

Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes

WT/DS302

FIRST WRITTEN SUBMISSION OF HONDURAS

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I. INTRODUCTION

1. The measures of the Dominican Republic that are at issue in this dispute are the following:

- (i) a surcharge imposed on imports;
- (ii) a foreign exchange fee imposed on imports;
- (iii) a requirement to affix a stamp on imported cigarettes in the territory of the Dominican Republic;
- (iv) the application of the Selective Consumption Tax to certain imported cigarettes;
- (v) the determination of the value of the imported cigarettes for the purpose of applying the Selective Consumption Tax;
- (vi) the failure to publish the survey on which the Selective Consumption Tax is based; and
- (vii) a regulation requiring importers of cigarettes to post a bond.

2. None of these measures can be reconciled with the obligations of the Dominican Republic under the General Agreement on Tariffs and Trade 1994 ("GATT"). Article II:1(a) of the GATT prohibits, in principle, duties and charges on bound items other than ordinary customs duties. The surcharge and the foreign exchange fee are levied in addition to ordinary customs duties and are therefore inconsistent with that provision. The other measures at issue are internal measures discriminating against imported products inconsistently with the national treatment requirement set out in Article III of the GATT. The most serious of these is the requirement to affix a tax stamp on imported cigarettes *in the territory of the Dominican Republic*. This requirement discriminates against imported products because it forces foreign but not domestic producers to package their cigarettes twice, thereby significantly increasing production costs for cigarette importers. Other Members of the WTO that require tax stamps on cigarettes permit their affixation during the packaging process in the exporting country. Only Paraguay and the Dominican Republic require that the stamp be affixed in their territory.¹

3. The Dominican Republic administers its Selective Consumption Tax for cigarettes in a manner that results in a tax for certain imported cigarettes that is higher than that imposed on like domestic cigarettes inconsistently with Article III. To determine the basis for this

¹ List prepared by the BAT Republica Dominicana of countries imposing a stamp requirement and those permitting the stamp to be affixed abroad. Information as of the month of December 2003. Exhibit-HOND – 1.

Selective Consumption Tax, the Dominican Republic relies upon surveys of retail prices. As the Dominican Republic does not publish its surveys and no criteria have been established for determining the value of new imported products not included in the surveys, the Dominican Republic also fails to abide by the requirements set out in Article X:1 and X:3 of the GATT regarding the publication and administration of trade regulations. To the knowledge of Honduras, the Dominican Republic is the only country in the Central American and Caribbean region that levies consumption taxes on the basis of prices determined by surveys conducted by the Government. Some countries use specific taxes, others rely on the c.i.f. price or on the retail selling price as reported by the producer or importer. However, no country uses a survey conducted by the Government.

4. Also of great concern to Honduras is a regulation adopted by the Dominican Republic according to which both domestic producers and importers of cigarettes must post a bond of RD\$ 5,000,000.00, allegedly to secure the payment of the Selective Consumption Tax. This requirement, which is imposed in respect of imported cigarettes as a condition of importation, is a restriction on importation inconsistent with Article XI:1 of the GATT. However, even if this requirement were to be regarded as an internal measure covered by Article III of the GATT, it would be inconsistent with the obligations of the Dominican Republic. Domestic producers may pay the Selective Consumption Tax *after* the cigarettes are sold, while importers are required to pay the tax before the cigarettes clear customs. Consequently, there is a risk of non-payment in the case of domestic, but not in the case of imported, cigarettes. To give domestic producers, but not importers, the right to pay the Selective Consumption Tax *after* the sale of the cigarettes *and* to require nevertheless both domestic producers and importers to post a bond to secure the payment of that Tax discriminates against imported cigarettes and therefore violates Article III:4 of the GATT.

5. Honduras would like to stress that it recognises that the Dominican Republic has the right to levy customs duties and consumption taxes on cigarettes and to take the measures necessary to secure compliance with its fiscal law. The complaint that Honduras is submitting to the Panel concerns import charges that the Dominican Republic levies in addition to its ordinary customs duties and a selective consumption tax that it administers in a manner that discriminates against imported cigarettes. Honduras believes that the Dominican Republic need not impose a multitude of import charges and non-transparent, unreasonable and discriminatory administrative burdens on importers of cigarettes to pursue its legitimate policy goals. It would be in the interest of not only Honduras, but also the Dominican Republic, if the measures at issue were withdrawn forthwith.

6. Honduras regrets that, despite the numerous efforts made by both its authorities and its exporters to resolve these issues with the Dominican Republic, these matters remain unresolved.

II. PROCEDURAL BACKGROUND

7. On 8 October 2003, Honduras requested consultations with the Dominican Republic pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXII:1 of the GATT concerning certain measures affecting the importation and internal sale of cigarettes.² Consultations were held in Geneva on 4 November 2003 with a view to reaching a mutually satisfactory solution. Unfortunately, the consultations failed to settle the dispute.

8. On 8 December 2003, Honduras requested the establishment of a panel pursuant to Article 6 of the DSU and Article XXIII of the GATT, with standard terms of reference as set out in Article 7 of the DSU.³ At its meeting of 9 January 2004, the Dispute Settlement Body ("DSB") established the panel. Its terms of reference are as follows:

To examine, in the light of the relevant provisions of the covered agreements cited by Honduras in document WT/DS302/5, the matter referred by Honduras to the DSB in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁴

9. On 17 February 2004, the Dominican Republic and Honduras agreed on the composition of the Panel as follows:

Chairman:	Elbio Roselli
Members:	Tae Yul Cho Cristian Espinosa Cañizares

10. Pursuant to Article 10 of the DSU, Chile, China, El Salvador, the European Communities, Guatemala, Nicaragua and the United States have reserved their third-party rights.⁵

² *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Request for Consultations by Honduras, WT/DS302/1, G/L/645, dated 8 October 2003, circulated 13 October 2003.

³ *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Request for the Establishment of a Panel by Honduras, WT/DS302/5, dated 8 December 2003, circulated 9 December 2003.

⁴ *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, Constitution of the Panel at the Request of Honduras, Note by the Secretariat, WT/DS302/6, dated 18 February 2004.

⁵ *Ibid.*

III. THE MEASURES AT ISSUE

A. THE SURCHARGE IMPOSED ON IMPORTS

11. The Dominican Republic imposes a surcharge on all goods that is described as the "transitional surcharge for economic stabilisation" ("surcharge"). This surcharge was established by Article 2 of Decree 646-03 of 30 June 2003 which provides:

Se aplicará un recargo transitorio de estabilización económica del 2%, sobre el valor CIF del universo de los bienes incluidos en las Partidas Arancelarias de la Nomenclatura del Sistema Armonizado de Designación y Codificación de Mercancías cuya destinación sea el régimen de despacho a consumo.⁶

12. This Decree further provides that:

La obligación de pagar el recargo transitorio ... nace conjuntamente con la obligación tributaria aduanera y los ingresos generados por el mismo serán entregados íntegramente al Banco Central de la República Dominicana.⁷

13. Thus, the Decree applies a 2% surcharge, calculated on the c.i.f. value of all goods imported into the Dominican Republic.

14. This surcharge is imposed on imports, upon their importation, concurrently with and in addition to, the ordinary customs duties. The surcharge applies to both bound and unbound items.

B. THE FOREIGN EXCHANGE FEE IMPOSED ON IMPORTS

15. The Dominican Republic imposes a foreign exchange fee on all imports at the same time as the surcharge and the ordinary customs duties are imposed, namely, upon importation. Given its name, the fee is ostensibly intended to address "foreign exchange" matters related to the payment of imports in a foreign currency. However, the single criterion

⁶ "A 2% transitional surcharge for economic stabilization shall be levied on the c.i.f value of the universe of goods [all goods] included in the Harmonized Commodity Description and Coding System and which fall under the regime of customs clearance for consumption." (Courtesy translation)

⁷ "The obligation to pay the transitional surcharge ... arises concurrently with the customs duty payable and the revenues thereby generated shall be delivered in their entirety to the Central Bank of the Dominican Republic." (Courtesy translation)

Even though Article 3 narrowed the scope of the transitional surcharge by excluding " ... goods imported under the Free Trade Agreements approved by the National Congress, goods covered under their tariff reduction programmes, or those that appear on the exclusion lists under these agreements", at present, this provision no longer exists and therefore the transitional surcharge applies on an MFN basis to all countries. Article of Decree 693-03 of 16 July 2003, Single Article. Exhibit – HOND – 2.

which determines the amount of the "foreign exchange fee" is the "value of imports at the selling rate of foreign exchange."

16. The foreign exchange fee was originally levied pursuant to the Seventeenth Resolution of the Monetary Board dated 24 January 1991 which provides:

3. ... En cuanto a los egresos (venta), el mercado privado cubrirá todas las importaciones de bienes y servicios y pagos en moneda extranjera en general de la economía, excluyendo todas las importaciones de bienes y servicios y los pagos en moneda extranjera que serán cubiertos por el mercado oficial

...

11. Se establecerán los mecanismos de lugar con la Secretaría de Estado de Finanzas y sus dependencias, afin (sic) de que solamente puedan iquidarse (sic) y retirarse de las Aduanas las mercancías cubiertas con divisas adquiridas a través de los bancos comerciales y el Banco Central, cuya solicitud de importación haya sido verificada por esta última Institución.

12. El Banco Central cobrará a los usuarios de las transacciones oficiales y a los bancos comerciales por delegación de sus operaciones cambiarias, el equivalente en pesos dominicanos (RD\$) del dos y medio por ciento (2-1/2%) de la tasa de cambio de venta aplicada a cada transacción.⁸

17. This provision, originally introduced in 1991, has been amended several times to alter the rate from 2.5% to 5%, from 5% to 4.75%, and from 4.75% to 10%.⁹ The most recent modification which increased the foreign exchange fee to 10% was made effective by the First Resolution of the Monetary Board of the Dominican Republic dated 22 October 2003, which sets out:

⁸ "3. ... With regard to expenditure (sale), the private market will cover all imports of goods and services and foreign currency payments of the economy in general, excluding all imports of goods and services and foreign currency payments to be covered by the official market

...

11. Appropriate mechanisms shall be established with the Ministry of Finance and its agencies in order that only goods paid for with foreign currency purchased through the commercial banks and the Central Bank, whose import application has been verified by the latter institution, may be assessed and removed from customs.

12. The Central Bank shall charge the users of official transactions and the commercial banks for the delegation of their exchange operations the equivalent in Dominican dollars (DR\$) of two and one half per cent (2-1/2%) of the selling exchange rate applied to each transaction." (Courtesy translation)

Seventeenth Resolution of the Monetary Board dated 24 January 1991, Exhibit – HOND – 3(a)

⁹ The provision has been amended, *inter alia*, by the First Resolution of the Monetary Board dated 27 September 2001, and the First Resolution of 20 August 2002, Exhibit – HOND – 3(b) and 3(c).

... a partir de la fecha de la presente Resolución, la comisión cambiaría a las importaciones a que se refiere el Ordinal 12 (modificado) de la Decimoséptima Resolución adoptada por este Organismo en fecha 24 de enero de 1991, que cobra la Dirección General de Aduanas por delegación del Banco Central, sea incrementada a diez por ciento (10.0%), calculada sobre el valor de las importaciones a la tasa de cambio de venta de las divisas.

PARRAFO I: Esta disposición tiene carácter transitorio.

PARRAFO II: El desmonte de esta comisión se iniciará a partir del mes de febrero del año 2004 o cuando el mismo no suponga un impacto negativo sobre la estabilidad macroeconómica.¹⁰

18. The foreign exchange fee applies to both bound and unbound items.

C. THE REQUIREMENT TO AFFIX A STAMP ON IMPORTED CIGARETTES IN THE TERRITORY OF THE DOMINICAN REPUBLIC

19. The Dominican Republic requires that a stamp be affixed on all cigarette packages in the territory of the Dominican Republic. This requirement applies both to domestic and imported cigarette packages. For *domestic* cigarettes, the stamp may be affixed during the production process before the cellophane wrap is applied. In other words, domestic producers may affix the stamp on the cigarette packages at their own premises. However, the effect of this requirement for *imported* cigarettes is that the stamp can only be placed on the cellophane of each cigarette package after it is imported into the Dominican Republic, but prior to its sale. Foreign producers are not allowed to affix the stamp on their own premises abroad. Instead, the Dominican Republic requires that imported cigarette packages be placed in a bonded warehouse or a warehouse under the control of the Directorate-General of Internal Taxes ("DGIT") in the territory of the Dominican Republic. The stamp then has to be affixed on the imported cigarette packages in these warehouses in the presence of tax inspectors.

20. This requirement and their administrative procedures are established by the following pieces of legislation:

¹⁰ "... as of the date of this Resolution, the foreign exchange fee on imports referred to in (amended) Paragraph 12 of the Seventeenth Resolution adopted by this Board on 24 January 1991, collected by the Directorate General of Customs on behalf of the Central Bank, shall be increased by ten per cent (10.0%), computed on the value of the imports at the selling rate of foreign exchange.

PARAGRAPH I: This provision is transitional in nature.

PARAGRAPH II: The elimination of this fee shall begin in the month of February 2004 or when this will not negatively impact macroeconomic stability." (Courtesy translation)

First Resolution of the Monetary Board of the Dominican Republic dated 22 October 2003, Exhibit – HOND – 3(d).

1. Article 37 of Decree No. 79-03

21. Decree No.79-03 approved the Regulation on the implementation of Section IV of the Tax Code of the Dominican Republic ("Regulation 79-03"). Article 37 ("Article 37") of this Regulation provides that stamps must be affixed on imported cigarette packages in bonded warehouses under the control of the DGIT:

**ARTÍCULO 37. CONTROL DE PRODUCTOS DEL
TABACO MEDIANTE ESTAMPILLAS**

Los productores nacionales e importadores de cigarrillos y cigarros deberán colocar una estampilla en las cajetillas de cigarrillos o cajas de cigarros al momento de la producción o la importación. Para el caso de los cigarrillos, la producción nacional y la importación estarán sujetas a los controles descritos en los Párrafos I, II y III del presente artículo.¹¹

2. Articles 1 and 2 of Decree No. 130-02

22. Decree No. 130-02 provides in Article 1 that "local producers and [importers of] cigarettes" must affix in the national territory and under the supervision of the DGIT the stamps provided in Law No. 2461 of 18 July 1950 on Stamped Paper.

23. Articles 1 and 2 of this Decree mandate that the stamp, as "provided in Law No. 2461", be affixed in the territory of the Dominican Republic:

Artículo 1.- Los fabricantes locales y [importadores de] cigarrillos (sic), deberán colocar en territorio nacional y bajo supervisión de la Dirección General de Impuestos Internos, las estampillas dispuestas en la Ley No. 2461 del 18 de julio de 1950, sobre Especies Timbradas.

Artículo 2.- Las disposiciones establecidas en el Artículo primero del presente decreto serán igualmente aplicables en los casos de importación de cigarros y cigarrillos, en cuyo caso dicha mercancía deberán (sic) ser depositada en un almacén fiscal o un depósito bajo el control de la Dirección General de Impuestos Internos, donde se procederá a la colocación de las

¹¹Article 37: "CONTROL OF TOBACCO PRODUCTS BY MEANS OF STAMPS
Domestic producers and importers of cigarettes and cigars shall place a stamp on the cigarette packet or cigar box at the time of production or importation. In the case of cigarettes, domestic production and imports shall be subject to the controls described in paragraphs I, II and III of this article." (Courtesy translation)

estampillas de control dispuestas por la citada Ley No. 2461 del
1950.¹²

D. THE APPLICATION OF THE SELECTIVE CONSUMPTION TAX FOR CERTAIN IMPORTED
CIGARETTES

24. The Dominican Republic establishes a Selective Consumption Tax on certain products, such as tobacco products. In order to apply the tax rate to certain imported cigarettes, the Dominican Republic determines the value of these products based on the retail selling price of the so-called "nearest similar product." The relevant legislation and administrative practices are explained in detail below.

1. The Selective Consumption Tax as provided in the Tax Code¹³

25. By way of general background, Article 362 of the Tax Code provides that the following transactions are subject to the Selective Consumption Tax.: " ... the *transfer* of some production goods at manufacturer level, *imports* of such goods and the *provision or hiring* of the services described in ... Title [IV of the Tax Code]." Article 363 defines the term "transfer" as "[t]he conveyance of goods subject to this tax for consideration or free of charge at manufacturer or producer level." Article 363 also defines "importation" as "[t]he introduction of goods into the customs territory, for use and/or final consumption."¹⁴

26. The Selective Consumption Tax is an *ad valorem* internal tax. The Tax Code establishes rules to determine the applicable tax rate and tax base for cigarette products. The establishment of the tax rate is not at issue in this dispute. The matter at issue is the determination of the tax base. Article 367(b) establishes a different tax base for domestic and imported products as follows:

Cuando se trate de bebidas alcohólicas, cervezas o productos del tabaco, se tomará como base imponible el precio de venta al por menor, antes de ser aplicado este impuesto. El precio de venta al por menor a ser utilizado como base imponible se

¹² "Article 1.- Article 1.- The local manufacturers and [importers of] cigarettes shall apply, in the national territory and under the supervision of the *Dirección General de Impuestos Internos* (Directorate General of Internal Taxes), the stamps provided for in Law No. 2461 of 18 July 1950 on Stamped Paper.

Article 2.- The provisions of Article 1 of this decree shall also be applicable in cases of importation of cigars and cigarettes, in which case the said goods shall be placed in a bonded warehouse or warehouse under the control of the *Dirección General de Impuestos Internos*, where the control stamps provided for by the aforementioned Law No. 2461 of 1950 shall be applied." (Courtesy translation). Decree No. 130-02 of 11 February 2002. Exhibit – HOND – 5.

¹³ Exhibit – HOND – 6

¹⁴ Article 364 provides that the tax obligation arises for both domestic producers and importers, but at different points. For domestic products, the tax obligation arises when the domestic manufacturer "transfers" the products; whereas for imported products, the tax obligation arises when the importer "imports" the products.

obtendrá a partir de las encuestas de precios promedios realizadas por el Banco Central de la República Dominicana. *En caso de un producto que no sea producido en el mercado nacional, se le aplicará el precio al por menor utilizado para aquel producto más similar existente en el mercado nacional; es decir el sustituto más cercano. La frecuencia de ajuste de los precios al por menor será establecida en el Reglamento.*¹⁵ (Emphasis added)

27. Therefore, Article 367(b) of the Tax Code distinguishes between:

- (i) A product produced in the domestic market, the retail selling price of which is obtained from average-price surveys; and,
- (ii) A product which is not produced on the domestic market, the retail selling price of which is determined on the basis of the retail selling price of the "nearest similar product."

28. According to this provision, the determination of the value of domestic cigarettes for purposes of the tax must be based on the retail selling price of each brand, as provided in the survey. By contrast, the tax base for imported cigarettes is the value of the "nearest similar product on the domestic market." There are no regulations in the Tax Code which establish the criteria and procedures that should be used to determine the "nearest similar product on the domestic market".

2. Article 3 of Regulation 79-03

29. Article 3 of Regulation 79-03 provides that:

En el caso del literal b) del Artículo 367 del Código Tributario, se tomará como base imponible, el precio de venta al por menor, antes de aplicar este impuesto, el cual se determinará y actualizará anualmente, partiendo del precio promedio del mercado para tales productos, de acuerdo con la encuesta realizada por el Banco Central. *Si se importaran o se produjeran nuevos productos del alcohol o del tabaco que no figuren en la encuesta a partir de la cual se determinó el precio de venta al por menor, la base imponible para el nuevo*

¹⁵ Article 367 (b): "Where ... tobacco products are concerned, the retail selling price before this tax is applied shall be taken as the tax base. The retail selling price to be used as the tax base shall be obtained from average-price surveys conducted by the Central Bank of the Dominican Republic. *In the case of a product that is not produced on the domestic market, the retail price used for the nearest similar product on the domestic market, that is to say, the closest substitute, shall be applied. The frequency with which retail prices are adjusted shall be laid down in the Regulation.*" (Courtesy translation)

*producto será la del similar más cercano existente en el
mercado local.*¹⁶(Emphasis added)

30. Article 3 of Regulation 79-03 reaffirms that the tax base for both domestic and imported cigarettes is the retail selling price as determined by the average market price in accordance with the survey. However, not all imported cigarettes are included in the survey. Therefore, in order to determine the tax base for these products, the Dominican Republic uses the price of the "nearest similar product." The Dominican Republic has not published the criteria that it uses to determine the "nearest similar product."¹⁷

3. General Norm 02-96

31. The General Norm 02-96 specifies that the tax base for the Selective Consumption Tax for domestic goods shall be determined on the basis of the price to the retailer of the product. It provides in Article I:

Art I: Se modifica el artículo 1ro. de la Norma General No.3-94, de fecha 8 de octubre 1994 para que en lo sucesivo rija de la manera siguiente:“ARTICULO I“ La base imponible para el pago del Impuesto Selectivo al Consumo establecido en el Título IV de la Ley 11-92 (Código Tributario de la República Dominicana), para la transferencia de los alcoholes, cervezas o productos del tabaco, será el precio de venta AL POR MENOR.

PARRAFO.- La base imponible de los productos antes señalados será determinada incrementando el precio de lista (sin descuentos, bonificaciones, donaciones o similares, de acuerdo a lo que expresa el acápite (a) del artículo 367 de la Ley No. 11-92), en un 30% para los productos del alcohol, un 20% para las cervezas y 20% para los productos del tabaco, que son equivalentes a los porcentajes que resultan de las

¹⁶ "With respect to Article 367(b) of the Tax Code, the tax base shall be taken to be the retail selling price, before the tax is applied, which shall be determined and updated annually, on the basis of the average market price for such products, in accordance with a survey conducted by the Central Bank. If new... tobacco products, not represented in the survey on the basis of which the retail selling price was determined, are imported or produced, the tax base for the new product shall be that of the nearest similar product on the domestic market." (Courtesy translation)

¹⁷ Honduras notes that Article 43 of Regulation 79-03 states that: "[e]l presente Reglamento deroga y deja sin efecto todas las normas para la aplicación de este impuesto, como también todo decreto, reglamento y cualquier disposición administrativa que le sea contrario." ("the present regulation repeals and renders without effect all rules for the application of this tax, as well as any decree, regulation, or any other administrative provision that is contrary to its provisions.") (Courtesy translation.) It would appear from this provision that General Norm 02-96 and its predecessor, General Norm 03-94, are repealed. However, during consultations, the Dominican Republic stated that General Norm 02-96 is still applicable in order to determine the tax base for domestic cigarettes. The Dominican Republic also stated that the Article 367 of the Tax Code, Article 3 of Regulation 79-03 and General Norm 02-96 were the only laws or regulations that were applicable for determining the tax base for cigarettes.

diferencias entre los precios del fabricante y los precios AL
POR MENOR de los referidos productos”.¹⁸

32. Pursuant to this provision, the tax base for tobacco products, including domestic cigarettes, is determined by increasing by 20% of the listed price of the cigarettes. An explanation of how the final tax is calculated for domestic products is provided as an exhibit.¹⁹ The survey is not used to establish the tax base for these domestic products.

4. Administrative practice for determining the nearest similar product

33. Honduras exports to the Dominican Republic cigarettes of the brands Viceroy and Belmont. For the purpose of applying the Selective Consumption Tax to Viceroy cigarettes, the Dominican Republic bases the value of the imported product on what it considers to be the nearest similar product in the domestic market. The determination of what is the nearest similar product is therefore of critical importance to determine the actual amount to be paid in tax by importers. The Dominican Republic disregards the retail selling price of Viceroy as the relevant factor in determining the tax base for applying the Selective Consumption Tax. The Dominican Republic does not consider Lider cigarettes as the nearest similar product to Viceroy cigarettes, even though they both sell for the same retail selling price.²⁰ The result is that Viceroy cigarettes are deemed to be selling at a retail price higher than the actual selling price and therefore, are required to pay taxes based on this higher amount.²¹ The following chart illustrates the retail selling price and the actual tax paid for these products:

¹⁸ "Art I: Article 1 of General Rule No. 3-94 of 8 October 1994 is amended to provide as follows henceforth: "ARTICLE I "The tax base for the payment of the Selective Consumption Tax prescribed under Title IV of Law 11-92 (Tax Code of the Dominican Republic) for the transfer of alcoholic beverages, beers or tobacco products shall be the RETAIL price.

PARAGRAPH.- The tax base for the aforementioned products shall be arrived at by increasing the listed price (without discounts, bonuses, gifts or the like, pursuant to Article 367(a) of Law No. 11-92), by 30% for alcoholic beverages, 20% for beers and 20% for tobacco products, these being equivalent to the percentages deriving from the differences between the manufacturer's prices and the RETAIL prices of the aforementioned products." (Courtesy Translation) . General Norm No. 02-96 Exhibit – HOND - 7

¹⁹ An explanation as to how the Selective Consumption Tax (ISC) is calculated in the Dominican Republic is provided in Exhibit - HOND- 8.

²⁰Attestations of the retail selling price of Viceroy and a copy of an invoice for Lider. Exhibit – HOND – 9.

²¹ Administrative complaints made by the importer, BAT Republica Dominicana, before the Customs Authorities. Exhibit – HOND – 10.

Brand	Retail Selling Price	Selective Consumption Tax paid	% Actual Tax burden
Kent	RD\$ 22.00	RD\$ 6.54	29.73%
Marlboro	RD\$ 26.00	RD\$ 7.73	29.73%
Belmont	RD\$ 20.00	RD\$ 6.13	30.65%
Nacional	RD\$ 24.00	RD\$ 7.36	30.65%
Viceroy	RD\$ 18.00	RD\$ 6.54	36.33%
Lider	RD\$ 18.00	RD\$ 5.34	29.66%

(Information applicable during the period of 17 March – 1 August 2003²²)

34. This table illustrates that the manner in which the Dominican Republic determines the tax base for certain imported cigarettes leads to the imposition of a Selective Consumption Tax that is higher than that applied to domestic cigarettes. The result is that imported cigarettes and domestic cigarettes that are sold for the same retail selling price are taxed differently; imported cigarettes are taxed at a higher rate than the domestic cigarettes which are sold at the same retail selling price.

E. THE ADMINISTRATION OF THE LAW FOR DETERMINING THE TAX BASE FOR CIGARETTES

35. Article 367(b) of the Tax Code, Article 3 of the Regulation 79-03 and Article I of the General Norm 02-96 are the relevant laws governing the application of the Selective Consumption Tax on cigarettes, particularly with respect to the determination of the "nearest similar product". The determination of what is the nearest similar product is required for the imposition of the Selective Consumption Tax on imported cigarettes. As noted above, the tax base for imported cigarettes is determined by the value of the nearest similar product. However, the relevant laws do not contain any criteria to determine what is the "nearest similar product" in the Dominican Republic's market.²³ Therefore, the Dominican Republic has wide scope to determine what is the "nearest similar product" to certain brands of imported cigarettes, such as Viceroy.

F. THE LACK OF PUBLICATION OF THE SURVEY ON WHICH THE SELECTIVE CONSUMPTION TAX IS TO BE BASED

36. As noted above, Article 367(b) of the Tax Code and Article 3 of the Regulation 79-03 both require that the Central Bank of the Dominican Republic conduct a survey in order to

²² These prices were effective until 1 August 2003. After 1 August 2003, the retail selling prices of all brands, both domestic and imported, have been increasing constantly due to the inflationary pressures in the Dominican Republic.

²³ During consultations the Dominican Republic stated that the only pieces of legislation relevant to the determination of the tax base of domestic and imported cigarettes were Article 367 of the Tax Code, the Regulation 79-03 and the General Norm 02-96.

determine the retail selling price to be used as the tax base for the application of the Selective Consumption Tax.

37. Article 367(b) establishes a different tax base for domestic and imported products as follows:

Cuando se trate de bebidas alcohólicas, cervezas o productos del tabaco, se tomará como base imponible el precio de venta al por menor, antes de ser aplicado este impuesto. El precio de venta al por menor a ser utilizado como base imponible se obtendrá a partir de las encuestas de precios promedios realizadas por el Banco Central de la República Dominicana. *En caso de un producto que no sea producido en el mercado nacional, se le aplicará el precio al por menor utilizado para aquel producto más similar existente en el mercado nacional; es decir el sustituto más cercano. La frecuencia de ajuste de los precios al por menor será establecida en el Reglamento.*²⁴
(Emphasis added)

38. Article 3 of Regulation 79-03 provides that:

En el caso del literal b) del Artículo 367 del Código Tributario, se tomará como base imponible, el precio de venta al por menor, antes de aplicar este impuesto, el cual se determinará y actualizará anualmente, partiendo del precio promedio del mercado para tales productos, de acuerdo con la encuesta realizada por el Banco Central.²⁵

39. The survey, which is supposed to reflect average prices, should be the primary source for the determination of the retail selling price for cigarettes. Therefore, the information contained in the survey is of critical importance to traders for the following reasons:

- (i) The retail selling price as determined by the survey should be used as the tax base for domestic cigarettes. This amount should subsequently be used to determine the tax base of imported cigarettes which have not yet been included in the survey.

²⁴"Where ... tobacco products are concerned, the retail selling price before this tax is applied shall be taken as the tax base. The retail selling price to be used as the tax base shall be obtained from average-price surveys conducted by the Central Bank of the Dominican Republic. In the case of a product that is not produced on the domestic market, the retail price used for the nearest similar product on the domestic market, that is to say, the closest substitute, shall be applied. The frequency with which retail prices are adjusted shall be laid down in the Regulation." (Courtesy translation)

²⁵"With respect to Article 367(b) of the Tax Code, the tax base shall be taken to be the retail selling price, before the tax is applied, which shall be determined and updated annually, on the basis of the average market price for such products, in accordance with a survey conducted by the Central Bank." (Courtesy translation)

- (ii) In addition, as imported goods may also be included in the survey, the prices listed in the survey would be the primary source for determining the tax base for the selective Consumption Tax to be applied for these products.

40. However, the Dominican Republic has failed to publish, or otherwise make available to importers, any of these surveys. As a result, traders are not apprised of the basis upon which their products will be taxed.

G. THE BOND REQUIREMENT FOR IMPORTERS OF CIGARETTES

41. Article 376 of the Tax Code requires that domestic producers of alcohol and tobacco products post a bond:

Ningún producto de alcohol o de tabaco podrá ser producido en la República Dominicana a menos que la persona que desee elaborar dichos productos se haya previamente registrado y haya suministrado a la Administración Tributaria una fianza para asegurar que toda obligación fiscal establecida en virtud de éste capítulo será cumplida.²⁶

42. Even though Article 376 of the Tax Code requires that only domestic producers post a bond, Article 14 of Regulation 79-03 subsequently introduced a bond requirement for importers of cigarettes:

A los fines del Artículo 376 del Código Tributario, el monto de la fianza será de cinco millones de pesos (RD\$5,000,000), indexado por inflación. Dicha fianza deberá ser provista a la DGII tanto por importadores como por fabricantes locales de bebidas alcohólicas, cervezas y productos del tabaco y deberá ser emitida por una compañía de seguro o institución bancaria acreditada en el país.²⁷

43. There is now a bond requirement for both domestic producers and importers. The purpose of this bond requirement is ostensibly to ensure that the Selective Consumption Tax is paid.²⁸ However, Honduras notes that the timing of when the Selective Consumption Tax

²⁶"No alcohol or tobacco product may be produced in the Dominican Republic unless the person wanting to manufacture the said products has previously registered and posted with the Tax Administration a bond intended to ensure that any tax obligation established under this Chapter is met." (Courtesy translation)

²⁷ "For the purposes of Article 376 of the Tax Code, the amount of the bond shall be five million pesos (RD\$5,000,000) indexed for inflation. This bond shall be posted with the Directorate-General of Internal Taxes (DGIT) by both importers and domestic manufacturers of alcoholic beverages, beer and tobacco products and shall be issued by a domestically accredited insurance company or bank." (Courtesy translation)

²⁸ Article 376 is part of Chapter VII of Section IV of the Tax Code and provides that the bond is intended to ensure that any tax obligation under that Chapter is met. However, Honduras notes that Chapter VII

must be settled with the government differs between importers and domestic producers. An importer must liquidate and pay the Selective Consumption Tax together with the corresponding customs duties at the moment that the products enter into the Dominican Republic. This is provided in:

ARTICULO 369.- IMPORTACIONES.

En el caso de importación de bienes el impuesto se liquidará y pagará conjuntamente con los impuestos aduaneros correspondientes, en la forma y condiciones que establezca los Reglamentos.²⁹

44. However, domestic producers must settle the Selective Consumption Tax on the 20th day following the month in which the actual sale (or transfer) occurred for domestic products:

ARTICULO 353.- PERIODO FISCAL Y DECLARACION JURADA.

- a) El período fiscal es el mes calendario.
- b) Obligación de presentar declaración jurada. Los contribuyentes de este impuesto deberán presentar una declaración jurada de las actividades gravadas, en la forma y condiciones que establezca el Reglamento.
- c) Plazo para la presentación y pago del impuesto. La declaración deberá ser presentada en el transcurso de los primeros veinte (20) días de cada mes, aún cuando no exista impuesto a pagar.³⁰

45. As domestic producers only have an obligation to pay the amount of the tax due and owing to the government on the 20th day in the month following the month in which the actual sale (or transfer) occurred, it would appear that the bond is a security in the event that

does not establish any tax obligations. Nevertheless, the Dominican Republic stated that the purpose of the bond requirement was to secure the payment of any tax obligation arising from the Tax Code, including the Selective Consumption Tax.

²⁹"ARTICLE 369.- IMPORTS.

In the case of imported goods, the tax shall be assessed and paid together with the corresponding customs duties and taxes, in the form and under the conditions laid down in the Regulations." (Courtesy translation)

³⁰ "ARTICLE 353.- FISCAL PERIOD AND SWORN STATEMENT.

(a) The fiscal period is the calendar month.
(b) Obligation to file a sworn statement. Payers of this tax shall submit a sworn statement of the taxed activities, in the form and under the conditions laid down in the Regulations.
(c) Time-limit for filing and payment of the tax. The statement shall be filed in the course of the first twenty (20) days of each month, even if there is no tax to pay." (Courtesy translation)

Even though this provision establishes the fiscal period and the requirements for the payment of the sales taxes (ITBIS), it is also applicable for the settlement of the Selective Consumption Tax by virtue of Article 368 of the Tax Code on the Liquidation and Payment of the Selective Consumption Tax.

the tax obligation is not properly discharged at that time. However, as noted above, importers are required to pay the full amount of the Selective Consumption Tax upon the importation of the product. Therefore, with respect to the importers, there is no potential Selective Consumption Tax liability that the bond requirement would secure as the tax obligation has already been discharged.

46. In addition, the bond requirement is a fixed amount of RD\$ 5 million that must be posted by each importer and each domestic producer. In contrast, the Selective Consumption Tax is dependent upon variable factors such as monthly volumes of sales and changes in the retail selling price according to market factors. Therefore, there is no direct relationship between the amount required to be guaranteed (*i.e.* the fixed amount of the bond) and the actual amount giving rise to the tax. These two amounts are not commensurate.

IV. LEGAL ARGUMENT

A. THE SURCHARGE IS INCONSISTENT WITH ARTICLE II:1(B) OF THE GATT.

1. Applicable provisions

47. Article II:1(b), second sentence, of the GATT provides:

[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.

2. The surcharge is a duty or charge other than an ordinary customs duty.

48. As noted above, the Dominican Republic imposes on all goods a surcharge that is described as the "transitional surcharge for economic stabilisation." Article 2 of Decree 646-03 of 30 June 2003 provides:

Se aplicará un recargo transitorio de estabilización económica del 2%, sobre el valor CIF del universo de los bienes incluidos en las Partidas Arancelarias de la Nomenclatura del Sistema Armonizado de Designación y Codificación de Mercancías

cuya destinación sea el régimen de despacho a consumo.³¹

49. This Decree further provides that " ... la obligación de pagar el recargo transitorio ... nace conjuntamente con la obligación tributaria aduanera y los ingresos generados por el mismo serán entregados íntegramente al Banco Central de la República Dominicana."³²

50. The surcharge applies to both bound and unbound items. In the Dominican Republic's Schedule of Concessions, cigarettes which fall under the 4-digit tariff heading 2402 have a bound rate of 40%. As the surcharge applies to the bound item of cigarettes, the surcharge falls within the scope of Article II:1(b), second sentence, of GATT.

51. Article 2 of Decree 646-03 refers to two different and distinct types of amounts that are payable: (i) the surcharge, and (ii) the customs duty payable. The term "customs duty payable" on its face comprises the obligation to pay all duties, including "ordinary customs duties". The obligation to pay the surcharge – while this term is not specifically defined – arises concurrently with the customs duty payable. It follows that the obligation to pay the surcharge is an obligation separate from that of the obligation to pay the "customs duty", including ordinary customs duties. In other words, it is an "other" duty or charge within the meaning of Article II:1(b), second sentence. The term "other" means "existing besides or distinct from that or those already specified or implied; further, additional."³³ The placement of the term "transitional surcharge" beside the term "customs duty payable" indicates that it is a distinct type of charge or duty. The surcharge is a "duty or charge" *other* than an "ordinary customs duty" within the meaning of Article II:1(b), second sentence, of the GATT.

3. The surcharge is imposed on, or in connection with, importation.

52. The surcharge is " ... levied on the *c.i.f* value of [all] goods included in the Harmonized Commodity Description and Coding System and which fall under the regime of customs clearance for consumption" (emphasis added). It is only products that are imported that would fall under "the regime of customs clearance for consumption." Therefore, the surcharge is imposed on, or in connection with, the importation of all goods.

³¹ "A 2% transitional surcharge for economic stabilization shall be levied on the *c.i.f* value of the universe of goods [all goods] included in the Harmonized Commodity Description and Coding System and which fall under the regime of customs clearance for consumption." (Courtesy translation)

³² "[t]he obligation to pay the transitional surcharge ... arises concurrently with the customs duty payable and the revenues thereby generated shall be delivered in their entirety to the Central Bank of the Dominican Republic." (Courtesy translation)

³³ *The New Shorter Oxford English Dictionary*, L. Brown (ed.), (Clarendon Press, 1993), Vol. II, p. 2031.

4. The Dominican Republic did not record the surcharge in its Schedule of Concessions and it is therefore inconsistent with Article II:1(b), second sentence, in the light of the Understanding on Article II:1(b).

53. The Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994 ("the Understanding") provides:

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".

54. Paragraph 2 of the Understanding provides that the relevant date as of which a WTO Member's "other duties or charges" must be bound:

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.

55. Therefore, as of 15 April 1994, all WTO Members had to record all charges and duties in their respective Schedules of Concessions.

56. The Dominican Republic did not record this surcharge. Indeed, as the surcharge did not exist as of 15 April 1994, it was not possible for it to be recorded in the Dominican Republic's Schedule of Concessions.

5. The surcharge is in excess of the duties or charges imposed as of 15 April 1994.

57. Article II:1(b), second sentence, read together with the Understanding, prohibits Members after 15 April 1994 from imposing "other duties or charges" in excess of the binding in the "other duties and charges" column of the Schedule. As the Dominican Republic did not record the surcharge as an "other duty or charge" in its Schedule of Concessions, any surcharge that it now introduces must be "in excess of" those set out and provided in its Schedule.

58. It follows from the above that the 2% surcharge is in excess of, and therefore is inconsistent with, the Dominican Republic's obligations under Article II:1(b), second sentence, of the GATT.³⁴

B. THE FOREIGN EXCHANGE FEE IS INCONSISTENT WITH ARTICLE II:1 (B) OF THE GATT.

59. The basis for the WTO-inconsistency of the foreign exchange fee is the same as that of the surcharge. However, for the sake of completeness, Honduras reiterates its arguments below in connection with the foreign exchange fee.

1. Applicable provisions

60. The applicable provision is Article II:1(b) of the GATT, which is cited above.³⁵

³⁴ Honduras submits that as the surcharge is inconsistent with the specific obligation set out in Article II:1(b), second sentence, it is consequently inconsistent with the general prohibition set out in Article II:1(a) of the GATT. The Appellate Body has explained the relationship between Article II:1(a) and Article II:1(b), first sentence, as follows:

Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favourable than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a): that is, the application of ordinary customs duties in excess of those provided in the Schedule.

.... Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members "treatment no less favourable than that provided for" in its Schedule. It is evident to us that the application of customs duties in excess of those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes "less favourable" treatment under the provisions of Article II:1(a). A basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members.

(Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items*, WT/DS56/AB/R, paras. 45 - 47.)

Even though this statement of the Appellate Body refers to the relationship between Article II:1(a) and Article II:1(b), *first* sentence, Honduras submits that the principle underlying this relationship remains equally valid for the relationship between Article II:1(a) and Article II:1(b), *second* sentence. Honduras considers that Article II:1(b), second sentence, read together with the Understanding, prohibits Members from carrying out a specific kind of practice, that is, the introduction of "other duties or charges" not recorded in the Member's Schedule of Concessions. The very introduction of the surcharge, which is an "other duty or charge" is therefore a specific kind of practice that is prohibited by Article II:1(b), second sentence, and to paraphrase the Appellate Body, will always be inconsistent with paragraph Article II:1(a). In addition, the imposition of an other duty or charge "in excess of" those applied as of 15 April 1994 is also a specific kind of practice prohibited by Article II:1(b), second sentence, and therefore is inconsistent with Article II:1(a).

³⁵ See *supra*, para. 47.

2. The foreign exchange fee is a duty or charge other than an ordinary customs duty.

61. As noted above, the Dominican Republic imposes a foreign exchange fee on all imports at the same time as it imposes the ordinary customs duties, namely, upon importation.³⁶ The "ordinary customs duties" are levied upon the entry of goods into a customs territory. The foreign exchange fee applies to both bound and unbound items. In the Dominican Republic's Schedule of Concessions, cigarettes which fall under the 4-digit tariff heading 2402 have a bound rate of 40%. As the foreign exchange fee applies to the bound item of cigarettes, the foreign exchange fee falls within the scope of Article II:1(b), second sentence, of the GATT.

62. As a result, the foreign exchange fee is a duty or charge "other" than an ordinary customs duty.³⁷

3. The foreign exchange fee is imposed on, or in connection with, importation.

63. The First Resolution of 22 October 2003 states clearly that the foreign exchange fee referred to in (amended) Paragraph 12 of the Seventeenth Resolution adopted by this Board on 24 January 1991 is a "foreign exchange fee *on imports*" (emphasis added). Furthermore, the foreign exchange fee is collected by Customs at the time of importation, and is "computed on the value of the imports." As it is applied on the value of imports and at the time of importation, the foreign exchange fee clearly is a duty or charge other than "ordinary customs duties" imposed on, or in connection with, importation, within the meaning of Article II:1(b), second sentence.

4. The Dominican Republic did not record the foreign exchange fee in its Schedule of Concessions and it is therefore inconsistent with Article II:1(b), second sentence, in the light of the Understanding on the Interpretation of Article II:1(b) of the GATT.

64. The Understanding requires that all duties or charges, other than ordinary customs duties, must be recorded in a Member's Schedule of Concessions.

³⁶ See, for example, a Customs Declaration issued by the Directorate-General of Customs of the Dominican Republic. Exhibit – HOND - 11. Honduras notes that the legal basis for the Monetary Board's authority to levy the foreign exchange fee was in Article 25 (f), (h) and (r) of the Organisation Act of the Central Bank of the Dominican Republic of 29 December 1962. Organisation Act of the Central Bank of the Dominican Republic of 29 December 1962. Exhibit – HOND - 12

³⁷ Article II:1(b) applies to "other duties or charges" of any kind, whether they take the form of an "exchange action" or a "trade action". For the purpose of making a finding under Article II:1(b), therefore, the Panel need not decide whether the fee is an "exchange action" or a "trade action" within the meaning of Article XV:4 of the GATT.

65. Article II:1(b), second sentence, read together with the Understanding, prohibits Members after 15 April 1994 from imposing "other duties or charges" other than those that were recorded in the "other duties or charges" column of that Member's Schedule. Honduras notes that the foreign exchange fee was never recorded as an "other duty or charge" in the Dominican Republic's Schedule of Concessions.

66. Therefore, Honduras submits that the foreign exchange fee is inconsistent with Article II:1(b), second sentence, in the light of the Understanding on Article II:1(b).

5. The current foreign exchange fee is in excess of the duties or charges imposed as of 15 April 1994.

67. If the Panel were to find that the imposition of the foreign exchange fee is WTO-consistent notwithstanding the Dominican Republic's failure to record it as an "other duty or charge" in its Schedule of Concessions, Honduras submits that it is nevertheless "in excess of" the rate applied as of 15 April 1994. The legislation establishing the foreign exchange fee was enacted in 1991. However, it provided that the fee could be levied at a rate of 2.5%. Therefore, Honduras notes that the rate of 2.5% that was applied before 15 April 1994 is lower than the rate of 10% that is currently applied.³⁸ Therefore, Honduras submits that the foreign exchange fee is inconsistent with Article II:1(b), second sentence.

C. THE REQUIREMENT TO AFFIX A STAMP IN THE TERRITORY OF THE DOMINICAN REPUBLIC IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT.

1. The Applicable provisions

68. Article III:4 of the GATT provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ...

69. Honduras submits that, by requiring that the tax stamp of cigarette packages be affixed in the territory of the Dominican Republic, the Dominican Republic accords treatment

³⁸ The foreign exchange fee is inconsistent with Article II:1(b), second sentence, because it is imposed in excess of the Dominican Republic's recorded bindings in the "other duties or charges" column in its Schedule of Concessions. As stated above, the Appellate Body in *Argentina – Textiles* has explained the relationship between Article II:1(a) and Article II:1(b), first sentence. Honduras submits that the principle underlying this relationship remains equally valid for the relationship between Article II:1(a) and Article II:1(b), second sentence. The foreign exchange fee, which is *in excess* of the rate applied as of 15 April 1994, is inconsistent with Article II:1(b), second sentence, and is consequently inconsistent with Article II:1(a).

less favourable to imported cigarettes than that accorded to domestic cigarettes, in a manner inconsistent with Article III:4 of the GATT

70. The Appellate Body has stated that, in order to establish a violation of Article III:4, three elements must be satisfied:

...that the imported and domestic products at issue are 'like products'; that the measure at issue is a 'law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, or use'; and that the imported products are accorded 'less favourable' treatment than that accorded to like domestic products.³⁹

71. These three elements are met as demonstrated below.

2. Imported and domestic cigarettes are "like products" within the meaning of Article III:4.

72. The Appellate Body has explained that the notion of "like products" in Article III:4 as follows:

We turn to consideration of how a treaty interpreter should proceed in determining whether products are "like" under Article III:4. ... The Report of the Working Party on Border Tax Adjustments outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body.* This approach has, in the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products.* We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

The kind of evidence to be examined in assessing the "likeness" of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant

³⁹ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, para. 133.

evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue. We have noted that, under Article III:4 of the GATT 1994, the term "like products" is concerned with competitive relationships between and among products. Accordingly, whether the Border Tax Adjustments framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are – or could be – in a competitive relationship in the marketplace.⁴⁰

(* Footnotes omitted.)

73. In *EC- Bananas*, the panel examined the factors normally used to determine likeness: customs classification, end-use, and the properties, nature and quality of the product, and concluded that all of these factors support a finding that bananas from all sources are "like" for the purposes of the provisions at issue.⁴¹ Applying the four criteria set out above, Honduras submits that, for the purposes of Article III:4, imported cigarettes and domestic cigarettes of all brands are like products.

74. In general, both imported and domestic cigarettes have the same physical properties (i.e. tobacco) and similar presentation⁴²; they have the same end-use (i.e. they are smoked); they are interchangeable for consumers (e.g. many consumers do switch from one brand to another) and; they are classified under the same tariff heading.

3. The requirement of affixing a stamp on cigarette products in the territory of the Dominican Republic is a requirement that affects the internal sale of imported cigarettes.

75. The requirement to affix a stamp on both imported and domestic cigarettes is found in Article 37 of the Regulation and Articles 1 and 2 of Decree 130-02. The fulfilment of this requirement is a prerequisite for withdrawing the cigarettes from the warehouse in order that they may be distributed and sold in the Dominican Republic and, therefore, affects the internal sale of imported cigarettes.

⁴⁰ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/ABR, paras. 101-103.

⁴¹ Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R, ECU, para. 7.62-7.63. This approach was also adopted by the Panel in *United States- Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, para. 6.7-6.9.

⁴² Copies of imported and domestic cigarette packages. Exhibit – HOND – 13. The original cigarette packages will be circulated at the first substantive meeting with the Panel.

4. The requirement of affixing a stamp in the territory of the Dominican Republic accords treatment less favourable to imported cigarettes than that accorded to domestic cigarettes.

76. The requirement of affixing a stamp in the territory of the Dominican Republic applies to both domestic and imported cigarettes and is, as such, a formally identical requirement. Nevertheless, it has been recognised in GATT jurisprudence that:

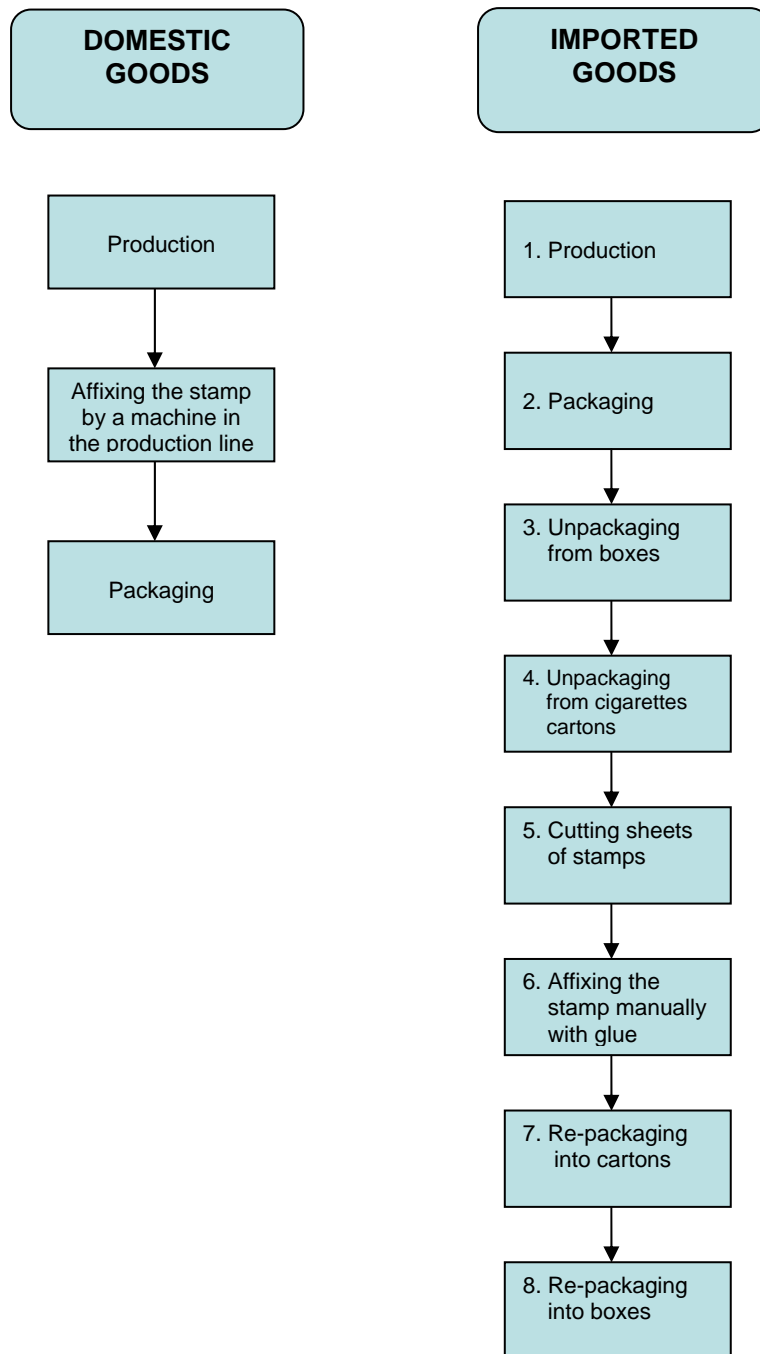
... there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported products to ensure that the treatment accorded to them is in fact no less favourable ...⁴³

77. In the case at hand, the identical requirement of affixing the stamp in the Dominican Republic imposes the following additional steps and costs for importers of cigarettes.

(a) Additional steps

78. As the stamp must be affixed in the territory of the Dominican Republic, imported cigarettes must undergo additional steps in order to comply with this requirement. For domestic cigarettes, no additional steps are required to so comply; the stamp may be affixed during the production process prior to the final packaging of the product. In contrast, in the case of imported cigarettes the affixing of the stamp requires a separate process after cigarettes have been produced and packed in the exporting country. This additional process requires the reopening of boxes and cartons, the affixation of the stamps on the cigarette packages (over the cellophane), and the repackaging of cartons and boxes. The following diagram illustrates the difference in processes:

⁴³ GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, para. 5.11; See also, GATT Panel Report, *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, paras. 5.30 – 5.31.



79. This diagram illustrates that imported cigarettes have to undergo several additional steps. First, the importer must reopen the boxes and then reopen the cigarette cartons in order to remove the cigarette packages so that the stamp may be affixed on the cigarette packages. The sheets of stamps have to be individually cut and then individually glued onto the packages. Subsequently, the cigarette packages have to be replaced in the cartons and then replaced in the boxes. All these additional steps require the importer to hire additional labour to carry out these tasks in the Dominican Republic. Honduras submits photographs which provide graphic evidence of the burdensome steps that the importer has to undertake to comply with this requirement.⁴⁴

80. Domestic producers, on the other hand, do not have to carry out all these additional steps.

81. In addition, the fact that the stamp on imported cigarettes is placed over the cellophane aesthetically detracts from the overall presentation of the final product. Cigarettes manufactured in the Dominican Republic are allowed to have the stamp added to the package before the cellophane wrap is applied and during the production process. As a result, imported cigarettes cannot be as attractively packaged as domestic cigarettes.

(b) Additional costs

82. The costs to the importer of affixing the stamp in the territory of the Dominican Republic amount to US\$0.9 per thousand cigarettes; that is 9.70% of the c.i.f. average price.⁴⁵ Honduras does not have access to the costs incurred by a domestic producer in the Dominican Republic to affix the stamp in the course of the production process. However, a report from PriceWaterhouseCoopers that demonstrates that the cost for a cigarette producer in Honduras for affixing the stamp during the overall production process is US\$0,01 per thousand cigarettes; that is 0,1% of the c.i.f. average cost.⁴⁶ It is reasonable to assume that these costs in terms of percentage would be the same for a domestic producer in the Dominican Republic.

83. The Appellate Body has stated:

[w]hether or not imported products are treated 'less favourably' than like domestic products should be assessed ... by examining whether a measure modifies the *conditions of*

⁴⁴ Exhibit – HOND – 14

⁴⁵ Report by the Auditors, Berman, Ceballos & Asociados, dated 9 December 2003, Exhibit –HOND-

⁴⁶ Report by the Auditors, PricewaterhouseCoopers, dated 10 February 2004, Exhibit – HOND – 16.

competition in the relevant market to the detriment of imported products.⁴⁷

84. In the light of the foregoing analysis, Honduras submits that the requirement to affix the stamp in the Dominican Republic modifies the *conditions of competition* for imported cigarettes in the Dominican Republic to their detriment, and thus treats imported cigarettes less favourably.⁴⁸

85. Based on the foregoing, Honduras submits that the measure at issue is inconsistent with Article III:4 of the GATT.

D. THE APPLICATION OF THE SELECTIVE CONSUMPTION TAX FOR CERTAIN IMPORTED CIGARETTES IS INCONSISTENT WITH ARTICLE III:2 OF THE GATT.

1. Applicable provisions

86. Article III:2 of the GATT provides:

The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products.

87. The Appellate Body has construed this provision as follows:

Read in their context, and in the light of the overall object and purpose of the *WTO Agreement*, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are 'like' and, second, whether the taxes applied to the domestic product are 'in excess of' those applied to the like domestic product. If the imported and domestic products are 'like products', and if the taxes applied to the imported products are 'in excess of' those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.⁴⁹

⁴⁷ Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, para. 137.

⁴⁸ Honduras considers that the Dominican Republic could still fulfil the objectives intended by the stamp affixation requirement through other means that do not modify the conditions of competition for the imported products. For example, the Dominican Republic could permit the stamp to be affixed in the exporting country under controlled circumstances.

⁴⁹ Appellate Body Report, *Japan Taxes on Alcoholic Beverages*, WT/DS8/ABR, WT/DS10/ABR, WT/DS11/AB/R, p. 18-19.

88. Therefore, applying the test as set out by the Appellate Body to the facts of this dispute, Honduras submits that the measure at issue is inconsistent with Article III:2 of the GATT for the reasons as set out below.

2. Domestic and imported cigarettes are "like products" within the meaning of Article III:2, first sentence.

89. The Appellate Body has stated that it agrees "... with the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis."⁵⁰ Honduras has established above that imported and domestic cigarettes are "like products."⁵¹

3. Certain imported cigarettes are subject to internal taxes in excess of those applied to like domestic products.

90. The Dominican Republic treats like products which sell for the same retail selling price differently.

91. In other words, the Dominican Republic establishes the tax base for certain imported cigarettes such as Viceroy on the basis of what it determines to be the retail selling price of the "nearest similar product," whereas it determines the tax base for its domestic cigarettes such as Lider and Marlboro on their actual retail selling prices.

92. This difference in approach in determining the tax base has led to various complaints being filed with the courts in the Dominican Republic.⁵²

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

⁵⁰Appellate Body Report, *Japan Taxes on Alcoholic Beverages*, WT/DS8/ABR, WT/DS10/ABR, WT/DS11/AB/R, p. 20.

⁵¹ If the Panel were to find that domestic and imported cigarettes were not like products, Honduras submits that domestic and imported cigarettes are nevertheless directly competitive or substitutable and are not similarly taxed in accordance with Article III:2 and Note *Ad Article III:2* of the GATT.

⁵² See *supra*, footnote 21.

94. Honduras provides the following table which illustrates the retail selling price of the relevant products:

Brand	Retail Selling Price	Selective Consumption Tax paid	% Actual Tax burden
Kent	RD\$ 22.00	RD\$ 6.54	29.73%
Marlboro	RD\$ 26.00	RD\$ 7.73	29.73%
Belmont	RD\$ 20.00	RD\$ 6.13	30.65%
Nacional	RD\$ 24.00	RD\$ 7.36	30.65%
Viceroy	RD\$ 18.00	RD\$ 6.54	36.33%
Lider	RD\$ 18.00	RD\$ 5.34	29.66%

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

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

96. Due to this difference in taxation, the Selective Consumption Tax applied to Honduras' Viceroy cigarettes is in excess of the Selective Consumption Tax applied to its like domestic product, Lider. Viceroy cigarettes have a higher tax burden of 36.33% as compared to the tax burden of 29.66% for Lider.

97. The measure at issue is therefore inconsistent with Article III:2, first sentence, of the GATT.

E. THE FAILURE TO ESTABLISH AND/OR APPLY TRANSPARENT AND GENERALLY APPLICABLE CRITERIA FOR DETERMINING THE VALUE OF IMPORTED CIGARETTES IS INCONSISTENT WITH ARTICLE X:3(A) OF THE GATT.

1. Applicable provisions

98. Article X:3(a) of the GATT provides:

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

99. The "laws, regulations, decisions and rulings" are defined in Article X:1 as follows:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting

their sale, distribution, transportation, insurance, warehousing
inspection, exhibition, processing, mixing or other use.

2. The law governing the Selective Consumption Tax falls under Article X:1 of the GATT.

100. Article 367 (b) of the Tax Code, Article 3 of the Regulation and Article I of the General Norm 02-96 are "laws, regulations ... of general application ... pertaining to ... taxes or other charges". Therefore, these measures fall under the scope of Article X:1 of the GATT.

3. The administration of the Selective Consumption Tax is not conducted in a reasonable manner.

101. The Dominican Republic administers the provisions governing the Selective Consumption Tax in a manner that is not reasonable; in particular, with respect to determination of the "nearest similar product on the domestic market."

102. Honduras submits that there is no adequate reason for the Dominican Republic to disregard the actual retail selling price of Lider when determining the tax base for Viceroy. As stated above, both Viceroy and Lider have the same retail selling price. The Dominican Republic, however, relies on the price of Kent or Marlboro to determine the "nearest similar" product to Viceroy in the Dominican Republic's market.

103. Therefore, this unreasonable administration of the criteria to determine the "nearest similar product" to Viceroy is inconsistent with Article X:3(a) of the GATT.

104. The Panel in *Argentina – Bovine Hides* emphasised that:

Article X:3(a) requires an examination of the *real effect that a measure might have on traders operating in the commercial world*. This, of course, does not require a showing of trade damage, as that is generally not a requirement with respect to violations of the GATT 1994. But it can involve an examination of whether there is a *possible impact on the competitiveness situation* due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc."⁵³ (Emphasis added.)

105. As shown above, the determination of "nearest similar product" as one with a higher retail selling price leads to the imposition of the Selective Consumption Tax on certain imported cigarettes in excess of like domestic cigarettes. Therefore, this unreasonable

⁵³ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted on 16 February 2001, paragraphs 11.77.

administration of the laws and regulations governing the Selective Consumption Tax, particularly the manner in which the "nearest similar product" is determined, has an impact on the competitiveness of imported cigarettes.

F. THE FAILURE TO PUBLISH THE SURVEYS THAT ARE USED TO DETERMINE THE SELECTIVE CONSUMPTION TAX IS INCONSISTENT WITH ARTICLE X:1 OF THE GATT.

1. Applicable provisions

106. Article X:1 of the GATT provides, in relevant part:

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

2. The surveys to be used to determine the rates for the Selective Consumption Tax fall under Article X:1.

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

3. The surveys to be used to determine the Selective Consumption Tax have not been published.

108. However, the survey has not been made publicly available. A trader has requested access to the survey from the Dominican Republic but this request was not complied with.⁵⁴ According to Article X:1, the survey should have been published *promptly* in such a manner as to enable governments and traders to become acquainted with them.

⁵⁴ Letters from the BAT Company Dominican Republic to the DGIT and Customs requesting the survey. Exhibit – HOND – 17.

109. A WTO panel has stated that:

Indeed, Article X:1 requires the prompt publication of trade-related regulation “so as to enable governments and *traders* to become acquainted with them.”⁵⁵

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

G. THE REQUIREMENT TO POST A BOND IS INCONSISTENT WITH ARTICLE XI:1 OF THE GATT, OR, IN THE ALTERNATIVE, IF THE BOND REQUIREMENT IS DETERMINED TO BE AN INTERNAL MEASURE, IS INCONSISTENT WITH ARTICLE III:4 OF THE GATT.

1. Applicable provisions

111. Article XI:1 of the GATT provides:

No ... restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [Member] on the importation of any product of the territory of any other [Member] ...

112. If the bond requirement were considered to be an internal measure, then the provisions of Article III.4, which is cited above, would apply.

2. The requirement to post a bond as stated in the applicable law is a restriction inconsistent with Article XI:1.

113. In the light of Article 14 of the Regulation, importation would not be allowed unless the bond requirement is complied with. Therefore, the bond requirement constitutes a restriction imposed on the importation of cigarettes into the Dominican Republic. In GATT/WTO jurisprudence, panels have interpreted Article XI:1 as a comprehensive ban of all types of limitations on the importation of products other than duties, taxes and charges. For instance, in *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, the panel stated that :

The text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges". As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies "to all measures

⁵⁵ Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted on 16 February 2001, paras. 11.68.

instituted or maintained by a [Member] prohibiting or restricting the importation of exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges." The scope of the term restriction is also broad, as seen in its ordinary meaning, which is "a limitation on action, a limiting condition or regulation".⁵⁶

114. The requirement has the effect of restricting imports when the bond is not provided, in a manner inconsistent with Article XI:1.

3. If, in the alternative, the requirement to post the bond is an internal measure, it accords less favourable treatment to imported cigarettes than that accorded to like domestic cigarettes, and is therefore inconsistent with Article III:4.

115. If the Panel were to consider that the requirement to post a bond is an internal measure, it should find that it is inconsistent with Article III:4 of the GATT because it accords less favourable treatment to imported cigarettes than that accorded to like domestic cigarettes.⁵⁷ As stated above, domestic producers have the obligation to pay the amount of the tax on the 20th day of the month following the month in which the original sale (or transfer) was made. In this situation, it appears that the bond is a security in the event that the tax obligation is not properly discharged. However, importers have to pay the full amount of the Selective Consumption Tax upon the importation of the product. Therefore, with respect to the importers, there is no Selective Consumption Tax liability that the bond requirement would secure.

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

⁵⁶ Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799, para. 5.128.

⁵⁷ Article 376 is part of Chapter VII of Section IV of the Tax Code and provides that the bond is intended to ensure that any tax obligation under that Chapter is met. However, Honduras notes that Chapter VII of Section IV does not establish any tax obligations. Nevertheless, the Dominican Republic stated during consultations that the purpose of the bond requirement was to secure the payment of any tax obligation arising from the Tax Code, including the Selective Consumption Tax.

had to pay RD\$91.5 million a month for the Selective Consumption Tax, whereas it would have had to post the bond for RD\$5 million.

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

V. CONCLUSION

118. In the light of the considerations set out above, Honduras requests the Panel to find that:

- the surcharge on imported goods is inconsistent with Article II:1(b), second sentence, of the GATT;
- the foreign exchange fee is inconsistent with Article II:1(b), second sentence, of the GATT;
- the requirement to affix a stamp on imported cigarettes in the territory of the Dominican Republic is inconsistent with Article III:4 of the GATT;
- the application of the Selective Consumption Tax to certain imported cigarettes is inconsistent with Article III:2 of the GATT;
- the manner in which the Dominican Republic determines the value of imported cigarettes for the purpose of applying the Selective Consumption Tax is inconsistent with Article X:3(a) of the GATT;
- the failure to publish the survey on which the Selective Consumption Tax is based is inconsistent with Article X:1 of the GATT.
- the requirement that importers of cigarettes post a bond is inconsistent with Article X1:1 or, in the alternative, with Article III:4 of the GATT.

119. Honduras requests the Panel to recommend, in accordance with Article 19.1 of the DSU, that the DSB request the Dominican Republic to bring the measures at issue into conformity with the GATT.

VI. LIST OF EXHIBITS SUBMITTED BY HONDURAS

Number of Exhibit	Exhibit
Exhibit – HOND – 1	List prepared by the BAT Republica Dominicana of countries imposing a stamp requirement and those permitting the stamp to be affixed abroad.
Exhibit – HOND – 2	Decree 646-03 of 30 June 2003 and Decree 693 -03 of 16 July 2003
Exhibit – HOND – 3 (a)	Seventeenth Resolution of the Monetary Board dated 24 January 1991.
Exhibit – HOND – 3 (b)	First Resolution of the Monetary Board dated 27 September 2001
Exhibit – HOND – 3 (c)	First Resolution of the Monetary Board dated 20 August 2002.
Exhibit – HOND – 3 (d)	First Resolution of the Monetary Board dated 22 October 2003.
Exhibit – HOND – 4	Decree No. 79-03 approving the Regulations on the implementation of Section IV of the Tax Code of the Dominican Republic.
Exhibit – HOND – 5	Decree No. 130-02 of 11 February 2002.
Exhibit – HOND – 6	Law 11-92 – Tax Code of the Dominican Republic (relevant portions)
Exhibit – HOND – 7	General Norm No. 02-96 of 1 June 1996.
Exhibit – HOND – 8	Explanation as to how the Selective Consumption Tax is calculated in the Dominican Republic.
Exhibit – HOND – 9	Attestations of the retail selling price for Viceroy and a copy of an invoice for Lider.
Exhibit – HOND – 10	Administrative complaints made by the importer BAT Republica Dominicana before Customs in the Dominican Republic
Exhibit – HOND – 11	Customs Declaration issued by the Directorate-General of Customs of the Dominican Republic.
Exhibit – HOND – 12	Organisation Act of the Central Bank of the Dominican Republic of 29 December 1962 (relevant portion).
Exhibit – HOND – 13	Copies of the imported and domestic cigarette packages.
Exhibit – HOND – 14	Photographs of the process of affixing the stamp in the Dominican Republic
Exhibit – HOND – 15	Report by the Auditors, Berman, Ceballos & Asociados, dated 9 December 2003.
Exhibit – HOND – 16	Report by the Auditors, PricewaterhouseCoopers, dated 10 February 2004
Exhibit – HOND – 17	Letters from the BAT Company Dominican Republic to the DGIT and Customs requesting the survey.