs and cordials		Free 1/		$3.08/pf. liter 1/
	30	In containers each holding not over 4 liters	pf.liters			
	60	In containers each holding over 4 liters	pf.liters			
2208.90		Other:				
2208.90.01	00	Aquavit	pf.liters	Free 1/		$1.99/pf. liter 1/
		Bitters:				
2208.90.05	00	Not fit for use as beverages	pf.liters	Free 1/		$1.32/pf. liter 1/
2208.90.10	00	Fit for use as beverages	pf.liters	Free 1/		$1.32/pf. liter 1/
		Brandy:				
		Slivovitz:				
		Valued not over $3.43/liter:				
2208.90.12	00	In containers each holding not over 4 liters	pf.liters	Free 1/		$2.35/pf. liter 1/
2208.90.14	00	In containers each holding over 4 liters	pf.liters	Free 1/		$1.32/pf. liter 1/
2208.90.15	00	Valued over $3.43/liter	pf.liters	Free 1/		$2.35/pf. liter 1/
		Other:				
		In containers each holding not over 4 liters:				
2208.90.20	00	Valued not over $2.38/liter	pf.liters	Free 1/		$2.35/pf. liter 1/
2208.90.25	00	Valued over $2.38 but not over $3.43/liter	pf.liters	Free 1/		$2.35/pf. liter 1/
2208.90.30	00	Valued over $3.43/liter	pf.liters	Free 1/		$2.35/pf. liter 1/
		In containers each holding over 4 liters:				
2208.90.35	00	Valued not over $2.38/liter	pf.liters	Free 1/		$1.32/pf. liter 1/
2208.90.40	00	Valued over $2.38/liter	pf.liters	Free 1/		$1.32/pf. liter 1/

1/ Imports under this subheading are subject to Federal Excise Tax (26 U.S.C. 5001).

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit of Quantity	Rates of Duty 1 General	Rates of Duty 1 Special	Rates of Duty 2
2208 (con.)		Undenatured ethyl alcohol of an alcoholic strength by volume of less than 80 percent vol.; spirits, liqueurs and other spirituous beverages (con.):				
2208.90 (con.)		Other (con.):				
2208.90.46		Kirschwasser and ratafia	.....	Free 1/		$3.08/pf. liter 1/
	30	In containers each holding not over 4 liters	pf.liters			
	60	In containers each holding over 4 liters	pf.liters			
		Tequila:				
2208.90.50	00	In containers each holding not over 4 liters	pf.liters	Free 1/		$1.68/pf. liter 1/
2208.90.55	00	In containers each holding over 4 liters	pf.liters	Free 1/		$1.32/pf. liter 1/
2208.90.71	00	Imitations of brandy and other spirituous beverages	pf.liters	Free 1/		$2.35/pf. liter 1/
		Other:				
		Spirits:				
2208.90.72	00	Mezcal in containers each holding not over 4 liters	pf.liters	Free 1/		$1.78/pf. liter 1/
2208.90.75	00	Other	pf.liters	Free 1/		$1.78/pf. liter 1/
2208.90.80	00	Other	pf.liters	21.1¢/pf.liter 1/	Free (A,AU,BH,CA, CL,E,IL,J,MA, MX,P,SG) 1/ 12.6¢/pf. liter (JO) 1/	$4.05/pf. liter 1/
2209.00.00	00	Vinegar and substitutes for vinegar obtained from acetic acid	pf.liters liters	0.5¢/pf.liter	Free (A,AU,BH,CA, CL,E,IL,J,JO,MA, MX,P,SG)	2.1¢/pf.liter

1/ Imports under this subheading may be subject to Federal Excise Tax (26 U.S.C. 5001).

3. Case Law

3-1. *EC—LAN*, Appellate Body Report (1998)

The EC—LAN dispute turns on the interpretation of a negotiated tariff concession. The US heavily relied on an argument based on "legitimate expectations." What did they mean by this? Could it have been argued differently? Which arguments should the US have made – consistent with the rules on interpretation – to support their claim that LAN equipment falls under automatic data processing machines and not telecommunications equipment? Assuming that the AB was correct in holding that one cannot rely on legitimate expectations, but has to look at what the parties have agreed on, what should be the result of the case?

Note: most footnotes have been removed, and footnote numbering differs from the original.

European Communities—Customs Classification of Certain Computer Equipment

Appellate Body Report, WT/DS62/AB/R, 5 June 1998

Beeby, Chairperson; Ehlermann, Member; Lacarté-Muro, Member

Introduction

1. The European Communities appeals from certain issues of law covered in the Panel Report, *European Communities - Customs Classification of Certain Computer Equipment* (the "Panel Report") and certain legal interpretations developed by the Panel in that Report. The Panel was established to consider complaints by the United States against the European Communities, Ireland and the United Kingdom concerning the tariff treatment of Local Area Network ("LAN") equipment and personal computers with multimedia capability ("PCs with multimedia capability"). The United States claimed that the European Communities, Ireland and the United Kingdom accorded to LAN equipment and/or PCs with multimedia capability treatment less favourable than that provided for in Schedule LXXX of the European Communities ("Schedule LXXX") and, therefore, acted inconsistently with their obligations under Article II:1 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994").

2. The Panel Report was circulated to the Members of the World Trade Organization (the "WTO") on 5 February 1998. The Panel reached the conclusion that:

> . . . the European Communities, by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for under heading 84.71 or heading 84.73, as the case may be, in Part I of Schedule LXXX, acted inconsistently with the requirements of Article II:1 of GATT 1994.

The Panel made the following recommendation:

> The Panel recommends that the Dispute Settlement Body request the European Communities to bring its tariff treatment of LAN equipment into conformity with its obligations under GATT 1994.

3. On 24 March 1998, the European Communities notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 3 April 1998, the European Communities filed an appellant's submission. On 20 April 1998, the United States filed an appellee's submission and on the same day, Japan filed a third participant's submission. The oral hearing, provided for in Rule 27 of the *Working Procedures*, was held on 27 April 1998. At the oral hearing, the participants and the third participant presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

(...)

III. Issues Raised in this Appeal

57. The appellant, the European Communities, raises the following issues in this appeal:
(...)

(b) Whether the Panel erred in interpreting Schedule LXXX, in particular, by reading Schedule LXXX in the light of the "legitimate expectations" of an exporting Member, and by considering that Article II:5 of the GATT 1994 confirms the interpretative value of "legitimate expectations"; and

(c) Whether the Panel erred in putting the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation conducted under the auspices of the GATT/WTO, solely on the importing Member.

(...)

V. “Legitimate Expectations” in the Interpretation of a Schedule

74. The European Communities also submits that the Panel erred in interpreting Schedule LXXX, in particular, by:

(a) reading Schedule LXXX in the light of the "legitimate expectations" of an exporting Member; and

(b) considering that Article II:5 of the GATT 1994 confirms the interpretative value of "legitimate expectations".

Subordinately, the European Communities submits that the Panel erred in considering that the "legitimate expectations" of an exporting Member with regard to the interpretation of tariff concessions should be based on the classification practices for individual importers and individual consignments, or on the subjective perception of a number of exporting companies of that exporting Member.

75. Schedule LXXX provides tariff concessions for ADP machines under headings 84.71 and 84.73 and for telecommunications equipment under heading 85.17. The customs duties set forth in Schedule LXXX on telecommunications equipment are generally higher than those on ADP machines. We note that Schedule LXXX does not contain any explicit reference to "LAN equipment" and that the European Communities currently treats LAN equipment as telecommunications equipment. The United States, however, considers that the EC tariff concessions on ADP machines, and not its tariff concessions on telecommunications equipment, apply to LAN equipment. The United States claimed before the Panel, therefore, that the European Communities accords to imports of LAN equipment treatment less favourable than that provided for in its Schedule, and thus has acted inconsistently with Article II:1 of the GATT 1994. The United States argued that the treatment provided for by a concession is the treatment reasonably expected by the trading partners of the Member which made the concession. On the basis of the negotiating history of the Uruguay Round tariff negotiations and the actual tariff treatment accorded to LAN equipment by customs authorities in the European Communities during these negotiations, the United States argued that it reasonably expected the European Communities to treat LAN equipment as ADP machines, not as telecommunications equipment.

76. The Panel found that:

> . . . for the purposes of Article II:1, it is impossible to determine whether LAN equipment should be regarded as an ADP machine purely on the basis of the ordinary meaning of the terms used in Schedule LXXX taken in isolation. However, as noted above, the meaning of the

> term "ADP machines" in this context may be determined in light of the legitimate expectations of an exporting Member.

77. In support of this finding, the Panel explained that:

> The meaning of a particular expression in a tariff schedule cannot be determined in isolation from its context. It has to be interpreted in the context of Article II of GATT 1994 ... It should be noted in this regard that the protection of legitimate expectations in respect of tariff treatment of a bound item is one of the most important functions of Article II.

The Panel justified this latter statement by relying on the panel report in European Economic *Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("EEC – Oilseeds*"), and stated that:

> The fact that the *Oilseeds* panel report concerns a non-violation complaint does not affect the validity of this reasoning in cases where an actual violation of tariff commitments is alleged. If anything, such a direct violation would involve a situation where expectations concerning tariff concessions were even more firmly grounded.

78. The Panel also relied on Article II:5 of the GATT 1994, and stated that:

> Although Article II:5 is a provision for the special bilateral procedure regarding tariff classification, not directly at issue in this case, the existence of this provision confirms that legitimate expectations are a vital element in the interpretation of Article II and tariff schedules.

79. Finally, the Panel observed that its proposition that the terms of a Member's Schedule may be determined in the light of the "legitimate expectations" of an exporting Member:

> . . . is also supported by the object and purpose of the WTO Agreement and those of GATT 1994. The security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" (expression common in the preambles to the two agreements) cannot be maintained without protection of such legitimate expectations. This is

consistent with the principle of good faith interpretation under Article 31 of the Vienna Convention.

80. We disagree with the Panel's conclusion that the meaning of a tariff concession in a Member's Schedule may be determined in the light of the "legitimate expectations" of an exporting Member. First, we fail to see the relevance of the *EEC - Oilseeds* panel report with respect to the interpretation of a Member's Schedule in the context of a violation complaint made under Article XXIII:1(a) of the GATT 1994. The *EEC - Oilseeds* panel report dealt with a non-violation complaint under Article XXIII:1(b) of the GATT 1994, and is not legally relevant to the case before us. Article XXIII:1 of the GATT 1994 provides for three legally-distinct causes of action on which a Member may base a complaint; it distinguishes between so-called *violation* complaints, *non-violation* complaints and *situation* complaints under paragraphs (a), (b) and (c). The concept of "reasonable expectations", which the Panel refers to as "legitimate expectations", is a concept that was developed in the context of *non- violation* complaints. As we stated in *India - Patents*, for the Panel to use this concept in the context of a violation complaint "melds the legally-distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action", and is not in accordance with established GATT practice.

81. Second, we reject the Panel's view that Article II:5 of the GATT 1994 confirms that "legitimate expectations are a vital element in the interpretation" of Article II:1 of the GATT 1994 and of Members' Schedules. It is clear from the wording of Article II:5 that it does not support the Panel's view. This paragraph recognizes the possibility that the treatment contemplated in a concession, provided for in a Member's Schedule, on a particular product, may differ from the treatment accorded to that product and provides for a compensatory mechanism to rebalance the concessions between the two Members concerned in such a situation. However, nothing in Article II:5 suggests that the expectations of only the exporting Member can be the basis for interpreting a concession in a Member's Schedule for the purposes of determining whether that Member has acted consistently with its obligations under Article II:1. In discussing Article II:5, the Panel overlooked the second sentence of that provision, which clarifies that the "contemplated treatment" referred to in that provision is the treatment contemplated by both Members.

82. Third, we agree with the Panel that the security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994. However, we disagree with the Panel that the maintenance of the security and predictability of tariff concessions allows the interpretation of a concession in the light of the "legitimate expectations" of exporting Members, i.e., their subjective views as to what the agreement reached during tariff negotiations was. The security and predictability of tariff concessions would be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone. Article II:1 of the GATT 1994 ensures the

maintenance of the security and predictability of tariff concessions by requiring that Members not accord treatment less favourable to the commerce of other Members than that provided for in their Schedules.

83. Furthermore, we do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the "legitimate expectations" of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the Vienna Convention. Recently, in India - Patents, the panel stated that good faith interpretation under Article 31 required "the protection of legitimate expectations". We found that the panel had misapplied Article 31 of the Vienna Convention and stated that:

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended.

84. The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule -- the interpretation of which is at issue here -- are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*.

85. Pursuant to Article 31(1) of the *Vienna Convention*, the meaning of a term of a treaty is to be determined in accordance with the ordinary meaning to be given to this term in its context and in the light of the object and purpose of the treaty. Article 31(2) of the *Vienna Convention* stipulates that:

> The context, for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Furthermore, Article 31(3) provides that:

> There shall be taken into account together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

Finally, Article 31(4) of the *Vienna Convention* stipulates that:

> A special meaning shall be given to a term if it is established that the parties so intended.

86. The application of these rules in Article 31 of the Vienna Convention will usually allow a treaty interpreter to establish the meaning of a term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:

> . . . supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

With regard to "the circumstances of [the] conclusion" of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.

87. In paragraphs 8.20 and 8.21 of the Panel Report, the Panel quoted Articles 31 and 32 of the Vienna Convention and explicitly recognized that these fundamental rules of treaty interpretation applied "in determining whether the tariff treatment of LAN equipment ... is in conformity with the tariff commitments contained in Schedule LXXX". As we have already noted above, the Panel, after a textual analysis, came to the conclusion that:

> . . . for the purposes of Article II:1, it is impossible to determine whether LAN equipment should be regarded as an ADP machine purely on the basis of the ordinary meaning of the terms used in Schedule LXXX taken in isolation.

Subsequently, the Panel abandoned its effort to interpret the terms of Schedule LXXX in accordance with Articles 31 and 32 of the *Vienna Convention*.[1] In doing this, the Panel erred.

88. As already discussed above, the Panel referred to the context of Schedule LXXX30 as well as to the *object and purpose of the WTO Agreement* and the GATT 1994, of which Schedule LXXX is an integral part. However, it did so to support its proposition that the terms of a Schedule may be interpreted in the light of the "legitimate expectations" of an exporting Member. The Panel failed to examine the context of Schedule LXXX and the object and purpose of the *WTO Agreement* and the GATT 1994 in accordance with the rules of treaty interpretation set out in the *Vienna Convention*.

89. We are puzzled by the fact that the Panel, in its effort to interpret the terms of Schedule LXXX, did not consider the *Harmonized System* and its *Explanatory Notes*. We note that during the Uruguay Round negotiations, both the European Communities and the United States were
parties to the *Harmonized System*. Furthermore, it appears to be undisputed that the Uruguay Round tariff negotiations were held on the basis of the *Harmonized System*'s nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. Neither the European Communities nor the United States argued before the Panel[2] that the *Harmonized System* and its *Explanatory Notes* were relevant in the interpretation of the terms of Schedule LXXX. We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*.

90. A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. We note that the United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. Singapore, a third party in the panel proceedings, also referred to these decisions. The European Communities observed that it had introduced reservations with regard to these decisions and that, even if they were to become final as they stood, they would not affect the outcome of the present dispute for two reasons: first, because these decisions could not

[1] As discussed above in paragraphs 76-84, the Panel relied instead on the concept of "legitimate expectations" as a means of treaty interpretation.
[2] We recall, however, that in reply to our questions at the oral hearing, both the European Communities and the United States accepted the relevance of the *Harmonized System* and its *Explanatory Notes* in interpreting the tariff concessions of Schedule LXXX. See paras. 13 and 38 of this Report.

confirm that LAN equipment was classified as ADP machines in 1993 and 1994; and, second, because this dispute "was about duty treatment and not about product classification". We note that the United States agrees with the European Communities that this dispute is not a dispute on the *correct* classification of LAN equipment, but a dispute on whether the tariff treatment accorded to LAN equipment was less favourable than that provided for in Schedule LXXX. However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant; and, therefore, they should have been examined by the Panel.

91. We note that the European Communities stated that the question whether LAN equipment was bound as ADP machines, under headings 84.71 and 84.73, or as telecommunications equipment, under heading 85.17, was *not* addressed during the Uruguay Round tariff negotiations with the United States. We also note that the United States asserted that:

> In many, perhaps most, cases, the detailed product composition of tariff commitments was *never* discussed in detail during the tariff negotiations of the Uruguay Round . . . . (emphasis added)

and that:

> The US-EC negotiation on Chapter 84 provided an example of how two groups of busy negotiators dealing with billions of dollars of trade and hundreds of tariff lines relied on *a continuation of the status quo*. (emphasis added)

This may well be correct and, in any case, seems central to the position of the United States. Therefore, we are surprised that the Panel did not examine whether, during the Tokyo Round tariff negotiations, the European Communities bound LAN equipment as ADP machines or as telecommunications equipment.

92. Albeit, with the mistaken aim of establishing whether the United States "was entitled to legitimate expectations" regarding the tariff treatment of LAN equipment by the European Communities, the Panel examined, in paragraphs 8.35 to 8.44 of the Panel Report, the classification practice regarding LAN equipment in the European Communities during the Uruguay Round tariff negotiations. The Panel did this on the basis of certain BTIs and other decisions relating to the customs classification of LAN equipment, issued by customs authorities in the European Communities during the Uruguay Round. In the light of our observations on "the circumstances of [the] conclusion" of a treaty as a supplementary means of interpretation under Article 32 of the *Vienna Convention*, we consider that the classification practice in the European Communities during the Uruguay Round is part of "the circumstances of [the] conclusion" of the *WTO Agreement* and may be used as a supplementary means of

interpretation within the meaning of Article 32 of the *Vienna Convention*. However, two important observations must be made: first, the Panel did *not* examine the classification practice in the European Communities during the Uruguay Round negotiations *as a supplementary means of interpretation* within the meaning of Article 32 of the *Vienna Convention*; and, second, the value of the classification practice as a supplementary means of interpretation is subject to certain qualifications discussed below.

93. We note that the Panel examined the classification practice of only the European Communities, and found that the classification of LAN equipment by the United States during the Uruguay Round tariff negotiations was not relevant. The purpose of treaty interpretation is to establish the *common* intention of the parties to the treaty. To establish this intention, the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States was *not* relevant.

94. In this context, we also note that while the Panel examined the classification practice during the Uruguay Round negotiations, it did not consider the EC legislation on customs classification of goods that was applicable at that time. In particular, it did not consider the "General Rules for the Interpretation of the Combined Nomenclature" as set out in Council Regulation 2658/87 on the Common Customs Tariff. If the classification practice of the importing Member at the time of the tariff negotiations is relevant in interpreting tariff concessions in a Member's Schedule, surely that Member's legislation on customs classification at that time is also relevant.

95. Then there is the question of the *consistency* of prior practice. Consistent prior classification practice may often be significant. Inconsistent classification practice, however, *cannot* be relevant in interpreting the meaning of a tariff concession. We note that the Panel, on the basis of evidence relating to *only* five out of the then 12 Member States[3], made the following factual findings with regard to the classification practice in the European Communities:

> To rebut the presumption raised by the United States, the European Communities has produced documents which *indicate* that LAN equipment had been treated as telecommunication apparatus by other customs authorities in the European Communities. (emphasis added)

[3] With regard to the manner in which the Panel evaluated the evidence regarding classification practice during the Uruguay Round tariff negotiations, we note that in paragraph 8.37 of the Panel Report, the Panel accepted certain BTIs submitted by the United States as relevant evidence, while in footnote 152 of the Panel Report, it considered similar BTIs submitted by the European Communities to be irrelevant.

> . . . it would be reasonable to conclude at least that the practice [regarding classification of LAN equipment] was not uniform in France during the Uruguay Round.
>
> Germany appears to have consistently treated LAN equipment as telecommunication apparatus.
>
> . . . LAN equipment was generally treated as ADP machines in Ireland and the United Kingdom during the Uruguay Round.[4] (emphasis added)

As a matter of logic, these factual findings of the Panel lead to the conclusion that, during the Uruguay Round tariff negotiations, the practice regarding the classification of LAN equipment by customs authorities throughout the European Communities was *not* consistent.

96. We also note that in paragraphs 8.44 and 8.60 of the Panel Report, the Panel identified Ireland and the United Kingdom as the "largest" and "major" market for LAN equipment exported from the United States. On the basis of this assumption, the Panel gave special importance to the classification practice by customs authorities in these two Member States. 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.

97. For the reasons set out above, we conclude that the Panel erred in finding that the "legitimate expectations" of an exporting Member are relevant for the purposes of interpreting the terms of Schedule LXXX and of determining whether the European Communities violated Article II:1 of the GATT 1994. We also conclude that the Panel misinterpreted Article II:5 of the GATT 1994.

98. On the basis of the erroneous legal reasoning developed and the selective evidence considered, the Panel was not justified in coming to the conclusion that the United States was entitled to "legitimate expectations" that LAN equipment would be accorded tariff treatment as ADP machines in the European Communities and, therefore, that the

[4] In this paragraph, the Panel stated that the only direct counter-evidence against the claim of the United States that customs authorities in Ireland and the United Kingdom consistently classified LAN equipment as ADP machines during the Uruguay Round negotiations is a BTI issued by the UK customs authority to CISCO, classifying one type of LAN equipment (routers) as telecommunications apparatus. The Panel dismisses the value of this BTI as evidence on the basis that it "became effective only a week or so before the conclusion of the Uruguay Round negotiations [15 December 1993]". Similarly, in footnote 152 of the Panel Report, the Panel did not consider other BTIs issued by the UK customs authorities to be relevant because they became valid after the conclusion of the Uruguay Round negotiations. We note, however, that all of these BTIs became valid in December 1993 or February 1994, i.e., before the end of the verification process, to which all Schedules were submitted and which took place between 15 February 1994 and 25 March 1994 (MTN.TNC/W/131, 21 January 1994). Therefore, in our view, the Panel should have considered these BTIs.

European Communities acted inconsistently with the requirements of Article II:1 of the GATT 1994 by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for in Schedule LXXX.

99. In the light of our conclusion that the "legitimate expectations" of an exporting Member are not relevant in determining whether the European Communities violated Article II:1 of the
GATT 1994, we see no reason to examine the subordinate claim of error of the European Communities relating to the evidence on which the "legitimate expectations" of exporting Members were based.

VI. Clarification of the Scope of Tariff Concessions

100. The last issue raised by the European Communities in this appeal is whether the Panel erred in placing the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation, held under the auspices of the GATT/WTO, solely on the importing Member.

101. In paragraph 8.60 of the Panel Report, the Panel concluded that:

> We find that the United States was entitled to legitimate expectations that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities, based on the actual tariff treatment during the Uruguay Round, particularly in Ireland and the United Kingdom . . . We further find that the United States was not required to *clarify the scope* of the European Communities' *tariff concessions* on LAN equipment . . . (emphasis added)

Prior to this conclusion, the Panel stated the following:

> . . . we find that the European Communities cannot place the burden of clarification on the United States in cases where it has created, through its own practice, the expectations regarding the continuation of the actual tariff treatment prevailing at the time of the tariff negotiations. It would not be reasonable to expect the US Government to seek clarification when it had not heard any complaints from its exporters, who were apparently satisfied with the current tariff treatment of LAN equipment in their major export market -- Ireland and the United Kingdom.

102. The European Communities appeals these findings, and argues that:

> . . . the Panel erred where it considered that, in any case, the onus of clarifying the scope of a tariff concession during a multilateral tariff negotiation . . . shall necessarily be put on the side of the
> importing Member. By doing so, the Panel has created and applied a new rule on the burden of proof in the dispute settlement procedure which is outside its terms of reference and is beyond the powers
> of a panel.

103. We do not agree that the Panel has created and applied a new rule on the burden of proof. The rules on the burden of proof are those which we clarified in *United States - Shirts and Blouses*.

104. The Panel's findings in paragraphs 8.55 and 8.60 on the "requirement of clarification" are linked to the Panel's reliance on "legitimate expectations" as a means of interpretation of the tariff concessions in Schedule LXXX. They serve to complete and buttress the Panel's conclusion that "the United States was entitled to legitimate expectations that LAN equipment would continue to be accorded tariff treatment as ADP machines in the European Communities".

105. We note that the Panel's findings in paragraphs 8.55 and 8.60 on the "requirement of clarification" were, in fact, the Panel's response to the question whether:

> . . . the exporting Member has any inherent obligation to seek clarification when it has been otherwise given a basis to expect that actual tariff treatment by the importing Member will be maintained.

106. We also note the Panel's references to the panel report in Panel on Newsprint and the report by the Group of Experts in Greek Increase in Bound Duty. In both of these reports, the conclusions on the obligations of the importing contracting party under Article II:1 of the GATT 1994 were reached on the basis of the ordinary meaning of the wording of the respective Schedules. These reports also assume that the tariff concessions made by the importing contracting party would have had to be limited by "conditions or qualifications" if they were to be interpreted restrictively. That the Panel reads these two reports in this way is evident from the Panel's concluding remark that "these cases . . . confirm that the onus of clarifying tariff *commitment* is generally placed on the importing Member" (emphasis added).

107. However, the case before us raises a different problem. The question here is whether the European Communities has committed itself to treat LAN equipment as ADP machines under headings 84.71 or 84.73, rather than as telecommunications equipment

under heading 85.17 of Schedule LXXX. We do not believe that the "requirement of clarification", as discussed by the Panel, is relevant to this question.

108. The Panel also based its conclusions on the "requirement of clarification" on a certain perception of the nature of tariff commitments. The Panel stated:

> . . . that a tariff commitment is an instrument in the hands of an importing Member which inherently serves the importing Member's "protection needs and its requirements for the purposes of tariff and trade negotiations" . . . It is for this reason that it behooves the importing party, as the effective bearer of its rights and responsibilities, to correctly identify products and relevant duties in its tariff schedules, including such limitations or modifications as it intends to apply.

109. We do not share this perception of the nature of tariff commitments. Tariff negotiations are a process of reciprocal demands and concessions, of "give and take". It is only normal that importing Members define their offers (and their ensuing obligations) in terms which suit their needs. On the other hand, exporting Members have to ensure that their corresponding rights are described in such a manner in the Schedules of importing Members that their export interests, as agreed in the negotiations, are guaranteed. There was a special arrangement made for this in the Uruguay Round. For this purpose, a process of verification of tariff schedules took place from 15 February through 25 March 1994, which allowed Uruguay Round participants to check and control, through consultations with their negotiating partners, the scope and definition of tariff concessions. Indeed, the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.

110. For the reasons stated above, we conclude that the Panel erred in finding that "the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment". We consider that any clarification of the scope of tariff concessions that may be required during the negotiations is a task for *all* interested parties.

VII. Conclusions

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

(a) upholds the finding of the Panel that the request of the United States for the establishment of a panel met the requirements of Article 6.2 of the DSU;

(b) reverses the findings of the Panel that the United States was entitled to "legitimate expectations" that LAN equipment would be accorded tariff treatment as ADP machines in the European Communities and, therefore, that the European Communities acted inconsistently with the requirements of Article II:1 of the GATT 1994 by failing to accord imports of LAN equipment from the United States treatment no less favourable than that provided for in Schedule LXXX; and

(c) reverses the ancillary finding of the Panel that the United States was not required to clarify the scope of the European Communities' tariff concessions on LAN equipment.

* * *

3-2. *EC—IT Products*, Panel Report (2010)

The panel report in EC—IT Products is a good contrast with the LAN case. While addressing similar issues, such as technology and functionality, these two disputes ended up with quite diverging conclusions. Why?

Editorial note: all footnotes have been omitted.

European Communities—Tariff Treatment of Certain Information Technology Products

Reports of the Panel, WT/DS375/R, WT/DS376/R, & WT/DS377/R, 16 August 2010

II. FACTUAL ASPECTS

A. Measures at Issue

2.1 The complaining parties claim that the European Communities is required to accord duty-free tariff treatment to certain information technology products. These products1 are described by the complaining parties as certain "flat panel display devices" ("FPDs"), (…) The complaining parties claim that the European Communities is obliged to grant such duty-free treatment under the European Communities Schedule of Concessions to the GATT 1994 ("the EC Schedule") pursuant to modifications therein to reflect the commitments it has made under the *Ministerial Declaration on Trade in Information Technology Products* ("Information Technology Agreement" or "ITA").

(...)

VII. FINDINGS

B. Background

1. The Information Technology Agreement (ITA)

7.5 Two years following the conclusion of the Uruguay Round negotiations, during the WTO Ministerial Conference held in Singapore between 9-13 December 1996, 29 WTO Members and States or separate customs territories in the process of acceding to the WTO adopted the "Ministerial Declaration on Trade in Information Technology Products" ("the ITA").

7.6 The ITA preamble expresses the desire to "achieve maximum freedom of world trade in information technology products" and to "encourage the continued technological

development of the information technology industry on a world-wide basis". Paragraph 1 of the ITA "declares" that "[e]ach party's trade regime should evolve in a manner that enhances market access opportunities for information technology products".

7.7 In accordance with paragraph 2 of the ITA, participants to the ITA ("ITA participants") agreed to "bind and eliminate" customs duties and other duties and charges within the meaning of Article II:1(b) of the General Agreement on Tariffs and Trade 1994, through equal duty rate reductions, on "(a) all products classified (or classifiable) with Harmonized System (1996) ('HS') headings listed in Attachment A to the Annex to this Declaration"; and "(b) all products specified in Attachment B to the Annex to this Declaration, whether or not they are included in Attachment A".

(...)

7.11 As reflected above, paragraph 2 of the ITA Annex refers to two attachments – Attachment A and Attachment B – that set forth product coverage under the ITA. A chapeau paragraph preceding these Attachments indicates that Attachment A "lists the HS headings or parts thereof to be covered", whereas Attachment B "lists specific products to be covered by an ITA wherever they are classified in the HS". Attachment A is divided in two sections. Attachment A, Section 1 includes a table listing HS1996 headings (four digits) and subheadings (six digits) with their corresponding "HS descriptions", including the following HS1996 subheading at issue in this dispute:

	HS96		HS description
	8471	60	Input or output units, whether or not containing storage units in the same housing

(...)

7.13 Following the chapeau, Attachment B lists 13 products, including the following descriptions at issue in this dispute:

> "**Flat panel displays** (including LCD, Electro Luminescence, Plasma and other technologies) for products falling within this agreement, and parts thereof." (...)

7.14 In addition to modalities and product coverage, paragraph 5 of the ITA Annex directs ITA participants to consider any divergence among them in classifying information technology products, beginning with the products specified in Attachment B, in furtherance of the "common objective of achieving, where appropriate, a common classification for these products within existing HS nomenclature". Further, the ITA contemplates that ITA participants meet "periodically" to "review product coverage" and determine whether "Attachments should be modified to incorporate additional products". At the time of implementation, discussed in paragraphs 7.16-7.20 below, participants agreed to establish a

Committee of Participants on the Expansion of Trade in Information Technology Products ("CITA"). Among other responsibilities, CITA is responsible for conducting consultation and review concerning the expansion of ITA product coverage as provided for in paragraph 3 of the ITA Annex and the elimination of classification divergences provided for in paragraph 5 of the ITA Annex.

7.15 ITA participants agreed to review participation in the ITA "no later than 1 April 1997". Following the review and approval, the ITA participants agreed to modify their respective schedules of concessions, including agreement to bind all tariffs on items listed in the Attachments no later than 1 July 1997 and "phase in" customs duty rate reductions beginning in 1 July 1997 and concluding "no later than 1 January 2000".

(...)

E. Flat Panel Display Devices (FPDs)

7.118 In this section of the Reports, the Panel will consider the **complainants**' claims that certain EC measures are inconsistent with Articles II:1(a) and II:1(b) of the GATT 1994 because they result in less favourable tariff treatment to imports of certain flat panel display devices than that provided for these products under the EC Schedule, and because the tariff treatment provided is in excess of that provided for in the EC Schedule. In the joint Panel request, the complainants indicate that the identified measures at issue cover "certain flat panel displays using LCD technology that are 'capable of reproducing video images from a source other than an automatic data-processing machine'", as well as "flat panel displays with certain attributes, including digital visual interface (DVI)".

7.119 The complainants argue, in their Joint Panel Request, that pursuant to commitments made in the ITA, the European Communities is obliged to provide duty-free treatment to flat panel display devices. In particular, the complainants allege that certain flat panel display devices are covered by the duty-free concession set forth in the narrative description "Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof", located in the Annex to the EC Schedule, regardless of which tariff line the products are classified under in the EC combined nomenclature. Second, the complainants allege that certain flat panel display devices are covered by the duty-free concession as "[i]nput or output units...Other" in tariff item number 8471 60 90 in the EC Schedule. According to the complainants, despite these duty-free concessions, the challenged measures require that particular flat panel display devices which have a DVI connector, or are capable of reproducing video images from a source other than an automatic data-processing machine, be classified under tariff item number 8528 59 10 or 8528 59 90, which carry a 14 per cent *ad valorem* duty. The application of this 14 per cent duty on imports that they consider should be granted duty-free treatment is the essence of the complainants' claim. The complainants reject that the suspension of the collection of

duties on specific flat panel displays pursuant to what they allege to be a temporary measure, resolves the matter.

7.120 The **European Communities** submits that the products referred to by the complainants are new "multifunctional" products for which there is no "specific heading". Thus, these monitors had to be classified on a case-by-case basis, considering their "specific characteristics. Consequently, the European Communities rejects the complainants' Article II claims. To the extent the Panel considers that a product were in an individual case to be treated as duty-free, the European Communities argues that the chance of a breach of Article II would be unlikely, because the European Communities suspends the application of duties which, it argues, reduces the likelihood that customs duties have been "unduly levied".

7.121 The task before the Panel, therefore, is to determine: (a) the scope of duty-free treatment in the EC Schedule; (b) whether the products identified by the complainants fall within the scope of the duty-free tariff concession; (c) whether the challenged measures result in the imposition of duties on the products at issue in excess of those provided for in the EC Schedule; and (d) whether the measures at issue result in less favourable treatment of the products at issue than that provided for in the EC Schedule.

7.122 In light of the approach we have outlined above, we will first identify the measures and products at issue. This is particularly important as the European Communities argues that the complainants have failed to sufficiently identify what products should receive duty-free treatment in order to demonstrate a violation of WTO commitments based on the measures at issue.

(...)

7.232 The CN2010 maintains the same structure and CCT as the CN2007 version, as follows:

CN code	Description	Conventional rate of duty (%)	Supplementary unit
1	2	3	4
8528	Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus:		
	- Cathode-ray tube monitors:		
8528 41 00	- - Of a kind solely or principally used in an automatic data-processing system of heading 8471	Free	p/st
8528 49	- - Other:		
8528 49 10	- - - Black and white or other monochrome	14	p/st
	- - - Colour:		
8528 49 35	- - - - With a screen width/height ratio less than 1,5	14	p/st
	- - - - Other:		
8528 49 91	-------- With scanning parameters not exceeding 625 lines .	14	p/st

8528 49 99	-------- With scanning parameters exceeding 625 lines	14	p/st
	- Other monitors:		
8528 51 00	- - Of a kind solely or principally used in an automatic data-processing system of heading 8471 .	Free	p/st
8528 59	- - Other:		
8528 59 10	- - - Black and white or other monochrome	14 ([1])	p/st
8528 59 90	- - - Colour	14([2])	p/st

(...)

4. Whether the European Communities' tariff treatment of particular flat panel displays is consistent with its obligations under Article II of the GATT 1994

(...)

7.323 The **complainants** submit that FPDs are covered by the duty-free concession in the narrative description for FPDs in the Annex to the EC Schedule ("Flat panel display devices (including LCD, Electro Luminescence, Plasma, Vacuum-Fluorescence and other technologies) for products falling within this agreement, and parts thereof"). They argue that the ordinary meaning of the terms of the FPDs narrative description, when read in the context of the EC headnote, requires the European Communities to extend duty-free coverage to all products described by the narrative description for FPDs, wherever those products are classified. In their view, the tariff item numbers listed beside the narrative descriptions cannot limit the concession's scope to only those products classifiable in the listed codes. The United States even describes the EC headnote as a "separate" commitment, additional to the commitments associated with individual tariff lines in the EC Schedule.21 Within the terms of this narrative description, they indicate that the term "for" is key to the ordinary meaning analysis under the Vienna Convention.

7.324 The **European Communities** accepts that the EC headnote is part of its Schedule, but rejects the complainants' allegations on the ordinary meaning of the terms in the EC headnote as well as the FPDs narrative description. The European Communities argues that the fourteen tariff item numbers listed next to the FPDs narrative description determine the scope of the FPDs commitment made pursuant to Attachment B and therefore should not be "read out from the EC's Schedule".

(...)

7.343 Our initial analysis of the text of the EC headnote suggests that products described in or for Attachment B must be granted duty-free treatment irrespective of where those products are classified. This interpretation has implications for the meaning and significance of the tariff item numbers appearing alongside the product descriptions in the EC Schedule. In particular, whatever significance the tariff item numbers would have, they would not have the effect of controlling or determining the scope of coverage arising from the ordinary meaning of the product descriptions themselves. In other words, the plain meaning of the phrase "wherever the product is classified" is not consistent with a view that

the tariff item numbers notified by the European Communities operate to limit the scope of the EC concessions strictly to products that are classified or classifiable in the particular tariff item numbers listed next to a given product description in the Annex to the EC Schedule.

(...)

7.409 Taking into account our analysis of the provisions in the ITA so far, and looking at them in a holistic manner, the Panel is of the view that the drafters of the ITA considered that the traditional approach of listing HS codes was inadequate to address the full scope of the product coverage that was intended by participants to the ITA, in particular given the then prevailing divergences in the classification of products in and for Attachment B. Consequently, ITA participants agreed to implement their commitments though a "dual" approach that included binding and eliminating duties for both: (i) products classified or classifiable in HS codes listed in Attachment A, and (ii) products specified in Attachment B. While the approach under Attachment A is straightforward and "traditional" in WTO terms, ITA participants were directed under Attachment B to eliminate duties on all products "specified' in that Attachment. This approach was taken because ITA participants could not agree on precise headings for the products identified through the narrative descriptions in Attachment B. Since the narrative descriptions must determine the scope of coverage of those products, duty-free treatment must be extended to products specified in Attachment B "wherever they are classified".

(...)

7.763 Accordingly, the measures at issue, including Council Regulation No. 179/2009 operating in conjunction with the CN and CNEN 2008/C 133/01, and with Commission Regulation Nos. 634/2005 and 2171/2005, are inconsistent with the European Communities' obligations under Article II:1(a) of the GATT 1994.

* * *

4. WTO Agreement on Information Technology (2015)

4-1. Summary and Explanation of the Information Technology Agreement (ITA)

Excerpt from the WTO's Annual Report 2016, p. 47
https://www.wto.org/english/res_e/publications_e/anrep16_e.htm

Information Technology Agreement

On 16 December 2015, at the Tenth Ministerial Conference in Nairobi, participants in negotiations to expand the Information Technology Agreement (ITA) concluded a landmark deal to liberalize trade in an additional 201 high-tech products, whose annual value is estimated at US$ 1.3 trillion, accounting for nearly 10 per cent of world trade in goods. It is the first major tariff-cutting deal at the WTO since 1996.

Negotiations were conducted by 53 WTO members, including both developed and developing countries, accounting for approximately 90 per cent of world trade in these products. The new tariff commitments will be recorded in each participant's WTO schedule of commitments and applied on a most-favoured nation (MFN) basis, which means that all 162 WTO members will benefit from duty-free access in those markets.

Participants in the ITA expansion negotiations had agreed in July 2015 on a list of 201 additional products that will benefit from duty-free treatment. They then engaged in "staging" negotiations on how and over what period of time they would eliminate duties on these products. During November and December 2015, with the assistance of the WTO Secretariat, 24 draft schedules were reviewed and approved, paving the way for the conclusion of negotiations in Nairobi.

Approximately 65 per cent of tariff lines will be fully eliminated by 1 July 2016. Most of the remaining lines will be phased out in four stages over three years, which means that by 2019 almost all imports of the relevant products will be duty-free.

The ITA expansion declaration also contains a commitment to work to tackle non-tariff barriers in the IT sector (see page 71) and to keep the list of products covered under review to determine whether further expansion may be needed to reflect future technological developments.

According to preliminary estimates by the WTO Secretariat, approximately 95 per cent of participants' import duties on these products will be fully eliminated by 2019. Products covered by the ITA expansion include new generation multi-component integrated circuits, touch screens, GPS navigation equipment, portable interactive electronic education devices, video game consoles and medical equipment, such as magnetic resonance imaging products and ultra-sonic scanning apparatus.

Director-General Roberto Azevêdo said that the products covered by the agreement amounted to more than global trade in automotive products or global trade in textiles, clothing, iron and steel combined. "In fact, this deal will eliminate tariffs on approximately 10 per cent of global trade," he said in Nairobi following the announcement of the deal. He noted that some of the IT products currently faced very high tariffs. For example, in some markets, the import tariff for video cameras is 35 per cent. "With this agreement, tariffs will be reduced to zero — and legally locked-in at zero. So today marks a very significant achievement. Eliminating tariffs on trade of this magnitude will have a huge impact," he said.

The lower prices will help many other sectors that use IT products as inputs. The agreement will create jobs and help to boost growth around the world. It will improve productivity and market access, and enhance predictability for traders and investors, the DG declared.

* * *

Information Technology Agreement—an Explanation

Excerpt from the WTO's Annual Report 2016, p. 47
https://www.wto.org/english/res_e/publications_e/anrep16_e.htm

What is the ITA?

The original Information Technology Agreement (ITA) was reached on 13 December 1996, through a "Ministerial Declaration on Trade in Information Technology Products", at the first WTO Ministerial Conference, held in Singapore.

As the first and most significant tariff liberalization arrangement negotiated in the WTO after its establishment in 1995, it led to the elimination of import duties on products which in 2013 accounted for an estimated US$

1.6 trillion, almost three times as much as when it was signed in 1996. The IT sector has been one of the fastest growing sectors in world trade. Today, trade in these products accounts for approximately 10 per cent of global merchandise exports.

The ITA covers a large number of high technology products, including computers, telecommunication equipment, semiconductors, semiconductor manufacturing and testing equipment, software, scientific instruments, as well as most of the parts and accessories of these products.

Subscribed initially by 29 members, participation quickly increased at the beginning of 1997 when a number of other members decided to join the Agreement.

Today, following the recent accession of the Republic of Seychelles, the ITA now covers 81 WTO members, which account for approximately 97 per cent of world trade in information technology products.

The ITA requires each participant to eliminate and bind customs duties at zero for all products specified in the Agreement.

Because the ITA concessions are included in the participants' WTO schedules of concessions, the tariff elimination is implemented on a most-favoured nation (MFN) basis. This means that even countries that have not joined the ITA can benefit from the trade opportunities generated by ITA tariff elimination.

ITA product expansion negotiations

In May 2012, on the occasion of the 15th anniversary of the ITA, it was recognized that new categories of IT products had been developed, including a number of products which do not fall within the scope of the existing ITA. In light of new technological developments, some WTO members considered that the current product coverage of the ITA should be expanded.

In June 2012, 33 WTO members initiated an informal process towards launching negotiations for the expansion of the product coverage of the ITA. This process led to the establishment of a technical working group which met informally in Geneva, outside of the formal framework of the WTO ITA Committee. Participation in the ITA product expansion negotiations quickly increased to 54 WTO members.

After 17 rounds of negotiations, on Saturday, 18 July 2015, negotiators edged close to an agreement on a list of products for an ITA expansion, together with a draft declaration which spells out how the agreement would be implemented.

At a meeting on 24 July 2015, nearly all the participants agreed to expand the products covered by the Information Technology Agreement by eliminating tariffs on an additional list of 201 products. Annual trade in these 201 products is valued at over $1.3 trillion per year, and accounts for approximately 7% of total global trade today. The new accord covers new generation semi-conductors, semi-conductor manufacturing equipment, optical lenses, GPS navigation equipment, and medical equipment such as magnetic resonance imaging products and ultra-sonic scanning apparatus.

Who is participating in the expansion of the ITA?

Fifty-four WTO members took part in the negotiations on expanded coverage of the ITA. Nearly all the participants have confirmed their acceptance of the product coverage list, which was finalized on 24 July. Together, they account for approximately 90 per cent of

world trade in the products proposed for inclusion in the product expansion. The Agreement is open to any other members who wish to join.

What is the current level of MFN applied tariffs for the products under the ITA expansion?

Import duties on some of the covered products are relatively high in some markets. In the United States, for instance, applied duties on certain parts of telephone handsets are at 8.5%, while in China 35% duties are applied on video cameras, the EU tariff applied on DVD recorders is 14% and Thailand applies a duty of 30% on certain magnetic cards.

Beyond the monetary gains for the IT industry resulting from the elimination of import duties, investors and traders would also gain from significantly improved market access, predictability and certainty. This is because a number of these products are either currently unbound (i.e. they are not subject to a legal maximum limit at the WTO) or are bound at high tariff levels. With the ITA product expansion, the participating members would have the legal obligation not to impose import duties on covered products.

What happens next?

Under the terms of the agreement, the majority of tariffs will be eliminated on the 201 products within three years, with reductions beginning in 2016. By the end of October 2015, each of the participating members will submit to the other participants a draft schedule which spells out how the terms of the agreement would be met. Participants will spend the coming months preparing and verifying these schedules. The objective is to conclude this technical work in time for the Nairobi Ministerial Conference in December.

The agreement also contains a commitment to tackle non-tariff barriers in the IT sector, and to keep the list of products covered under review to determine whether further expansion may be needed to reflect future technological developments.

Annex I
Data on ITA expansion

Chart 1: World exports of selected product groups, 2013

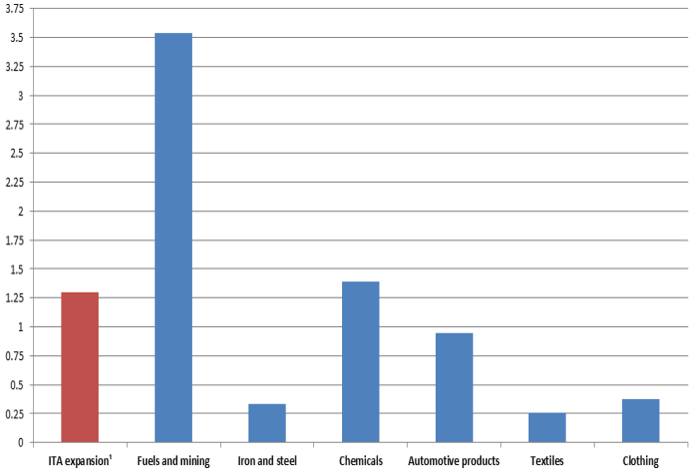


Chart 2: Estimated value of trade covered by the agreement, by member, 2011-2013 (%)

member	Exports: 2011-13 average $bn	Imports: 2011-13 average $bn
Albania	0.0	0.2
Australia	3.6	18.9
Canada	16.3	34.5
China	300.4	372.6
Colombia*	0.2	3.7
Costa Rica	2.7	2.5
European Union (28)	196.7	178.8
Guatemala	0.1	0.7
Iceland	0.1	0.2
Israel	10.4	7.1
Hong Kong, China	0.9	19.2
Japan	139.7	79.1
Korea	95.5	67.3
Malaysia	45.6	41.0
Mauritius*	0.0	0.2
Montenegro	0.0	0.1
New Zealand	0.7	2.7
Norway	3.4	6.2
Philippines	4.7	6.9
Singapore	120.9	85.0
Switzerland	19.0	13.6
Chinese Taipei	95.1	62.8
Thailand	23.0	26.7
Turkey*	1.9	10.8
United States	178.9	212.0
Rest of the world	74.0	228.7

Chart 3: Share of exports of products covered by the agreement, by member 2011-13 (%)

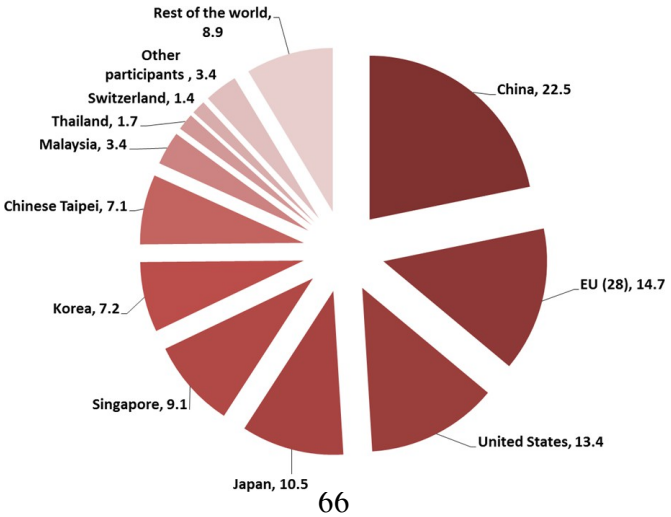


Chart 4: Share of imports of products covered by the agreement by member 2011-13 (%)

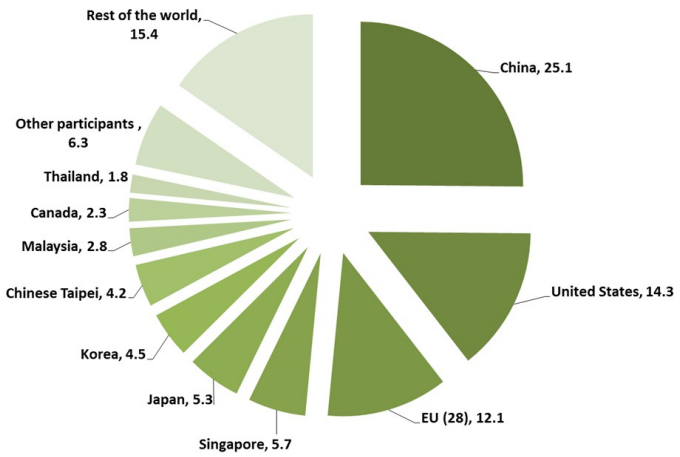
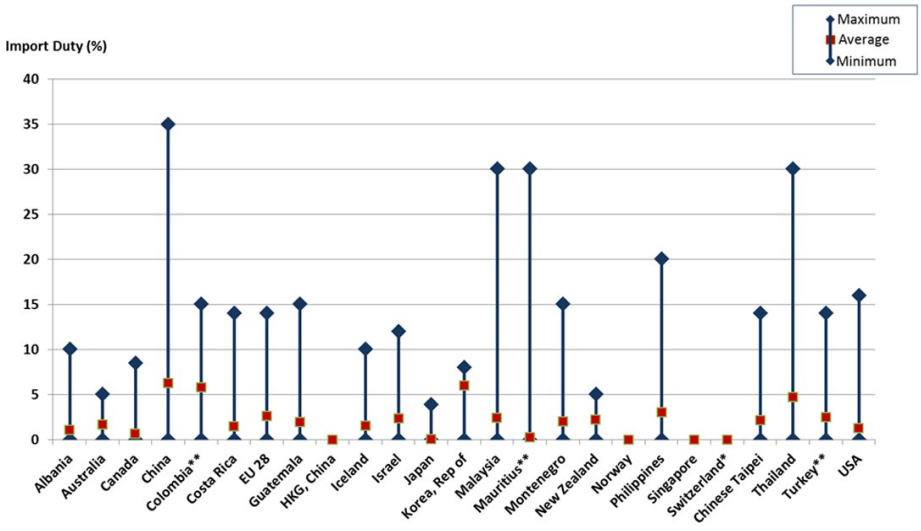


Chart 5: Applied MFN duty on products covered by the agreement



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