

UNITED STATES CUSTOMS USER FEE

Report by the Panel

I. INTRODUCTION

1. At the requests of the delegations of Canada and the European Economic Community, the Council agreed to establish the Panel, on 4 March 1987, and authorized the Council Chairman to draw up the terms of reference and to designate the Chairman and members of the Panel in consultation with the Parties concerned and with interested delegations (C/M/207, item 6).

2. The following terms of reference and composition of the Panel were communicated by the Chairman of the Council on 27 May 1987 (C/147):

Terms of reference

"To examine, in the light of the relevant GATT provisions, the matters referred to the CONTRACTING PARTIES by

- (a) Canada in document L/6130;
- (b) the European Economic Community in document L/6131;

and to make such findings as will assist the CONTRACTING PARTIES in making the recommendations or in giving the rulings provided for in Article XXIII:2."

3. The following is an understanding among the parties on the organization of the Panel's work:

"(i) The Panel will organize its examination and present its findings to the Council in such a way that the procedural rights which the parties to the dispute would have enjoyed if separate panels had examined the complaints are in no way impaired. If one of the complainants so requests the Panel will submit a separate report on the complaint of that party.

"(ii) The written submission by each of the complainants will be made available to the other complainant and each complainant will have the right to be present when the other complainant presents its views to the Panel.

"(iii) The Panel will invite contracting parties having expressed an interest in this matter at the Council to present their views to the Panel."

Composition

Chairman: Mr. F.P. Donovan

Members: Mr. R.E. Hudec

Mr. E.O. Rosselli

4. At the Council meeting when the Panel was established, Australia, India, Indonesia on behalf of the ASEAN contracting parties, and Japan explicitly reserved their rights to make a submission to the Panel. In accordance with paragraph 15 of the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance (26S/213), the Panel addressed letters to these contracting parties offering them the possibility to make a submission to or to be heard by the Panel. In the light of statements made in previous Council meetings (C/M/202, item 9; C/M/206, item 11), the Panel also gave Brazil, Chile, Hong Kong, Mexico, New Zealand, Peru, Sweden on behalf of the Nordic countries, and Switzerland this opportunity. Australia, Hong Kong, India, Japan, New Zealand, Peru and Singapore made use of this possibility. Their views are summarized below in paragraphs 61-67.

5. The Panel met on 3 June, 6-8 July, 15-18 September, 13-16 October and 10-14 November 1987. It met with the parties on 3 June, 7 July and 14 October and with interested third parties on 7 July 1987. It submitted its report to the parties to the dispute on 17 November 1987.

6. The Panel urged the parties to respect the need for confidentiality and requested them not to release any papers or make any statements in public regarding the dispute. The same was impressed upon the seven other delegations when they appeared before the Panel.

II. FACTUAL ASPECTS

7. The term "customs user fee" refers to a number of fees imposed by the United States for the processing by the US Customs Service of passengers, conveyances and merchandise entering the United States. Only one of these fees is at issue in this dispute. It is the "merchandise processing fee", an ad valorem charge imposed for the processing of commercial merchandise entering the United States. The merchandise processing fee was enacted on 21 October 1986 in the Omnibus Budget and Reconciliation Act of 1986 (OBRA) (Public Law 99-509). It was enacted as an amendment to an earlier provision, Section 13031(a) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) (Public Law 99-272). As first enacted, Section 13031(a) had imposed a series of eight other customs user fees, for the arrival of passengers and conveyances, for customs broker permits, and for certain dutiable mail. The October 1986 amendment added the merchandise processing fee, which went into effect on 1 December 1986.

8. From 1 December 1986 until 30 September 1987, the end of the 1987 fiscal year, the merchandise processing fee was 0.22 per cent of the customs value of the merchandise being entered. In fiscal years 1988 and 1989, the fee will be either 0.17 per cent or a lesser ad valorem rate

determined by the Secretary of the Treasury to be sufficient to provide the amount of revenue needed to fund "commercial operations" of the United States Customs Service for the upcoming fiscal year. According to the authoritative explanation of the legislation by the legislative committee that drafted it, this "special formula would allow reduction of the fee if that became necessary to ensure that the fee structure and revenue derived therefrom in the [subsequent years] of the programme are consistent with the international obligations of the United States."

9. Unless extended, the merchandise processing fee and the other user fees in Section 13031(a) will expire on 30 September 1989. During the period when these fees are in effect, Customs is precluded from assessing any other charges for cargo inspection or clearance services or any other customs service performed or personnel provided in connection with the arrival or departure of any commercial vessel, vehicle or aircraft, its passengers, crew or cargo, including customs services performed outside of normal business hours on an overtime basis, and customs services performed outside the United States. The only fees that may be charged for these customs activities are the Section 13031(a) user fees described above. Section 13031(f) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (as amended), provides that receipts from fees under section 13031(a) shall be deposited into a "Customs User Fee Account". Two separate sub-accounts have been established within this Customs User Fee Account. Receipts from the merchandise processing fees are deposited in one sub-account which can only be used to fund "commercial operations" of the US Customs Service; receipts from other Section 13031(a) fees are deposited in the other sub-account which is used to fund miscellaneous overtime expenses. The sub-account containing the merchandise processing fee receipts remains isolated and earmarked until enactment of appropriations legislation directing that the funds be used in a given fiscal year.

10. The merchandise processing fee is collected at the port of entry by Customs Service officers. The fee is imposed only on merchandise covered by a "formal entry", and is based on the appraised value of the merchandise. Formal entries are normally required for dutiable or duty-free merchandise valued over \$1,000, except for textiles, for which the threshold is \$250.

11. The legislation does not define which activities of the US Customs Service are to be considered "commercial operations", but the term has been defined administratively in the Fiscal Year (FY) 1988 Budget to include certain commercial activities currently performed by three Customs Service programmes known as "Inspection and Control", "Tariff and Trade", and "Investigations", as well as a pro-rata share of certain "Executive Management" and "Administration" expenses deemed allocable to these activities.

12. With regard to Inspection and Control, "commercial operations" include inspection and release of cargo (including the initial processing and

clearance of cargo manifests supplied by carriers) and half the cost of airport passenger processing.

13. With regard to Tariff and Trade, "commercial operations" comprise the entire programme, including:

(a) Appraisal and Classification: Establishing the value and particular tariff classification of merchandise, collecting anti-dumping and countervailing duties pursuant to outstanding anti-dumping or countervailing orders, and providing commodity expertise to the importing public;

(b) Laboratories: Technical support for classification of merchandise and investigations of "commercial fraud" (fraudulent non-compliance by commercial importers with customs laws and other legal requirements pertaining to entry);

(c) Regulatory Audits: Facilitating entry processing by post-entry audits of importers, and providing support for detection of commercial fraud; and

(d) Legal Rulings: Issuing decisions and rulings and promoting uniformity in application of customs laws.

14. With regard to Investigations, the activities classified as "commercial operations" are commercial fraud investigations.

15. With regard to the category of general expenses called Executive Management, "commercial operations" include approximately 60 per cent of the cost of all functions under this heading, which is the best estimate of the percentage that "commercial operations" bears to the entire operating budget of the US Customs Service. The functions listed under this category of expenses are Executive Management, International Affairs, Internal Affairs and Chief Counsel.

16. Each of the three operating programmes, as well as the Executive Management, contains a separate budget item for activities titled Administration. The "commercial operations" budget contains a single item for Administration which is approximately 64 per cent of all Administration expenses in the entire operating budget.

17. The United States FY 1987 budget did not contain a separate item for "commercial operations", and at the time this report was prepared, the FY 1988 budget had not yet been enacted. The United States did supply the Panel with figures showing an estimate of the costs incurred for "commercial operations" items in FY 1987, and showing what those costs would be in FY 1988 if 1987 levels of activity were maintained. The estimate of "commercial operations" expenses in FY 1987 totalled \$505 million, and the projected expenses for FY 1988 were \$535 million. A detailed breakdown of the United States estimates is presented in Annex I.

18. Section 13031(a)(9), as amended, exempts the following three classes of merchandise from the merchandise processing fee:

(a) Articles provided for in schedule 8 of the Tariff Schedules of the United States, i.e. articles exported and returned; personal exemptions; governmental importations; importations of religious, educational, scientific and other institutions; samples and articles admitted free of duty under bond; non-commercial importations of limited value; and other special classification provisions;

(b) Products of the insular possessions of the United States; and

(c) Products of countries listed in TSUS General Headnote 3(e)(vi) or (vii) (least developed developing countries, and beneficiary countries of the Caribbean Basin Economic Recovery Act (CBERA)).

19. Information provided by the United States showed that, of total 1986 imports of \$369 billion, these three exemptions would have resulted in the merchandise processing fee not being applied to approximately \$102 billion (approximately 28 per cent by value). The formula for calculating the fee in subsequent years is designed to recover the entire cost of "commercial operations" from the fees paid by non-exempt imports. The formula is to divide projected expenses of the commercial operations budget by the projected value of non-exempt imports for that year.

20. The United States reported that, according to the most recent data available, receipts from the merchandise processing fee for FY 1987 collected during the ten months it was in force (1 December 1986 to 30 September 1987) were \$536 million. Estimated receipts for FY 1988 were \$540 million, assuming application of the 0.17 per cent ad valorem fee provided for in the legislation and no change in any other provision of that law. The cost and revenue estimates supplied by the United States are summarized in Annex I of this report.

III. MAIN ARGUMENTS

A. Summaries

21. Canada requested the Panel to find that the United States merchandise processing fee violated the General Agreement because:

- (i) it was neither commensurate with the cost of service rendered, nor limited in amount to the approximate cost of those services, as required by Articles II and VIII;
- (ii) it constituted taxation for fiscal purposes, contrary to Article VIII, to the extent that:
 - (a) the fee was charged for government activities which could not be considered services rendered to the importers in question; and

(b) it was imposed at a rate leading to collection of funds exceeding the cost of the services provided during the period in which the fee was charged; and

(iii) it represented indirect protection to domestic products, contrary to Article VIII.

22. Canada requested the Panel to find, therefore, that the ad valorem merchandise processing fee, as it was currently applied, was inconsistent with United States obligations under the General Agreement, and constituted a prima facie case of nullification or impairment of benefits accruing to Canada.

23. The European Economic Community requested the Panel to find that without prejudice to the conformity of the merchandise processing fee with other GATT provisions:

(i) The ad valorem merchandise processing fee introduced by the United States was inconsistent with Articles II and VIII; and

(ii) its introduction therefore constituted a prima facie nullification or impairment of benefits accruing to the Community.

24. The United States requested the Panel to find that:

(i) the merchandise processing fee was commensurate with the cost of services rendered, and therefore was consistent with Article II of the General Agreement; and

(ii) the fee was approximately equivalent to the cost of services rendered, and represented neither an indirect protection to domestic products nor a taxation of imports for fiscal purposes, and therefore was consistent with Article VIII:1(a) of the General Agreement.

B. Arguments relating to the terms: "commensurate with the cost of services rendered" (Article II:2(c)) and "limited in amount to the approximate cost of services rendered" (Article VIII:1(a))

25. The meaning of the concept "cost of services rendered" in Articles II and VIII raised a number of separate, although overlapping issues. For presentational reasons, these issues are presented under a series of three more specific questions.

(i) To what extent does the "cost of services" limitation in Articles II:2(c) and VIII:1(a) require that the amount of the fee not exceed the approximate cost of the government activities performed with respect to the individual customs entry for which the fee is imposed?

26. Canada argued that the "cost of services" limitations did require that the fee not exceed the cost of the services rendered to the individual

importer. The imposition of an unrestricted ad valorem user fee was in direct contravention of these obligations. The fee collected varied with the value of a specific shipment and, as the US fees had no upper limit, they could not, by definition, be "commensurate with the cost of services rendered" or "limited in amount to the approximate cost of services rendered". In fact, an instance where the fee charged was equivalent to the approximate cost of the services could occur only as the result of chance. It was not valid to contend that higher-value entries required more Customs effort than lower-value entries.

27. The European Economic Community argued that "cost of services rendered" in Articles II:2(c) and VIII:1(a) meant the cost of services provided to the individual importer paying the fee and not services which the authorities collecting the fee were empowered to provide to other importers of other products in other circumstances. A customs administration might have a wide variety of functions apart from collection of duties and administering quantitative restrictions, such as carrying out costly chemical analyses, or performing the other functions indicated in Article VIII of GATT. It would be contrary to Articles II and VIII if an importer importing an easily identifiable product which did not require detailed inspection or analysis should be required to contribute to the cost of administering a system of expensive controls applicable to different products or imposed for purposes unrelated to the goods which the importer in question was importing. An ad valorem fee without any limitation necessarily led to fee levels in excess of the cost of the individual service and was therefore inherently inconsistent with the requirements of Articles II and VIII. The cost of providing customs clearance to a given importer on a given transaction was determined by the time necessary to clear the shipment; it was not proportionate, except by coincidence, with the value of the goods. Likewise, the fact that the revenue from the fees was used to pay for technical laboratories and commercial customs fraud enforcement meant that importers importing products which did not need to be submitted to technical laboratories were contributing towards the cost of those laboratories, and that importers who were not and could not be suspected of customs fraud were contributing to the cost of fraud enforcement. Both of these features of the US fee system were contrary to the plain words of Articles II and VIII.

28. The United States did not agree that Articles II and VIII required contracting parties to match fee levels to the cost of services on a shipment-by-shipment basis. The United States argued that Articles II:2(c) and VIII:1(a) clearly permitted contracting parties to impose user fees that recovered the full costs of services rendered and were not in excess of such costs. Neither Article II nor Article VIII required that fees be "equal to" the cost of services rendered, but merely that they be "commensurate", or limited to the "approximate" cost. The legislative history of the merchandise processing fee indicated clearly the desire of Congress to conform to these provisions. The merchandise processing fee, as enacted, was commensurate with the cost of Customs commercial operations, as the total amount collected would approximately match salaries and expenses for such activities.

29. Canada did not agree that a user fee would be consistent with the GATT merely by virtue of the fact that the total revenue collected did not significantly exceed the total cost of services rendered. Such fees were levied, and charges are collected, on the basis of individual shipments. The "approximate cost" should therefore be calculated on the basis of the services rendered to individual shipments in connection with importation, and this calculated cost should represent an upper limit of the fee which could be charged. An indication that "approximate cost of services rendered" was intended to apply to an approximation of the cost of services for individual shipments was the inclusion of a list of services in Article VIII:4, some of which were applicable to only a limited number of shipments. For example, only a small percentage of imports into the United States were subject to quantitative restrictions or licensing requirements but, under the current ad valorem fee system, the cost of providing these "services" was spread across all imports. Similarly, the requirement for quarantine, sanitation and fumigation services would occur with respect to a limited number of imports, but the US divided these charges among all imports paying fees. Evidence that the drafters had intended that "cost of services" would relate to individual entries rather than the cost as a whole could also be found in the words of Article II:2 to the effect that "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product..." (emphasis added). Therefore, the "total cost" method of calculating fees was inconsistent with both Articles II and VIII when the fee collected was higher than the cost of services rendered, for example in the case of high value or bulk shipments. Shipments of duty-free products, where the US Customs did not have to calculate or collect the applicable duty, could also be subject to fees higher than the cost of services rendered.

30. The European Economic Community maintained that a comparison of the total merchandise processing fees collected with the total cost of the US Customs' "commercial operations" was not the test to be applied under Articles II and VIII. If this were the only requirement, user fees could be imposed on any basis, on any range of products, in accordance with any rules, as long as the revenue from them covered the total cost of the customs service collecting them, e.g. by a system which imposed fees on agricultural but not industrial products. Yet clearly any range of products, however defined, should not have to bear a disproportionate share of the cost of operating the customs service in question. Moreover, if the US theory were correct in that total cost was the only relevant criterion, it would be necessary for the Panel to determine which activities of the US Customs could correctly be considered as commercial customs clearance, and then to carry out cost accountancy investigations to calculate objectively the total cost of these activities, separately from the cost of all the other activities of the US Customs. If the Panel considered that the EEC was correct in arguing that "cost of services rendered" meant the cost of the service rendered to the individual importers, the Panel would not need to decide these issues.

31. The United States replied that the GATT clearly permitted recovery of the costs of services rendered to importers; the problem was that of

finding a fair and administrable allocation method that would avoid a protective effect and maximize stability and predictability in trade transactions. Both Articles II:2(c) and VIII:1(a) left it open to each contracting party how to collect user fees. These provisions did not rule out the use of a systematic method such as a flat fee or an ad valorem fee. The negotiating history confirmed this interpretation.¹ The drafting of the initial GATT provisions on user fees had been conducted against a background of a number of countries maintaining ad valorem user fees. When the GATT had entered into force, the provisions of Article VIII:1(a) were only hortatory in nature. When Article VIII:1(a) was made obligatory in 1955 ad valorem user fees were still widely practiced. It was not reasonable to infer from the historical record that the countries imposing ad valorem fees had intended to make their own ad valorem fees GATT-illegal. The more reasonable inference was that at that time, ad valorem fees were not generally considered to be GATT-inconsistent. No ruling has ever been made rejecting an Article VIII fee because it was assessed on a basis linked to the value of merchandise. Such a finding would be surprising, in view of the significant number of contracting parties, including some EEC member States, still using such fees. A 1986 survey by the United States Customs had shown that over 50 countries out of 79 countries surveyed charged some type of user fee; seventeen contracting parties had been found to charge on an ad valorem basis or a basis related to the value of imported merchandise. The results of this survey were communicated to the Panel. In the most recent GATT examination of border fees, contained in the Report of the Working Party on the Accession of the Democratic Republic of the Congo (Zaire) (18S/89), the aspect of the statistical fee objected to had been its level (3 per cent ad valorem), not its ad valorem nature. The United States hoped that the Panel would take into account the significance of its decision not only for the United States but also for many other contracting parties.

32. The United States argued that each of the options for a GATT-consistent user fee had its advantages and disadvantages. Any approach could produce arbitrary results in some cases. For instance, a transaction-based fee assessed at a flat rate per entry might avoid valuation of individual entries. However, countries sharing a land border with the United States would benefit disproportionately from a fee assessed on that basis, as they made extensive use of consolidated entry procedures permitting entry of multiple shipments on one entry form. Furthermore, the calculation and collection of duties amounted to a minor workload factor in entry processing; determination of the proper classification for a shipment was a more complex process, and was required for all entries regardless of the relevant rate of duty. The trend in US Customs operations was away from transaction-by-transaction accounting, and towards increased automation of operations, direct electronic data transfer and funds transfer between Customs, importers and brokers, and periodic

¹The United States provided the Panel with a detailed account of the negotiating history of Articles II:2(c) and VIII:1.

settlement of accounts between Customs and importers. A transaction-based fee ran counter to this trend, which had been driven by the need to process increasing imports with limited Customs resources. In addition, a flat-rate or transaction-based fee made it impossible to know whether fees would exceed the cost of services rendered. Measuring the cost of each Customs transaction as it happened would create a trade barrier in itself, and setting a schedule of transaction fees would cause trade distortions as transactions were manipulated to minimize fees. Each fee-avoidance action would necessitate a fee-adjustment response by the Treasury Department or Congress. An ad valorem fee required no such action. It also adjusted revenue automatically when inflation rates caused overall increases in Customs costs whereas transaction-based fees would require constant change to reflect such costs. When numerous different transaction fees were set, both Customs and the public would be faced with complex, difficult and expensive adjustments, including reprogramming of computer software. Congress had chosen to solve the allocation problem by imposing the fee as a percentage of customs value. It had been the judgement of Congress that, as expressed in legislative history provided to the Panel, "an overall ad valorem fee is the only way to equitably distribute the cost of Customs commercial services." An ad valorem fee provided more certainty and was more administrable for the importing public, for foreign exporters and for Customs than were the alternatives.

33. The United States maintained that Article VIII did not require contracting parties to match fee levels to the cost of services on a shipment-by-shipment basis. By any commercial or accounting definition, the cost of a service included both the direct cost of the service and the indirect costs that the service-providing organization incurred to be in a position to render the service. If a customs service could charge fees only on those shipments which were actually inspected, those shipments would have to bear the entire direct and indirect costs. In the United States, about twenty per cent of entries were actually inspected, and less than two per cent of containers were emptied and fully inspected. The question could be asked as to whether only the inspected entries should pay the entire cost of Customs commercial operations, and if so, how importers were to deal with the uncertainty that would be created. For reasons such as this, United States' importers and customs brokers had now opposed changing to a transaction-based fee. The indirect general overhead costs of the Customs Service were real costs, which could not be ignored and which had to be paid. Requiring that they be excluded from the cost base of a user fee amounted to requiring that these costs be cross-subsidized from general tax revenues. There was no such requirement in Article VIII. As for quarantine, fumigation and sanitation of shipments of merchandise, while Customs might withhold release of such shipments, or in some cases, supervise such activities, any charges imposed for quarantine, sanitation or fumigation remained the responsibility of the individual importer. As a rule, the individual importer contracted with private firms for these services, which were not paid for from the merchandise processing fee or other user fees. Furthermore, as for the costs of enforcement against fraud committed by commercial importers, every importer could potentially be suspected of fraud; fraud had no limitations when money or import restrictions were involved.

34. Canada replied that its view of the "cost of services" limitation did not mean that it was necessary to calculate the cost of each individual entry. This could lead to delays in processing and could represent an obstruction to trade. The cost of processing similar types of entries could be calculated with reasonable accuracy and it could be expected that a significant portion of entries would have a similar cost of processing. The flexibility afforded by the words "approximate cost" would allow for the same upper limit of fee to be calculated for most shipments, with different upper limits for shipments of products requiring different levels or types of service. The United States ad valorem fee was inconsistent with this principle, because it made no distinction between types of shipments that required significantly different levels of service in connection with importation. It would be contrary to GATT principles to collect any amount in excess of these maximum limits. It was also inaccurate and misleading to argue that Canada would benefit disproportionately from a flat-rate fee. Like other contracting parties, it would pay less under a GATT-consistent fee system which levied charges based on an approximation of the services actually rendered on importation rather than a system based on the value of goods. To choose a fee because it was the easiest to administer was not a valid excuse for imposing a GATT-inconsistent fee. As this Panel was examining only the United States fees, actions taken by other countries were irrelevant to this case. With regard to the report of the Working Party on the accession of Zaire, Canada disagreed with the United States' interpretation. Canada noted that the Working Party had questioned the method of application as well as the level of tax, and that this appeared to show that unlimited ad valorem fees were not acceptable under Article VIII:1(a).

35. The European Economic Community replied that the cost in practice had to be estimated, approximately and in advance, on the basis of average costs. The EEC did not suggest that only consignments which were in fact inspected should pay, because inspections were made, either at random or on some appropriate selection basis, at the option of the customs service in question. The average cost of clearances per consignment could be calculated on the basis of inspection of any given percentage of the total number of consignments cleared. The average cost could likewise cover the overhead costs of the customs authority in question. The EEC had never suggested that indirect costs should be excluded from the cost base of a user fee or that they should be cross-subsidized from general tax revenue. However, if some importers were allowed to make a disproportionately small contribution to the cost of the whole Customs Service, and others were obliged to make a contribution which was more than the cost of providing services to them, the government concerned could not claim that the costs which were not paid for by under-contributing importers were "overhead costs". Any objective and bona fide method of estimating the average cost of clearance would normally be compatible with GATT. The EEC accepted that a customs user fee had to be allocated in some way. But Article VIII required fee levels to be matched approximately to the cost of providing the customs clearance on a shipment-by-shipment basis. The EEC did not say that only a flat rate fee was permitted under GATT. However, in the abstract, all other things being equal, it was clear that in a system where the cost of clearance was similar for all types of goods - and in which the

national authorities had seen no reason to regard some kinds of clearance as more costly than others - a flat rate fee was much more likely to be consistent with GATT than an ad valorem fee, which automatically overcharged importers of high-value consignments and undercharged importers of low-value consignments. If the clearance of certain types of imports was more costly, e.g. because of the need for special testing, their clearance might be subjected to a higher fee. However, the cost for such special services should only be borne by those who used or caused them. Even if another system might have defects, that did not make the US system compatible with Articles II or VIII. The possibility that shipments across common land frontiers could be handled more cheaply than other shipments should not be considered a defect; if they were cheaper, Article VIII entitled the importers concerned to claim the benefit of the cost savings involved. This illustrated clearly why it was wrong to regard all revenues from ad valorem customs user fees merely as one pooled fund, since it inevitably resulted in some importers being arbitrarily compelled to cross-subsidize others. A flat rate fee per shipment was not a "disincentive" to consolidation. Importers could be relied on to try to save themselves costs if the system allowed them to do so and Customs officials could be instructed to save paperwork whenever possible and a reduced fee could be given for consolidated shipments, corresponding to the estimated cost saving.

36. The United States replied that there was no requirement in Article VIII, nor should Article VIII be interpreted to require, that the average cost of a transaction be calculated, and used as a ceiling on the total fee that could be charged. A major virtue of the ad valorem fee was that its incidence on small importations was so low that it did not have a protective effect. A dollar ceiling on the fee would mean that, in order to recover the cost of Customs "commercial operations", the rate itself would have to go up. The ceiling would benefit certain large volume imports at the expense of small volume imports that would be paying the higher rate. If the proposal was that the taxpayer should pay instead, this amounted to an assertion that the GATT required large-volume importations to be subsidized from general tax revenues, which was not the case. In addition, customs transactions in the United States were normally dealt with on the basis of entries of merchandise. There was no value or volume limit on goods that might be entered in a single entry. A dollar ceiling would lead to consolidation of entries, an increase in the average cost per entry and an increase of the fee itself. The best means to avoid this cycle of fee avoidance and fee adjustment, and the resulting uncertainty generated for importers and customs brokers, was to base a user fee purely on the one factor that could not be manipulated by the importer, i.e. the value of imports.

(ii) Do all the costs included in the "commercial operations" budget of the United States Customs Service constitute "cost of services rendered" to the commercial importers subject to the merchandise processing fee within the meaning of Articles II:2(c) and VIII:1(a)?

37. (a) The cost of certain Customs Service activities. Canada argued that the term "cost of services rendered" in connection with importation

should be strictly interpreted and limited to activities necessary for entry of shipments, such as document processing, inspection, calculation and collection of duty, and special services such as quarantine. Canada stated that Article VIII:4 provided a list of the type of services in connection with importation for which fees might be charged. All of the services enumerated were specific actions/requirements for getting goods into, or out of, a country, such as licensing, analysis, inspection and quarantine. The decision to provide a limited list of services clearly showed that the drafters had not expected a country to defray completely all costs of providing customs clearances through the mechanism of fees charged to importers. Various additions to the list had been considered during the drafting of the ITO and the GATT. Some of these had been adopted and others rejected. For example, it had been agreed to include the phrase "such as consular invoices and certificates" (EPCT/C.II/54/Rev.1, page 25) but not the addition to the list of "(i) Port facilities" (EPCT/W/67). This showed clearly that the drafters had envisaged limits on the activities for which fees could be charged. Some programmes the United States had included under the heading "Commercial Operations", such as clearance of carriers, could not reasonably be considered as services rendered in connection with importation of products. Not only was the clearance of a carrier a different activity from the clearance of merchandise, but the United States was already charging each vehicle and vessel a flat fee for clearance under another user fee system. Additionally, included under "Commercial Operations" activities were enforcement of anti-dumping and countervailing duty orders, activities related to commercial fraud investigations, investigations related to counterfeit merchandise, legal activities, processing of passengers and controls on exports. These should not be considered services rendered in connection with importation of most products.

38. The European Economic Community also questioned whether a general customs user fee could ever be assessed to cover the cost of government activities such as enforcement of anti-dumping and countervailing duty orders, commercial customs fraud investigations, enforcement of export controls, or processing of passengers. The EEC also questioned the inclusion of those Executive Management functions called Internal Affairs, International Affairs, and Chief Counsel, arguing that these functions were too far removed from the process of customs clearance to be charged to importers. The EEC did not believe that the Panel was required to consider these questions, however. In its view they only needed to be answered if the Panel agreed with the global method of fee assessment by the United States, because it was clear that the global method meant that importers were charged for the cost of government activities which did not arise in connection with the customs clearance of the products they imported.

39. The United States called attention to the fact that "commercial operations", as defined in the FY 1988 budget, did not include export controls or enforcement; these were paid for out of general revenues. There was no routine Customs clearance of exports; the only export-related function in the "customs operations" budget was the collection and forwarding, without processing, of statistical documents filed regarding certain exports. The United States went on to point out that "commercial

operations" included none of the non-commercial cargo activities in the Inspection and Control and the Investigations programmes (including drug and export performance), nor any part of the Tactical Interdiction programme (combatting drug and other smuggling activities), nor the Air Interdiction programme (combatting illegal entry of narcotics and other goods). These programmes were also paid from general revenues. Receipts from the passenger and conveyance user fees were kept in a separate sub-account, and did not fund the Customs Service's commercial operations; neither were those fees at issue in this case. The United States acknowledged that approximately 27 per cent of the total cost of passenger processing anticipated for FY 1988 was to be paid for from the merchandise processing fee, but stated that this accounted for only about 10 per cent of the total "commercial operations" budget (approximately \$55 million). Concerning the clearance of commercial merchandise, the entire entry process had to be viewed as a whole. The number of formal entries of imported merchandise had increased from 4.6 million in FY 1981 to 6.8 million in FY 1985, and 7.3 million in FY 1986. The direct costs associated with each shipment included costs of opening, devanning and inspecting the shipment and filling out entry documentation, as well as later costs of determining classification and appraisal, and regulatory audit and commercial fraud enforcement, if any. Substantial indirect costs were also necessary in order for the entry process to take place: for instance, heating, lighting and maintaining Customs facilities, advice on issues such as classification from product specialists and laboratories, legal rulings, and general regulatory audit and commercial fraud enforcement. Regulatory audit, combined with policing of customs fraud, had made it possible to be very selective in devanning and inspecting shipments. Without this a substantially higher proportion of shipments would have had to be inspected, with increased processing time for all imports.

40. Concerning other specific elements of the "commercial operations" budget that had been questioned, the United States made the following replies: The clearance of carriers referred to in the Inspection and Control programme referred to examination of cargo manifests, the first step in releasing cargo. The inclusion in "commercial operations" of functions relating to enforcement of laws against counterfeit goods was appropriate because these were also services rendered to importers of legitimate merchandise. The "commercial operations" activities pertaining to the anti-dumping and countervailing duty laws included only the collection of duties and administration of the procedures provided for in outstanding anti-dumping and countervailing duty orders, which the United States regarded as normal and GATT-consistent elements of customs operations. With regard to those general Executive Management activities for which a pro-rata share had been allocated to the "commercial operations" budget, the United States explained that (i) International Affairs related to the expense of maintaining Customs offices or officials in foreign countries, whose functions included furnishing customs information and participating in international customs organizations; (ii) Internal Affairs related to various programmes of personnel management and monitoring; and (iii) Chief Counsel related to the legal services required to deal with general legal issues arising from all Customs

operations, other than the specific customs law questions dealt with under the Tariff and Trade programme. The United States suggested that some differences of view in this area might be due to different perceptions of the import process, reflecting differences in national customs procedures. Not all countries actually released merchandise, as the United States did, before determining duty liability.² Not all countries had the same configuration of tasks given to their customs services. However, GATT did not require the adoption of any one solution to the management problems presented by customs clearance and determination of final duty liability.

41. (b) The cost of customs processing for exempt imports. Canada argued that the manner in which the United States had treated exemptions from the merchandise processing fee had not been consistent with the "cost of services" limitations of Articles II and VIII. The United States, had exempted certain countries and products from the fee, but had included the costs of providing services to these exempted countries and products in the total cost base. If the United States wished to provide exemptions (on which Canada reserved its rights), then the cost of services for these imports must be defrayed by the United States and the fees should be calculated in a manner whereby importers of non-exempt products did not have to pay for the costs of processing these exempted products. The European Economic Community considered that while it might not be a violation of the GATT to grant exemptions from a user fee régime, the cost of clearance of goods which were exempt from user fees could not be charged to other users without violating the General Agreement.

42. With respect to the treatment of exemptions, the United States explained that almost all of the value of imports under Schedule 8 was accounted for by articles of metal exported for further processing and then returned to the United States (item 806.30) and articles assembled abroad from components from the United States (item 807.00). Entries under these items were dutiable essentially on value added outside the United States. The Administration had proposed that the user fee exemption be eliminated for entries under items 806.30 and 807.00.

43. (c) The cost of "commercial operations" for the first two months of Fiscal Year 1987. Canada argued that the cost of Customs "commercial operations" for the first two months of FY 1987 (October-November 1986), when the merchandise processing fee was not in force, could not be considered services rendered to those importers paying the fee during the last ten months of FY 1987. The European Economic Community associated itself with this position. The United States argued that, with respect to the assessment of the merchandise processing fee in the last ten months of the initial fiscal year of the fee, the services rendered during those ten months were the same services rendered throughout the entire fiscal year.

²The United States provided further details on the various steps involved in the entry procedures in the United States.

(iii) To what extent did the total receipts collected under the US merchandise processing fee correspond to the total "cost of services rendered"?

44. Canada and the European Economic Community questioned the correspondence between the total receipts from the merchandise processing fee and the total costs of "services rendered" to the importers in question for the same period. Final figure for FY 1987 not being available, the parties to the dispute accepted that, for purposes of the present Panel report, the receipts for FY 1987 (1 December 1986 to 30 September 1987) were \$536 million, and that the estimated receipts for FY 1988, assuming a 0.17 per cent ad valorem rate and no other change in the law, were \$540 million. For the purpose of the present report, the parties also agreed to accept \$505 million as the total estimated cost of "commercial operations" in FY 1987, and \$535 million as the projected costs for the same level of "commercial operations" activities in 1988.

45. Canada pointed out that in both FY 1987 and FY 1988 the total receipts in question exceeded the total costs of "commercial operations". Canada further argued that, if the costs of "commercial operations" were reduced by excluding the costs not properly chargeable to the importers paying the tax, the excess of receipts over properly chargeable costs would be very substantial. Costs which should be excluded, in the Canadian view, were (i) the cost of those Customs activities which could not be considered "services rendered" to commercial importers, (ii) costs of processing exempt imports, and (iii) the cost of "commercial operations" for the first two months of FY 1987. A similar analysis of the costs of "commercial operations" for FY 1988 suggested a similar excess. Canada considered that these excesses constituted a violation of the requirements in Articles II and VIII that fees not exceed the cost of services rendered. The European Economic Community associated itself with this position.

46. Canada supplied the Panel with an illustrative analysis of the types of adjustments and calculations that should be made in determining the relationship of total receipts to total chargeable costs. Canada noted that the item in the analysis labelled "costs properly chargeable to commercial importers" should actually be lower, but it had not been possible to estimate costs of some activities which Canada considered did not properly fall within "commercial operations". As amplified by further explanation and applied to the data finally accepted, the analysis is reproduced as Annex 2.

47. The United States noted that, as described more fully above, it had not accepted the contention that various elements of the "commercial operations" budget were not properly chargeable to all commercial importers paying the fee, and so did not accept the various adjustments provided for in Canada's illustrative analysis. To the extent that receipts did exceed costs, however, it wished to reiterate that any excess would be retained in the special sub-account for "commercial operations" and would operate to reduce the fee otherwise chargeable in subsequent years, so that receipts would eventually be equated with costs.

48. Canada and the European Economic Community raised a further question with regard to the United States practice of drawing upon the receipts collected in one year to pay for "commercial operations" in the following year. They argued that the separation of actual receipts from actual expenditures in this fashion resulted in a further attenuation of the link between the fee and the cost of services, and that it also created an upward bias by permitting excess collections in one year to be spent as increased appropriations the following year. Canada further noted that the fees collected in one year amounted to fees for services that had not yet been rendered and that might never be rendered, particularly in respect of the individual importer paying the fee. The United States replied that the segregation of receipts, undertaken to assure that receipts were not used for other purposes, required such a delay in actual expenditure, since it was not possible to appropriate and spend funds out of a special account until the amount were actually collected, nor was it possible to fund customs operations on a month-to-month basis from current fee receipts.

C. Other provisions of Article VIII:1(a)

(i) "Indirect Protection to Domestic Products" (Article VIII:1(a))

49. Canada believed that, in certain circumstances, the customs user fees represented indirect protection to domestic products, in violation of the United States' obligations under the General Agreement. To satisfy the second condition of Article VIII:1(a), a fee would have to be structured in such a way that it did not act in a manner which was protectionist for certain shipments. The fees acted in the same manner as a tariff and, in addition, imposed extra business costs for exporting products to the United States, in the form of additional paperwork and administrative burden, as well as higher fees charged by customs brokerage firms. The potential protectionist effect of these extra costs was particularly evident in the case of lower value shipments. The fee could also act in a protectionist manner when it was applied to bulk commodity shipments or to goods with a low margin of added value. The legislation did not contain provisions to review cases where the fee was acting in a protectionist manner. The Panel should find that the fee represented an indirect protection to domestic products and nullified and impaired benefits accruing to Canada under the General Agreement.

50. The European Economic Community stated that the question whether the United States fee represented indirect protection, arose in particular if the Panel were to agree with the United States position that the "cost of services" limitation merely prevented contracting parties from making a profit out of its Customs operations as a whole. Much scope for concealed protection would result from such a view.

51. The United States argued that the level of the merchandise processing fee did not "represent an indirect protection to domestic products." The rate of the fee would decline to 0.17 per cent or a lesser rate sufficient to fund salaries and expenses of "commercial operations" of the Customs Service. The Customs Service budget was in turn subject to the discipline of the Administration's budget process, as well as the scrutiny of both the

Congressional committees with substantive jurisdiction over customs and trade, and the Congressional appropriations committees. The discipline of the budgetary process, and further efficiencies achieved by the Customs Service, would make it possible to keep the fee at a level that did not impede trade. Past discussions concerning user fees in the GATT showed that fees complained of had been much higher than the merchandise processing fee under examination, e.g. the 3 per cent Zairian fee cited above. Congress had chosen an ad valorem fee to make it possible to have a low rate that would not interfere with trade. Changing to a transaction-based fee, which could have a protective effect on low-value importations, would lead to more problems for trade, not fewer. With the increased consolidation of entries that a transaction-based fee would stimulate, the per-entry fee could increase still further.

(ii) "Taxation ... for fiscal purposes" (Article VIII:1(a))

52. Canada argued that the collection of fees which provided revenue in excess of the total cost of services rendered constituted "taxation... for fiscal purposes" and considered that certain elements of the merchandise processing fee offended in this respect. Any government activities which were not services that could be charged to importers who paid the merchandise processing fee should be a charge on general revenues, and thus a fee used to pay for such activities would be taxation for fiscal purposes.

53. The European Economic Community also considered that the merchandise processing fee represented a taxation of imports for fiscal purposes. The enactment of the fee until 30 September 1989 indicated that it was a contributory measure to the reduction of the US budget deficit. Explanations of the budget reduction process in the US Congress clearly demonstrated the link between the introduction of the fee and the objective to thereby reduce the budget deficit.

54. The United States stated that the intent of this provision of Article VIII:1(a) was to draw a line between fees which financed only the activity charged for, and fees which generated surplus funds which were either paid into the general revenues of the government, or used to finance extraneous activities. Reference was made to past GATT discussion concerning a French statistical tax on imports and exports (L/64, G/46/Add.4, SR.8/7 page 10, L/238, SR.9/2 page 5) which had been levied to develop a fund for providing certain social security benefits. The merchandise processing fee under examination was not such a fiscal measure, but a fee for services rendered. It had been the clear intent of Congress that proceeds not be spent on extraneous activities but only on the Customs activities necessary and useful to the import trade. The United States authorities had endeavoured to be true to that Congressional intent and to Article VIII. Proceeds of the fee were not deposited in general revenues of the United States, but were carefully segregated in a special budget receipt account. To avoid cross-subsidization of other activities by the merchandise processing fee, the proceeds of this fee were kept separate from the proceeds of the other eight fees referred to in paragraph 7, which were not the subject of this dispute. The statute required that the

Secretary of the Treasury reduce the level of the user fee if this was necessary to avoid collecting an amount in excess of the cost of Customs "commercial operations". Budget authorization legislation in the United States normally was used as a means for Congress to make policy decisions, including decisions unconnected to fiscal considerations. Provision of a time limitation on the merchandise processing fee reflected the untested nature of the fee, and the strength of importers in the political process.

55. The European Economic Community noted that the United States had interpreted the term "taxation of imports or exports for fiscal purposes" to mean that customs user fees might not be used to generate a revenue surplus. It noted, however, that the United States had given the same interpretation to the "cost of services" limitation. In the view of the EEC, this demonstrated that the US interpretation of "cost of services rendered" could not be correct. It could not be correct to interpret a term which appeared in both Articles II:2(c) and VIII:I(a) as having no meaning other than that of another term in one of the same two provisions. Provisions of an Agreement such as GATT should not be interpreted so as to be superfluous or unnecessary.

D. Other arguments

56. Canada considered that the United States customs user fee was inconsistent not only with the letter but also with the spirit of the General Agreement. Canada noted that although the GATT allowed certain fees under certain circumstances Article VIII:1(b) and (c) provided guidance regarding the general question of applying fees. Thus, the contracting parties had recognized "the need for reducing the number and diversity of fees and charges referred to in sub-paragraph (a)", as well as "the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements." As a result of the United States action, however, such fees and formalities had been increased instead of decreased. In addition, given the closely associated nature of the consular fees and the customs user fees (both being subject to Articles II:2(c) and VIII:1(a) and both involving charges for the processing required for importation of goods) the guidance of the CONTRACTING PARTIES on consular fees in particular, was also relevant. The question of administration of consular fees had been addressed in the Recommendation by the CONTRACTING PARTIES of 30 November 1952 (1S/25) on "The Abolition of Consular Formalities and Code of Standard Practices". According to its paragraph 1 "Any consular fee should not be a percentage of the value of the goods but should be a flat charge." This Recommendation had been slightly modified in the Recommendation of 30 November 1957 (6S/25) to read "No consular charge should be assessed as a percentage of the value of goods but should be a flat charge." The Recommendation of 1952, as amended in 1957, had been reaffirmed in general terms by the CONTRACTING PARTIES in the Recommendation of 31 October 1962 (11S/214).

57. The European Economic Community stated that it would be pointless to say that importers should not be asked to pay too many fees and charges, even those which might be imposed for services specifically rendered to

them, if they could legally be asked to pay a disproportionate contribution to the overall cost of customs processing. From a broader perspective the EEC took the position that service fees of the kind involved in this case were an anachronism in the modern world. It was questionable whether the collection of duties could be regarded as "services" provided. Neither the importer nor any private commercial party to any import transaction benefitted in any way from being obliged to comply with whatever importation formalities might be required. As a result of a series of judgements of the Court of Justice of the European Communities, all customs user fees on trade between the EEC member States were being eliminated. They were also being eliminated on imports into the EEC from non-Member States. Although the EEC was not asking the Panel to rule that all customs user fees were prohibited by Article VIII, it was saying that these considerations made it appropriate that Article VIII be interpreted strictly.

58. The United States reiterated that the merchandise processing fee before the Panel was collected from commercial shipments, and covered only the cost of Customs "commercial operations". Article VIII:1(b) and (c) would support an ad valorem fee rather than a transaction-based fee because an ad valorem fee was less complex. The efforts in the GATT in the 1950s to abolish consular fees were of only minor relevance. Consular fees were levied in the country of exportation and required preparation of special documents, submitted to the consulate of the country of destination. The problems noted in the 1962 report on Consular Formalities were not an issue here. In fact, the 1962 report recommended conversion from consular fees to import fees. It was incorrect to say that, since importers did not benefit from being obliged to comply with import formalities, customs services were not services rendered to them. This position appeared to be based on the assumption that there was some absolute right to import, to which customs clearance only acted as a hindrance. This assumption was wrong; the GATT did not give an importer the right to import goods without paying the duties specified in the relevant schedule of concessions, nor did it give even an importer of duty-free goods the right to import without showing that the goods actually qualified for duty-free treatment. The United States concluded by stressing that the legal provisions in question required that fees correspond to the cost of providing a service, and not to the value of benefits received from it.

E. Trade Effects

59. Canada estimated that the customs user fee would add \$152 million to the cost of goods imported from Canada in the period 1 December 1986 - 30 September 1987 and \$120 million in later years (assuming a 0.17 per cent fee). These amounts were substantial and represented an increase of over 20 per cent in the charges paid on goods imported into the United States from Canada in calendar year 1986. In addition to these fees, Canadian exporters were also being required to pay additional administrative costs and higher customs brokerage fees. Most of Canada's trade entered the United States under bound tariff rates, over 70 per cent of which was duty free. Canada, in its tariff negotiations with the United States, had placed a high priority on duty-free access.

60. The European Economic Community stated that the customs user fee had a considerable negative effect on its exports to the United States market. It was estimated to cost its exporters about \$175 million in 1987.

IV. SUBMISSIONS BY INTERESTED THIRD PARTIES

61. Australia called the Panel's attention to Article II:1(b), which required that products covered by a schedule should "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 and mandatorily imposed thereafter by legislation in force in the importing territory on that date". Australia considered that the merchandise processing fee, having the effect of raising duties and charges beyond the level existing when the United States schedule of bindings had been negotiated, was inconsistent with the United States obligations under that provision. It viewed the exception of Article II:2(c) as inapplicable because it did not consider the fee commensurate with the cost of services. Australia considered that the fees were also inconsistent with Article VIII as they appeared to have been imposed for fiscal purposes, were not related to the cost of the customs services rendered to the importer, and were a protection provided to United States industry. Benefits accruing to Australia under the General Agreement were therefore nullified or impaired within the meaning of Article XXIII:1(a). The United States had a number of commodities bound to Australia under Article II. Many items covered by ceiling bindings were entered at or near the bound rate and in such circumstances an additional fee breached even a ceiling binding.³ The ad valorem fee particularly discriminated against shipments of bulk commodities, including a number of Australia's major exports, where the charge was disproportionately high in relation to the service performed. Also, since the merchandise processing fee had been imposed in addition to a "port user fee", Australia was concerned at the additional costs to a number of its major exports and therefore at the possible nullification and impairment of benefits. Australia called the Panel's attention to several GATT decisions that surcharges which raised the level of the customs tariff beyond the maximum rates bound under Article II were inconsistent with GATT obligations. With respect to Article VIII:1(a), Australia called the Panel's attention to the United States complaint against France in 1952 (L/238) concerning the proceeds of a "statistical and customs control" tax which had been used for fiscal purposes, and another United States complaint in 1955 charging that a French "stamp tax" violated Articles II:1 and VIII:1 since it had been used for fiscal purposes and had also been in excess of the cost of services rendered (L/410, L/569, L/720). Australia also mentioned the report of the Working Party on the Accession of the Democratic Republic of the Congo (Zaire) (18S/89) in this regard. Australia considered, therefore, that there had generally been a consensus

³ Details were provided on bound rates and operative rates on items where the fee was likely to breach the binding. Estimates were given of increases in the cost of Australian exports to the United States for a number of products for which Australia had initial negotiator and/or principal/substantial supplier rights.

among contracting parties (and one which the United States had shared) that an import tax which exceeded the cost of service and/or was used for fiscal purposes was inconsistent with Article VIII:1(a). Article XXII consultations with the United States had failed to resolve the problem. Australia therefore requested the United States to bring its system into conformity with the GATT by making the fees correlate more exactly to services provided, and by entering into Article XXVIII negotiations to provide compensation where bindings were breached. Australia also raised two other issues. The first was a possible breach by the United States of the undertaking on standstill made at Punta Del Este, in particular of Part I:C(i) "not to take any trade restrictive or distorting measures inconsistent with the provisions of the General Agreement". Australia hoped that the United States would reconsider its action in the interests of ensuring the success of the Uruguay Round. The second was the exemption from the customs user fee of countries which participated in the Caribbean Basin Initiative (CBI) and least developed countries. The terms of the waiver granted in respect of the CBI required the United States not to use the duty free treatment to raise barriers or to create undue difficulties for the trade of other contracting parties and to consult promptly with any contracting party whose interests were affected by the operation of the Agreement. It appeared that the United States intended to recover costs associated with the import of products from these areas by imposing greater than proportional fees on other contracting parties. It was a matter of concern that this discriminatory practice could have an adverse effect on Australian exports.

62. Hong Kong stated that it had a particular interest in the matter because the United States was the principal market for its exports and that as a result of the imposition of the merchandise processing fee, the total cost of Hong Kong's exports to the United States was estimated to increase by approximately US\$20 million in 1987. Although all funds in the Customs User Fee Account should "only be available to the extent provided for in appropriation Acts, for the salaries and expenses of the United States Customs Service incurred in conducting commercial operations", the term "commercial operations" would appear to have a wider scope than services rendered on or in connection with importation, as provided in Article VIII:1(a). This in turn could mean that the fee at the present level of 0.22 per cent was not commensurate with or limited in amount to the approximate cost of services rendered. If this were so, the fee would represent a taxation on imports for fiscal purposes. Moreover, the merchandise processing fee was not levied on US exports and might thus also afford indirect protection to domestic products. On the general question of ad valorem assessment, Hong Kong noted that the General Agreement was silent on the actual mechanics of the application of customs fees or charges. The GATT provided only that the amount of the fee should approximate the cost of services rendered. Systematic devices for the collection of such fees, whether on a flat rate or ad valorem basis (either of which would produce variations at the individual transaction level), were therefore not inherently inconsistent with the GATT. The Panel should address the issues raised by this complaint but should exercise due care to avoid any generalization not based on specific GATT provisions that might

prejudice the rights of other contracting parties which were applying, or might wish to apply, the ad valorem system within the purview of Article VIII.

63. India was of the view that the merchandise processing fee was applied in a manner not consistent with Articles II:2(c) and VIII:1(a) and that it in fact amounted to taxation on imports for fiscal purposes. The argument that proceeds would be deposited in the special account which was only available for meeting the expenses of the US Customs Service was not a valid one, considering the fact that revenue was a fungible resource. Further, the services of customs personnel were utilized not only for checking import consignments but also exports. Any user fee which purported to have been imposed to meet such expenses could not be restricted to imports alone. India also stated that the exemption given to least developed countries from the payment of fees was not in conformity with the obligation of non-discrimination contained in Article I of the General Agreement. Neither was it covered by the provisions of the Enabling Clause (26S/203) since the exemptions granted in this case did not involve "special treatment of the least developed among the developing countries in the context of any general or specific measures in favour of developing countries".

64. Japan stated that the question before the Panel was a legal one and not factual. There was no direct link between the cost of cargo processing and the price of imported goods and therefore the fee could not be justified as being commensurate with the cost of services rendered. A fee on an ad valorem basis could result in revenues in excess of the cost of providing the services. While the intentions of the US Government were not put into question, the mechanism of collecting the fee did not always guarantee concordance with the requirements of the relevant GATT Articles. Despite the claim that the fee was not designed for fiscal purposes, the actual implementation of the measure could result in revenues far in excess of the cost of services rendered, and therefore could have the same implication as a taxation of imports for fiscal purposes. Moreover, the fact that other countries maintained similar ad valorem user fees did not render the United States measure consistent with the GATT. Japan considered that the United States merchandise processing fee was not consistent with the GATT, in particular Article II:2(c) and VIII:1(a).

65. New Zealand stated that if a charge such as the United States merchandise processing fee was compatible with Articles II and VIII, it would appear to be attractive for many contracting parties to consider. The basis of calculation of fees and charges, in terms of Article VIII, was to be the "approximate cost of services rendered". Any degree of flexibility in this provision implied by the term "approximate" seemed to relate to the degree of precision in calculating the cost rather than in the basis of the actual charging itself. For this basic reason it was difficult to reconcile an ad valorem basis with the basis prescribed by Article VIII. This contrast could be underlined by comparing the terms of this provision with those of Article VII:2(a). It was difficult to envisage that there would be a systematic relationship between value of imported goods and cost of services rendered. Yet, if a value was

relatively high it would carry a relatively high charge. Also, the ad valorem charge might be particularly non-transparent, because it would be extremely difficult, if not impossible, to ensure that aspects of customs administration which were actually outside the ambit of fees and charges imposed "on or in connection with importation or exportation" were not built into the charges. The above considerations applied in respect of all imports, but were even more important in the case of bound items. A concession granted in respect of a given item created a particularly clear and firm obligation. The wording of Article II pertaining to these obligations clarifies and renders more precise the logic of Article VIII. The cost of services, for which permission to levy a charge was granted in Article II:2(c), was limited strictly to those applicable to the specific product subject to a concession. The first sentence of Article II:2 made this clear: "Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product, etc." This, furthermore, was consistent with the nature of obligations in respect of a concession because it was granted in respect of a particular product. If an ad valorem system was applied there would be the possibility that the costs arising from Customs administration more generally (including those which would arise from the administration of other concessions negotiated elsewhere and in respect of other contracting parties) would be directly, or more likely, indirectly, "built into" the charge for a particular concession.

66. Peru stated that Articles II and VIII only permitted user fees which covered the cost of services rendered. The United States ad valorem fee did not meet this requirement and, in addition, provided indirect protection to domestic industry, which was also in contravention of Article VIII. Moreover, the fee increased the costs of exports to the United States and this affected Peru's interests. Peru therefore fully supported the views expressed by the complainants in previous Council meetings. The United States reference to Peruvian customs user fees at the Council (C/M/206, item 11) was erroneous in that this was not an ad valorem, but a fixed fee, expressed in US dollars and payable in Peruvian currency, as per the exchange rate on the date of importation. Decrees issued in January 1986 were applied in accordance with GATT obligations, covering exactly the cost of services rendered by the Peruvian Customs in connection with importation of goods.

67. Singapore stated that the imposition by the United States of a merchandise processing fee, on an ad valorem basis, was not consistent with the obligations of the United States under Articles II and VIII of the General Agreement. An ad valorem basis did not correspond to the cost of providing the service of processing the import of a product and resulted in revenues not commensurate with the cost of services rendered. Article VIII:1(a) clearly stated that any fees imposed should be limited to the approximate cost "of services rendered". Furthermore, the illustrative list in Article VIII:4 indicated that fees should only be charged for specific services related to importation and exportation. Article II:2(c) stated that fees or other charges should be commensurate with the cost of services rendered. A customs user fee that was not specific, but based on the value of the imports could not be commensurate with the cost of

services rendered. It would appear that the merchandise processing fee was being used to underwrite other commercial operations not related to importation. Singapore was also concerned about the discriminatory aspect of the fee which was applied to all imported merchandise, except products of the least-developed countries and eligible countries under the Caribbean Basin Economic Recovery Act. The level of 0.22 per cent was not so small that it could not be construed as having a protective effect. Based on the 0.22 per cent fee for the period 1 December 1986 to 30 September 1987, Singapore's estimated exports of about S\$9,100 million for the same period would incur a payable customs user fee of approximately S\$20 million. This would be an additional cost over and above the usual customs brokers' and other fees. Singapore was concerned about the effects on its exports to the United States which this additional fee would have. The merchandise processing fee might reduce the competitiveness of Singapore's exports in the US market, especially for products which were price-sensitive, and might have the indirect effect of encouraging potential US importers to source their merchandise from domestic suppliers.

V. FINDINGS AND CONCLUSIONS

68. Having reviewed the arguments made by Canada and the European Economic Community, the Panel considered that it would be possible to cover the points raised by each party in a single set of findings and conclusions, and that it would be neither necessary nor helpful to try to separate the frequently overlapping positions of the two parties in order to be able to give separate responses to them.

69. Before turning to the specific questions raised by the parties, the Panel first addressed the general meaning of Articles II:2(c) and VIII:1(a), and their relationship to each other. Article VIII:1(a) states a rule applicable to all charges levied at the border, except tariffs and charges which serve to equalize internal taxes. It applies to all such charges, whether or not there is a tariff binding on the product in question. The rule of Article VIII:1(a) prohibits all such charges unless they satisfy the three criteria listed in that provision:

- (a) the charge must be "limited in amount to the approximate cost of services rendered";
- (b) it must not "represent an indirect protection to domestic products";
- (c) it must not "represent ... a taxation of imports ... for fiscal purposes".

The first requirement is actually a dual requirement, because the charge in question must first involve a "service" rendered, and then the level of the charge must not exceed the approximate cost of that "service".

70. Article II:2(c) is a provision of somewhat narrower scope. Its function is to permit the imposition of certain non-tariff border charges on products which are subject to a bound tariff. Paragraph 1(b) of Article II establishes a general ceiling on the charges that can be levied on a product whose tariff is bound; it requires that the product be exempt

from all tariffs in excess of the bound rate, and from all other charges in excess of those (i) in force on the date of the tariff concession, or (ii) directly and mandatorily required by legislation in force on that date. Article II:2 permits governments to impose, above this ceiling, three types of non-tariff charges, of which the third, permitted by sub-paragraph (c), is "fees or other charges commensurate with the cost of services rendered".

71. In order to help clarify the meaning of Articles II:2(c) and VIII:1(a), the Panel examined the origins and the drafting history of these provisions. During the drafting of the General Agreement, the previous legal instrument referred to most frequently in connection with these provisions was the International Convention Relating to the Simplification of Customs Formalities of 3 November 1923⁴. One of the major purposes of the 1923 convention had been to reduce the number and the level of fees imposed in connection with importation. Governments had agreed to limit certain fees to the actual cost of the government activity in question. Article 10 stated, "When a visa [for commercial travelers] is required, its cost shall be as low as possible and shall not exceed the cost of the service." Article 11(8) stated, "The cost of the [consular] visa must be as low as possible, and must not exceed the cost of issue, especially in the case of consignments of small value." Article 12 stated, "The cost of a visa for Consular invoices shall be a fixed charge, which should be as low as possible." The Convention's two provisions on consular fees were reaffirmed in the recommendations of the World Economic Conference of 1927, which restated them as follows:

- (1) Consular fees should be a charge, fixed in amount and not exceeding the cost of issue, rather than an additional source of revenue. Arbitrary or variable consular fees cause not only an increase of charges, which is at times unexpected, but also an unwarrantable uncertainty in trade.⁵

72. The Panel was unable to find specific antecedents to Articles II:2(c) and VIII:1(a). In particular, no such provisions could be found in the United States bilateral trade agreements of 1934-1942, from which the United States had drawn many of the texts proposed for adoption in the General Agreement. Those bilateral agreements had contained no general limitation on non-tariff charges as in Article VIII:1(a), nor had their definition of tariff bindings permitted the imposition of new "service" fees as in Article II:2(c).

⁴League of Nations Treaty Series, vol. 30, p. 372 (1925). The treaty, which was negotiated under League of Nations auspices, entered into force on 27 November 1924.

⁵League of Nations Document C.356.M.129.1927.II., paragraph 5(1).

73. According to the detailed negotiating history of GATT Articles II:2(c) and VIII:1(a) provided by the United States, proposals to permit such fees, characterized as fees for "services rendered", appeared in the earliest stages of the GATT/ITO negotiations.⁶ The criteria stated in the initial draft texts submitted to the negotiating conference were almost identical to those adopted in the final texts, with the result that the actual negotiations presented no occasions for further elaboration of their meaning.

74. When the General Agreement was first adopted in 1947, the requirements of Article VIII:1(a) were merely hortatory, reading "should" rather than "shall". Article VIII:1(a) was made mandatory in the Review Session amendments to Part II of the General Agreement (3S/214), which were adopted in March 1955 and which entered into force in October 1957. Article II:2(c) was included in the original 1947 text of the General Agreement in its present form.

75. Two questions of general interpretation had to be answered before addressing the specific issues raised by the complainants. First, it was necessary to decide whether there was any legal significance in the slight difference in wording between the two "cost of services" limitations stated in Articles II:2(c) and VIII:1(a), i.e. "commensurate with the cost of services rendered" and "limited in amount to the approximate cost of services rendered." The words themselves suggested no immediately apparent difference in meaning. After reviewing both the drafting history and the subsequent application of these provisions, the Panel concluded that no difference of meaning had been intended. The difference in wording appears to be explained by the somewhat different paths by which each provision entered the General Agreement. The text which was to become Article VIII:1(a) appeared in the very first draft submitted to the negotiating conference by the United States, whereas the text of

⁶ According to negotiation records in the United States archives, the earliest reference occurred in a document titled "Agenda Resulting from Informal Exploratory Discussions between Officials of the United Kingdom and of the United States...", dated 16 October 1943.

⁷ Article VIII:1(a) first appeared as Article 13, Suggested Charter for an International Trade Organization of the United Nations, submitted by the United States in September 1946. The first document found by the Panel containing the text of what was to become Article II:2(c) was E/PC/T/153 of August 1947. See also E/PC/T/201 of September 1947.

Article II:2(c) originated as a standard term to be incorporated in each contracting party's schedule of concessions (see E/PC/T/153) and was not raised to the text of Article II until some time later (E/PC/T/201).⁸

76. Second, it was necessary to determine what type of fees were incorporated within the basic concept of "services rendered" in Articles II:2(c) and VIII:1(a). The Panel concluded that there was a rather well established general understanding of this concept, demonstrated more by practice than by the actual text of the General Agreement. In its original form, as found in Article 13 of the United States' Suggested Charter of September, 1946, Article VIII was explicitly addressed to "fees, charges, formalities and requirements relating to all customs matters", and this definition was followed by an illustrative list which is virtually the same as the list now included in Article VIII:4. The illustrative list includes various aspects of the customs process such as "consular transactions", "statistical services", and "analysis and inspection". The text of Article VIII was later changed to enlarge the scope of that provision. Notwithstanding the fact that the enlarged scope gave a different meaning to the illustrative list in paragraph 4, GATT practice since 1948 has tended to interpret that illustrative list according to its original meaning, as a list of those customs-related government activities which the draftsmen meant when they referred to "services rendered". Thus, GATT proceedings have treated the following types of import fees as being within Articles II:2(c) or VIII:1(a): consular fees (CP.2/SR.11 (pages 7-8); 1S/25), customs fees (L/245; SR.9/28 (pages 4-5)), and statistical fees (18S/89).

77. In referring to these customs-related government activities as "services rendered", the drafters of Articles II and VIII were clearly not employing the term "services" in the economic sense. Granted that some government regulatory activities can be considered as "services" in an economic sense when they endow goods with safety or quality characteristics deemed necessary for commerce, most of the activities that governments perform in connection with the importation process do not meet that

⁸ A collateral issue which the Panel considered but was not required to answer was whether the form of words utilized in Article II:2(c) might not have been intended as a reference to exactly the same fees permitted by Article VIII:1(a) - in other words, whether Article II:2(c) incorporates all three of the criteria in Article VIII:1(a). The following considerations had raised the issue: (i) The text of Article II:2(c) was in fact developed after the draft text of Article VIII:1(a) had been established. (ii) Article II:2(c) sets the standards for determining when "service" fees may be imposed in excess of tariff bindings, whereas Article VIII:1(a) is a general provision relating to fees on all products. (iii) At least two Article XXIII complaints in the past had claimed that an import fee used for a "fiscal purpose" had constituted a violation of Article II, and in both cases the contracting party complained against had agreed and had withdrawn the fee (L/64; SR.8/7 (page 10); L/410; SR.10/5 (pages 51-52)).

definition. They are not desired by the importers who are subject to them. Nor do they add value to the goods in any commercial sense. Whatever governments may choose to call them, fees for such government regulatory activities are, in the Panel's view, simply taxes on imports. It must be presumed, therefore, that the drafters meant the term "services" to be used in a more artful political sense, i.e., government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic licence accorded to taxing authorities, be called a "service" to the importer in question. No other interpretation can make Articles II:2(c) and VIII:1(a) conform to their generally accepted meaning.

(i) To what extent does the "cost of services" limitation in Articles II:2(c) and VIII:1(a) require that the amount of the fee not exceed the approximate cost of the government activities performed with respect to the individual customs entry for which the fee is imposed?

78. The Panel began its consideration of the legal issues by addressing the primary issue raised by Canada and the European Economic Community: whether the structure of the United States merchandise processing fee, in the form of an ad valorem charge without upper limits, was consistent with the "cost of services" limitation in Articles II and VIII. The complainants stressed that they did not intend to question the ad valorem method itself. They suggested, for example, that they would not object to an ad valorem fee that had a ceiling limitation equal to the average cost of processing an individual customs entry. The aspect of the United States fee the complainants wished to challenge was its tendency to impose fees exceeding the average cost of processing an individual entry. When the rate of an ad valorem fee is calculated by dividing the total costs of customs processing by the total value of the imports processed, the fee will, when imposed without upper limits, automatically exceed the average cost of processing whenever it is applied to entries of greater-than-average value.

79. The Panel agreed with the parties that the GATT consistency of this type of ad valorem fee turned on the meaning of the "cost of services" limitation in Article II:2(c) and Article VIII:1(a). The Panel understood the central contentions of the parties to be as follows: Canada and the EEC had argued that "cost of services rendered" should be interpreted to mean the cost of the customs processing activities ("services") actually rendered to the individual importer with respect to the customs entry in question, or, at least, the average cost of such processing activities for all customs entries of a similar kind. Both complainants had stressed that the normal practice with respect to service fees was to require persons to pay only for the services rendered to them. The United States had argued that the "cost of services" limitation did not require exact conformity between fees and costs, but only that the fee be "commensurate with" the cost (Article II:2(c)), or limited to the "approximate" cost (Article VIII:1(a)). It had argued that, stated in these terms, the "cost of services" requirements would be satisfied if the total revenues from the fee did not exceed the total cost of the government activities in question, and if the fee were otherwise fair and equitable in its application. The

United States had stressed that the ad valorem structure of the merchandise processing fee was the most equitable and least protective method by which such a fee could be imposed.

80. The Panel agreed with Canada and the EEC that the ordinary meaning of the term "cost of services rendered" would be the cost of those services rendered to the individual importer in question. That meaning was also in keeping with general practice when "services" are charged for, which is to charge the same fee for the same service received. And, finally, the origins of these provisions in the "cost of issue" requirements of the 1923 Convention pointed to this meaning as well.

81. The United States interpretation, by contrast, presented serious difficulties. Granted that the terms "commensurate with" and "approximate" were intended to confer a certain degree of flexibility in the requirement that fees not exceed costs, the range of fees permitted under the US merchandise processing fee could by no stretch of language be considered a matter of mere flexibility. Moreover, the United States contention that "cost of services rendered" referred only to the total cost of the relevant government activities would leave Articles II:2(c) and VIII:1(a) without any express standard for apportioning such fees among individual importers, thereby committing the issue of apportionment, at best, to an implied requirement of equitable (or non-protective) apportionment that would be neither predictable nor capable of objective application. Finally, if "cost of services rendered" meant the total cost of customs operations, the "fiscal purposes" criterion of Article VIII:1(a) would be rendered largely redundant.

82. While the Panel thus found that the text of the General Agreement supported the interpretation advocated by Canada and the EEC, it recognized that this interpretation did not yield a result that was completely satisfying from a policy standpoint. A standard which requires the same fee for the same service would be an appropriate method of charging for government activities which were actually "services" in the economic sense. As noted above, however, most of the import fees covered by these provisions do not involve any such services. They are ordinary taxes on imports.

83. Viewing the US merchandise processing fee as an ordinary tax on imports, the Panel found itself in agreement with the United States argument that the ad valorem structure of that fee was the least distortive means of levying such a tax. That structure would have the lowest ad valorem impact for whatever amount was being collected⁹, it would create

⁹The complainants had observed that the ad valorem impact of a flat-charge user fee can be reduced to minimal levels by simply not trying to collect the entire cost of the "service" in question. While this may be true, it is also true that, given the same revenue target for both kinds of tax, collecting that amount by means of an ad valorem tax without upper limits will produce lower upper rates than any other.

no distortion in relative prices between imports, it would be the most predictable for traders and investors, and it would be the simplest and least costly to administer. The United States had represented that the importers affected by the merchandise processing fee preferred its present method to all others. The Panel had no difficulty in believing that this was so.

84. The Panel was of the view, however, that the interpretation proposed by the United States presented an equally serious problem with regard to the policy objectives of the General Agreement. The problem was that the United States interpretation would enlarge the "service fee" authority granted by Articles II:2(c) and VIII:1(a), more importantly the former. Article II:2(c) is a rather extraordinary exception. It authorizes governments to impose new charges on imports in excess of the ceiling established by a tariff binding. Given the central importance assigned by the General Agreement to protecting the commercial value of tariff bindings, any such exceptions would require strict interpretation. The exception stated in Article II:2(c) requires particularly strict interpretation, however, because it does not conform to the policy justification normally given for such exceptions. In the words of an explanation of Article II:2 contained in a 1980 proposal by the Director-General (27S/24), the policy justification for the three types of border charges permitted by Article II:2 was that they did not "discriminate against imports". If the import fees authorized by Article II:2(c) were in fact fees for beneficial services, this justification would be valid. But given the reality that most such fees are simply an ordinary tax on imports, it cannot be said that such fees do not disadvantage imports vis-à-vis domestic products. In simple terms, Article II:2(c) authorizes governments to impose new protective charges in addition to the bound tariff rate. As such, it is an exception which should be doubly guarded against enlargement by interpretation.

85. In the Panel's view, the interpretation advocated by the United States would expand the scope of Articles II:2(c), as well as VIII:1(a). It would permit a broader variety of import fees to be imposed, and the greater availability and convenience of such fees would, the Panel believed, lead to an increase in both the number and the level of such fees. The Panel was convinced that the attainment of GATT policy objectives would not be furthered by such an interpretation. Thus, even though the requirement that import fees not exceed the cost of individual entries might increase the protective effect of such fees in a particular case, the Panel was unable to accept the United States argument that such consequences justified a more flexible interpretation. The Panel was satisfied that the text of the General Agreement did impose such a requirement, and that it would not promote the objectives of the General Agreement to relax it in the manner proposed by the United States.

86. The Panel concluded that the term "cost of services rendered" in Articles II:2(c) and VIII:1(a) must be interpreted to refer to the cost of the customs processing for the individual entry in question, and accordingly that the ad valorem structure of the United States merchandise processing fee was inconsistent with the obligations of Articles II:2(c) and VIII:1(a) to the extent that it caused fees to be levied in excess of such costs.

87. In reaching this conclusion, the Panel had also given careful consideration to another United States' argument based on the GATT's prior legal experience with ad valorem customs fees. The United States had argued that ad valorem service fees had been widely used throughout GATT's history, and that the absence of any previous challenge to their ad valorem character during this long period demonstrated that most contracting parties considered ad valorem fees to be consistent with Articles II and VIII. The United States had cited several instances in which the CONTRACTING PARTIES had examined particular ad valorem fees without objecting to their ad valorem character, and had placed particular stress upon the fact that, notwithstanding the large number of ad valorem fees in force in 1955, the governments maintaining such fees had agreed to make Article VIII:1(a) mandatory in the 1955 Review Session amendments.

88. The Panel had examined all of the instances cited by the United States, as well as others that came to light during the course of its research. This examination had persuaded the Panel that the evidence did not support the conclusion advocated by the United States. The Panel believed it would be of assistance to include the results of this examination in its report.

89. The Panel first noted that a substantial number of the service fees reported in GATT documents appeared to have had excessively high rates, a problem that would normally have led to legal challenges far more readily than questions of ad valorem structure. The fact that, for the most part, these rather obvious legal shortcomings also appeared not to have been challenged suggested that many of these fees had simply not been subject to the rules of Articles II and VIII, or had otherwise escaped attention. The Panel found some support for the former hypothesis in the fact that most service fees existing on the date of a government's accession to GATT were immune from legal scrutiny under both Articles II and VIII. Article II:1(b) states that tariff bindings do not prevent governments from continuing to impose any non-tariff border charges existing at the time tariff concessions were made.¹⁰ Article VIII:1(a) imposed no legal obligations at all from 1947 to 1957 when the Review Session amendments went into force, and thereafter the obligations of Article VIII were subject to the reservation for existing mandatory legislation in the

¹⁰ Article II:1(b) also exempted border charges imposed subsequently if they were required by laws in force at the time bindings were made. Ad valorem charges in this category would also have been exempt from challenge.

Protocol of Provisional Application.¹¹ The relative importance of such legal immunity was indicated in a 1962 working party report on customs formalities:

The question was raised whether the levying of substantial consular fees by the importing country was in conformity with the obligations of Article VIII of GATT since the rates exceeded the costs of the services rendered and were not the equivalent of an internal charge. It was noted, however, that Article VIII being in Part II of GATT involved obligations only within the arrangements for provisional application of the Agreement. [11S/216]

90. This same legal immunity would also have made it possible for governments with pre-accession service fees to accept the Review Session amendments making Article VIII:1(a) mandatory for post-accession service fees. Once again, the most evident legal problem at the time would have been the excessive rate of many existing fees, and the fact that the new legal obligation was accepted in spite of these more obvious legal shortcomings would tend to support that conclusion. In addition, it is not accurate to say that all governments accepting the Review Session amendment of Article VIII did so in the belief that their fees were in compliance with it. The working party report recommending the amendment also recommended that "the Agreement... contain a general provision allowing time for governments to bring their legislation into conformity with the rules." (3S/214-215) The same report went on to note that five governments had reserved their position, proposing instead that the amendment should become effective "at the earliest practicable date."

91. The Panel found five cases in which individual ad valorem service fees had been investigated by the CONTRACTING PARTIES.¹² The Panel found that in three of the cases the ad valorem method had not been challenged, but that in each case the failure to challenge it could be accounted for by reasons other than an assumption of its validity, either because the fee

¹¹The decision stating that Review Session amendments to Part II of the General Agreement are subject to the Protocol reservation is found at 6S/13; for an explanation of the decision, see John H. Jackson, World Trade and the Law of GATT (1968) pages 74-75.

¹²Articles II:2(c) and VIII:1(a) had also been considered in a sixth case, "EEC Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables" (25S/68 (pages 95-98)), but the Panel concluded that nothing in that discussion was relevant to the present case.

was immune from legal attack on that issue, or because the government imposing the fee had promptly agreed to remove it for other reasons.¹³ In the fourth case, the report of the working party contained a phrase which could have been a criticism of the ad valorem method, although the text was not clear.¹⁴ In the fifth case, the legal consistency of the ad valorem method had been expressly questioned.

92. The fifth case involved a 1954 complaint by the United States concerning an increase in the rate of a French stamp tax. The stamp tax was calculated as a percentage of the customs duty; the increase in question raised the rate from 1.7% of the customs duty to 2%, an increase said to equal about 0.1% ad valorem. France defended the increase on the ground that the tax had been provided for in its consolidated schedule and had not actually been changed in gold or dollar value (in essence, that it

¹³In 1948, the Netherlands brought a complaint concerning a discriminatory consular tax imposed by Cuba in which a rate of 5 per cent ad valorem was charged on goods from the Netherlands while a rate of 2 per cent ad valorem was charged on others. Cuba agreed to remove the discriminatory element (CP.2/9; CP.2/SR.11). Given the early date of the complaint, the tax itself almost certainly antedated Cuba's accession, and so would not have been open to challenge under Article II. Article VIII was not then in force.

In 1952, the United States brought a complaint concerning a French statistical tax of 0.4 per cent ad valorem, on the ground that it was being used to fund social payments to agricultural workers. France agreed that this purpose constituted a violation of Article II, and agreed to remove the tax, thereby rendering moot any other claim of legal inconsistency. (L/64; SR.8/7, page 10).

In 1955, the United States brought a complaint concerning the increase of a French stamp tax, from 2 per cent of the customs duties to 3 per cent; the revenues from the additional 1 per cent were used to fund social payments to agricultural workers. France immediately agreed that the added 1 per cent was inconsistent with GATT obligations because it was not used to fund customs services, thereby rendering moot any other claim of legal inconsistency. (L/410; SR.10/5, pages 51-52). (As is explained more fully below, the United States had already challenged the ad valorem character of the original 2 per cent tax in a 1954 proceeding.)

¹⁴A 1971 working party report on the accession of Zaire stated that a statistical tax of 3 per cent ad valorem was "not commensurate with the service rendered and was contrary to the provisions of Article VIII:1(a)". The report did not specify the specific violation or violations in question. Although Zaire's reply to this finding concentrated on the excessive rate of the tax, the working party's eventual recommendation also asked Zaire to "re-examine its present method of application of the statistical tax..." a form of expression which was more appropriate to a concern over the form of the tax than to concern over the excessive rate. (18S/89, pages 89-90).

was exempt under Article II:1(b)). France also defended the fee on the ground that its current level was commensurate with the cost of customs services rendered, and was thus authorized by Article II:2(c).¹⁵ The reply of the United States delegation was as follows:

Mr. BROWN (United States) thanked the French delegate for his report. The United States Government was particularly concerned with the principle that the maintenance of an ad valorem charge alone would not satisfy the requirements of Article II. After the statement and explanation of the intentions and attitude of the French Government, and since there was no substantial injury to United States exports, his delegation was prepared to withdraw the complaint from the Agenda. (SR.9/28, page 5)

93. Finally, to give a more complete view of GATT legal experience on the issue of ad valorem service fees, the Panel considered it relevant to note that the ad valorem method had in fact been expressly attacked in 1952 and 1957, in two formal recommendations concerning consular fees. (1S/25; 6S/25.) Although these recommendations were initiated at a time when Article VIII:1(a) was merely hortatory, and thus were not a legal ruling as such, they were expressly intended to implement the standards of Article VIII:1(a). In its preamble, the 1952 recommendation noted the "cost of services" standard stated in Article VIII:1(a), and then observed that "the [consular] fee charged is in many cases a high percentage of the value of the goods." The operative part of the recommendation then stated, "Any consular fee should not be a percentage of the value of the goods but should be a flat charge." The 1957 recommendation, issued one month after the effective date of the protocol making Article VIII:1(a) mandatory, restated the 1952 recommendation in similar terms. While it is probable that the primary concern with the ad valorem method in these recommendations had been its tendency to encourage excessive rates, the text of these recommendations is also consistent with a parallel objection to its cost apportionment consequences. In either event, governments were on notice from an early date that the CONTRACTING PARTIES did not necessarily consider the ad valorem method an acceptable structure for the type of fees covered by Article VIII.

94. Considering the historical evidence as a whole, the Panel could not agree with the United States argument that the GATT's legal experience with ad valorem service fees evidenced a widespread belief that the ad valorem method as such was consistent with the obligations of Articles II and VIII. Whether considered individually or as a whole, the events which constitute that history simply do not demonstrate any such understanding. If anything, these events tend to show that the ad valorem method has been questioned in those few cases where it has been put in issue.

¹⁵ Compliance with Article VIII:1(a) was not in issue, because in 1954 it was not mandatory.

(ii) Do all the costs included in the "commercial operations" budget of the United States Customs Service constitute "cost of services rendered" to the commercial importers subject to the merchandise processing fee within the meaning of Articles II:2(c) and VIII:1(a)?

95. After having dealt with the primary issue raised by the complaining parties, the Panel next considered several additional arguments by Canada and the European Economic Community claiming that various costs included in the "commercial operations" budget of the US Customs Service could not be considered "services rendered" to those commercial importers who were required to pay the fee. These arguments and the conclusions following from them were separate from the issue raised in the previous section. They would apply to any fee based on a calculation of total costs of customs processing, whether the fee was levied on an ad valorem basis or as a flat charge per entry. For convenience of analysis, the present report divides the arguments relating to different costs into three categories.

96. (a) The cost of certain Customs Service activities. The first category of costs to be challenged were the costs of certain Customs Service operations which, in the view of the complainant governments, could not be considered as "services rendered" within the meaning of Articles II:2(c) and VIII:1(a), and thus could not be charged to commercial importers under these provisions. Under this first heading, the parties questioned the inclusion of costs for the following activities of the Customs Service: airport passenger processing, activities related to exports, investigation of commercial fraud, investigation of counterfeit goods, collection of anti-dumping and countervailing duties, legal rulings on customs matters, technical laboratories, "clearance of carriers", and the pro-rata share of Executive Management activities called International Affairs, Internal Affairs, and Chief Counsel.

97. As noted in the previous section of this report, the Panel was of the view that Articles II:2(c) and VIII:1(a) contained a limitation upon the type of charges that could be imposed under these two provisions, a limitation to be found in the term "services rendered." Stated generally, the type of government activities deemed to be "services" were those activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic license accorded to taxing authorities, be called "services" to the importer in question.

98. The Panel was aware that, in applying this standard, its capacity to make judgments about the nature and functioning of particular government operations would of necessity be limited by the quality of the information presented to it. The Panel was of the view that the government imposing the fee should have the initial burden of justifying any government activity being charged for. Once a prima facie satisfactory explanation had been given, it would then be upon the complainant government to present further information calling into question the adequacy of that explanation.

99. In the course of reaching its conclusions on these issues, the Panel also took into account that the United States Government had made a substantial effort to conform to GATT requirements when calculating the

basis of the fee. The fact that the entire budget for the US Customs Service had been restructured in order to create a separate "commercial operations" account testified to the seriousness of that effort.

100. The Panel found that two of the challenged activities could not under any circumstances be regarded as "services rendered" to the commercial importers in question. The first was the activity of airport passenger processing. The cost of passenger processing was a large item in the "commercial operations" budget of the Customs Service, accounting for approximately ten percent. According to the information furnished to the Panel, the customs clearance of passengers was a wholly separate operation from the clearance of commercial cargoes, and the expenditures for the two processes are budgeted separately. Thus, passenger processing could not be considered a government activity "serving" those commercial importers who pay the merchandise processing fee.

101. The second item found not to qualify was the collecting and transmission of export documentation. No argument was made that export-related activities were properly chargeable to commercial importers. The United States sought to defend the failure to exclude the cost of this activity on the ground that the costs were de minimis. The Panel accepted that any system of cost allocation would of necessity require certain consolidations of minor functions within larger general categories, and that on balance such consolidations would probably not distort costs to any significant degree, especially since improper costs included in one case were likely to be offset by the exclusion of proper costs in another. On the other hand, the Panel also noted that the cost of adjusting budgets to reallocate any improper costs that were challenged would not be very great. Consequently, the Panel was of the view that, where affected governments consider particular cost items important enough to be challenged, the better solution would be to adhere to the legal requirements and to recommend that the government in question make the necessary budgetary correction. If costs were known well enough to support a claim of de minimis, they should be known well enough to permit moving the estimated cost of the challenged activity to another budget item.

102. The remaining "commercial operations" activities questioned by the complainants were all activities that had some relationship to the processing of commercial imports, but in each case one or both of the complainants had raised a question whether the activity was of sufficient proximity to the normal process of customs clearance to be considered a "service" rendered to the importer. A second and related issue raised by the complainants was whether, assuming that a particular activity (e.g., a customs fraud investigation) were considered a "service" to the directly affected importer, that activity could also be considered a "service" to all other importers who were not in fact directly affected by it.

103. With respect to all but one of these remaining activities, the Panel was satisfied that the challenged activities were both proximate enough, and of sufficiently general applicability, that their costs could be included in the fee applicable to all commercial importers. In reaching these conclusions, the Panel gave considerable weight to the United States

explanation that customs processing in the United States had increasingly moved away from hands-on processing of incoming shipments, towards a highly centralized process which focused on identifying problem transactions and concentrating on them. Under such a system, centralized and specialized activities far removed from the ordinary importer were in fact an essential ingredient to the more rapid handling of the ordinary entry, the ultimate objective of the "service" that importers were being made to pay for.

104. Taking into account this system of customs administration, the Panel was persuaded that investigations of customs fraud and counterfeit goods were activities that directly affected the manner in which all entries were processed. The Panel concluded that collection of anti-dumping and countervailing duties were also normal customs activities, and that, taken as a group with the administration of other special border measures that affect varying goods at varying times, they are of a sufficiently general character that they might properly be considered a part of general customs "services" applicable to all commercial importers. The Panel was likewise of the view that both technical laboratories and the service of providing legal rulings on customs matters were resources of general applicability to the entire customs process, and that their cost could be allocated among all commercial importers and did not have to be charged solely to the specific importers who happened to be beneficiaries of their "services" at the time in question. With respect to the "clearance of carriers" item, the Panel noted that this activity involved the examination of manifests which was the first step in discharging commercial cargo, and thus was clearly a part of the normal process of customs clearance.

105. Finally, with regard to the cost of those Executive Management functions challenged by the complainants, the Panel was satisfied that the United States was justified in including the pro rata cost of Internal Affairs and Chief Counsel, but it was unable to conclude that the International Affairs item had been properly allocated. Unlike the other functions in this category, which were described as involving centralized administrative functions, International Affairs was described as involving a variety of activities of Customs officers stationed in other countries, activities that were not identical and only some of which appeared to be related to the process of customs clearance. The Panel considered that the costs of such activities could not be allocated on the same pro rata basis as the other items. Since the United States supplied no other basis for allocating these costs, the Panel could not find that their inclusion was justified.

106. The Panel's conclusion under this first category of challenged costs was that the cost of passenger processing and the cost of handling export documentation could not be included in the cost base of the merchandise processing fee, and that the inclusion of the cost of International Affairs had not been justified.

107. (b) The cost of customs processing for exempt imports. The second category of costs challenged by the complainants was the cost of customs processing for imports that were exempt from the merchandise processing

fee. Exemptions from the fee had been provided to imports from US insular possessions, imports from least developed developing countries, imports from developing countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (CBERA), and imports classified under Schedule 8 of the Tariff Schedules of the United States. The information provided to the Panel made clear that the rate of the merchandise processing fee was calculated in a manner which assured that the revenues from the fee would cover the cost of customs processing for all commercial imports, including the cost of processing exempt imports. In short, those who paid the fee were paying not only the cost of processing their own entries, but also the costs of exempt entries. According to information supplied by the United States, the costs attributable to exempt imports were substantial. Out of total 1986 imports of \$369 billion, the total value of imports exempted from the fee would have been approximately \$102 billion, or about 28% if measured by value.

108. The United States gave a full explanation of the reasons for making these exemptions. In the Panel's view, however, none of the reasons for exempting a particular class of imports could provide any justification for the decision to make other importers pay the costs attributable to those imports.

109. The Panel concluded that processing exempted imports could not be considered as "services rendered" to the commercial importers paying the merchandise processing fee.

110. (c) The cost of "commercial operations" for the first two months of Fiscal Year 1987. The third category of costs challenged by the complainants concerned the cost of all "commercial operations" during the first two months of Fiscal Year 1987, a period when the fee was not in force. During the last ten months of FY 1987 when the merchandise processing fee had been in force, the rate had been set high enough to produce revenues sufficient to cover the "commercial operations" budget for the entire fiscal year. The complainants argued that the costs for the first two months could not be regarded as "cost of services rendered" to the importers paying the fee in the last ten months. The United States offered the view that the higher rate during the last ten months of the initial fiscal year of the fee was permissible, in view of the essential similarity between services rendered in the last ten months and those rendered during the entire fiscal year.

111. The Panel could not accept the justification presented by the United States. The Panel found nothing in Articles II or VIII which would authorize retroactive imposition of customs fees. The only plausible reading of the link required between costs and revenues was that revenues must be measured against the costs of the period in which the revenues are collected.

112. The Panel concluded, therefore, that the receipts from the last ten months of FY 1987 had to be measured against the costs of customs operations during that period, or, at least, against 10/12 of the total cost of "commercial operations" for FY 1987. Costs in excess of this amount could not be attributed to the commercial importers paying the fee.

(iii) To what extent, under Articles II:2(c) and VIII:1(a), can total charges in excess of the total "cost of services rendered" be rectified by sequestering revenues from the fee in an account that can only be expended for customs services in subsequent years?

113. Viewing the United States merchandise processing fee as a whole, Canada and the European Economic Community contended that the fee had resulted in an overcharge, for two basic reasons. The first reason was the inclusion in the base of the fee of the improper charges described above: (a) charges for the cost of airport passenger processing, export-related activities, and International Affairs, (b) charges for the cost of processing exempt imports, and (c) charges for the cost of "commercial operations" for the two months prior to December 1986. The second reason for the overcharge, argued the complainants, was that the rate of the fee had been set too high, generating more revenue than needed to cover all the costs (proper or improper) contained in the "commercial operations" budget. The rate of 0.22 percent ad valorem applied in the last ten months of FY 1987 had yielded approximately \$536 million in revenue, against estimated costs of approximately \$505 million for Customs "commercial operations" during all of FY 1987. Revenues for FY 1988 from the statutory rate of 0.17 percent ad valorem were projected to be \$540 million, against projected costs of \$535 million for the same period.

114. In response to the general problem of overcharges, the United States argued that the problem was essentially self-correcting under the US law, because funds from the merchandise processing fee were sequestered in a separate account that could only be expended for the "commercial operations" budget of the Customs Service. Excess revenues in one year simply constituted a surplus that must be used to reduce the fee in years following.

115. With regard to overcharges due to the second reason, i.e. incorrect rates, the Panel recognized that the "cost of services" limitation was a legal standard that could not be applied with precision in advance, at least not at the upper limit. Under any method of assessment seeking total reimbursement for the costs in question, governments would of necessity have to set the level of the fee on the basis of cost and revenue estimates, with a procedure for correcting overcharges when they occurred. The Panel considered that the United States system of sequestered accounts was a reasonable solution to the problem of overcharges due to incorrect estimates. The Panel noted the complainants' argument that the size of the overcharge in FY 1987 due to an incorrect rate (i.e. revenues of \$535 million for costs of \$505 million) exceeded normal tolerances. The Panel was not provided with the data on which the 1987 calculations were made, but, having been supplied by the parties with an array of differing cost and revenue estimates made during FY 1987, the Panel did not consider this six percent error to be outside the normal range of error for such forecasts.

116. The Panel could not agree, however, that sequestered accounts alone were sufficient to cure the overcharge due to the first reason, improper charges. The amount of the overcharge in FY 1987 due to such improper charges had been substantial. Based on the data accepted for the purpose of the present report, the Panel found that the \$505 million allocated to the "commercial operations" budget in FY 1987 exceeded the proper amount by over \$230 million.¹⁶ The projected costs of \$535 million for "commercial operations" in FY 1988 would also exceed proper costs by a similarly substantial sum, approximately \$185 million, so long as it included charges for airport passenger processing and exempt imports.¹⁷

117. As long as such improper costs remained in the "commercial operations" budget, sequestering of accounts would do nothing at all to correct the overcharge, because the revenues collected for such costs would be used to pay them and would never create a surplus to be carried over into future years. Even if such sums were treated as surplus, however, the carrying forward of sums of such magnitude, for credit in future years, could not be considered a satisfactory implementation of the legal obligations in question. Compliance with these obligations would require the removal of such costs from the basis of the present tax so that no further excess revenues are collected.

(iv) Does the US merchandising processing fee represent either "an indirect protection to domestic products" or "a taxation of imports ... for fiscal purposes" within the meaning of Article VIII:1(a)?

118. Having considered at some length the issues raised by the parties under the "cost of services" limitation in Articles II:2(c) and VIII:1(a),

¹⁶ Setting aside possible corrections for export-related activities and International Affairs, for which the Panel had no data, the Panel made the following calculations: The total cost, \$505 million, was first reduced by approximately \$51 million, representing the amount budgeted for passenger processing. The resulting sum of \$454 million was then further reduced to exclude the share of these costs attributable to exempt imports. The Panel did not have the data to calculate the percentage of exempt imports by number of entries, but using the percentage of exempt imports by value (28 per cent) it arrived at a figure of \$127 million that would have to be excluded. And finally, this sum of \$327 million was reduced by a further 2/12 (55 million) to exclude the cost of the two months prior to the imposition of the fee. The total chargeable amount under these calculations was \$272 million.

¹⁷ For FY 1988, the projected cost of passenger processing in the data submitted to the Panel was \$53 million. Removing this item reduced the total to \$482. Using the 1986 percentage by value (28 per cent) to calculate the necessary exclusion for exempt imports, a further reduction of approximately \$135 million was required. Once again, the Panel's calculation did not include possible corrections for export-related activities and International Affairs.

the Panel then considered whether the arguments of the parties had raised any further issues concerning the US merchandise processing fee under the second and third criteria stated in Article VIII:1(a).

119. The only issue raised by the parties under the third criterion prohibiting "taxation of imports ... for fiscal purposes" was the question of whether total revenues exceeded total attributable costs, an issue which the Panel dealt with fully under the "cost of services" requirement.

120. The only specific issue raised by the parties under the second criterion was whether the 0.22 and 0.17 percent ad valorem charges constituted "an indirect protection to domestic products" due to their effect on certain classes of price-sensitive imports. It was not necessary for the Panel to decide whether the "indirect protection" criterion actually involved a requirement of no adverse trade effects. The Panel concluded that, even if it did, it had not been demonstrated that these ad valorem charges had had a trade distorting effect.

Were the exemptions from the US merchandise processing fee granted to imports from certain countries inconsistent with the MFN obligation of Article I:1?

121. In a submission to the Panel, India, appearing as an intervening party, requested the Panel to consider whether the exemption contained in the merchandise processing fee legislation in favour of imports from least developed countries was consistent with the MFN obligations of Article I:1. Two other interveners, Australia and Singapore, also referred to this issue, mentioning in addition the exemption for beneficiaries of the CBERA. The two complainants had not raised this matter but reserved their right on the issue. They indicated that they had no objection to the Panel dealing with the issue.

122. The Panel understood the argument that these exemptions were inconsistent with the obligations of Article I to be as follows: The merchandise processing fee was a "charge imposed on or in connection with importation" within the meaning of Article I:1. Exemptions from the fee fell within the category of "advantage, favour, privilege or immunity" which Article I:1 required to be extended unconditionally to all other contracting parties. Such preferential exemptions therefore constituted a breach of the obligation of non-discrimination of Article I:1. The exemption from the fee granted to beneficiaries of the CBERA was not authorized by the waiver granting the US authority to extend duty-free treatment to these beneficiaries (31S/20). Nor was it authorized by the Enabling Clause of 28 November 1979 (26S/203), the relevant provisions of which authorized preferential tariff and non-tariff measures for the benefit of developing countries only if such measures conformed to the Generalized System of Preferences or to instruments multilaterally negotiated under GATT auspices. Nor, finally, did the Enabling Clause, cited above, authorize the preferential exemption from the merchandise processing fee for products from least developed developing countries. Under the Enabling Clause, special measures for least developed developing countries were permitted only if taken "in the context of any general or specific measures in favour of developing countries."

123. No answer in opposition to these legal claims was given, nor was the Panel aware of any that could be given.

124. Nevertheless the Panel concluded that it would not be appropriate to make a formal finding on this issue. GATT practice has been for panels to make findings only on those issues raised by the parties to the dispute. The Panel believed that this was sound legal practice and should be followed in this case. It was, of course, open to any contracting party who wished to raise this issue, or any other issue pertaining to the US merchandise processing fee, to commence dispute settlement proceedings in its own right under the General Agreement.

VI. SUMMARY

125. The Panel found that:

- (a) The term "cost of services rendered" in Articles II:2(c) and VIII:1(a) must be interpreted to refer to the approximate cost of customs processing for the individual entry in question, and that consequently the ad valorem structure of the United States merchandise processing fee was inconsistent with the obligations of Articles II:2(c) and VIII:1(a) to the extent it caused fees to be levied in excess of these approximate costs.
- (b) The United States merchandise processing fee, as applied in Fiscal Year 1987 and as established for Fiscal Year 1988, also exceeded the "cost of services rendered" within the meaning of Articles II:2(c) and VIII:1(a) to the extent it included charges for the cost of the following activities of the US Customs Service:
 - (i) airport passenger processing;
 - (ii) collecting and forwarding of export documentation;
 - (iii) the International Affairs item in the "commercial operations" budget;
 - (iv) customs processing of imports exempt from the merchandise processing fee;
 - (v) all activities within the present definition of "commercial operations" for the first two months of Fiscal Year 1987.
- (c) Accordingly, to the extent it had caused fees to be levied in excess of the "cost of services rendered" within the meaning of Articles II:2(c) and VIII:1(a), the United States merchandise processing fee had to be considered prima facie to nullify or impair benefits accruing to Canada and to the European Economic Community under the General Agreement.

126. In the light of the above, the Panel suggests that the CONTRACTING PARTIES recommend that the United States bring the merchandise processing fee into conformity with its obligations under the General Agreement.

ANNEX I

Estimated Costs of US Customs Service "Commercial
Operations" Referred to in Paragraph 17

	Estimated cost in FY 1987*		Estimated Budget for FY 1988**	
	FTE	Amount \$'000	FTE	Amount \$'000
Passenger Processing	1,087	50,863	1,087	53,299
Cargo Operations	3,625	167,450	3,625	176,895
Appraisement/Classification	2,593	117,902	2,593	123,711
Regulatory Audit	195	9,305	195	9,788
Technical & Legal Support	292	14,632	292	15,434
Fraud Investigations	323	16,713	323	17,658
Commercial Data Systems	125	35,733	125	38,152
Executive Management	263	18,374	263	18,667
Administration	557	74,217	557	81,412
Total, Commercial Operations	9,060	505,189	9,060	535,016

* Final data for FY 1987 not yet available.

** Based on FY 1987 FTE (full time equivalents).

ANNEX 2

Calculations Referred to in Paragraph 46

	FY 1987* \$000,000	FY 1988** \$000,000
Revenues for Fiscal Year	536***	540
Cost of "commercial operations" for Fiscal Year	505	535
<u>Less:</u> cost of activities not considered "services rendered" to commercial importers:		
passenger processing	51	53
fraud	17	18
<u>Sub-total I:</u> costs properly chargeable to commercial importers	437	464
<u>Less:</u> share of costs attributable to commercial imports exempted from fee (CBERA, LDDC, Insular, Schedule 8), measured by 1986 values (28%)	122	130
<u>Sub-total II:</u> costs properly chargeable to non-exempt commercial imports	315	334
<u>Less:</u> for FY 1987 costs for two months not covered by fee (1.10.86 to 1.12.86) = 2/12	53	-
<u>Sub-total III:</u> costs properly chargeable to commercial importers subject to the fee	262	334
Excess Receipts over Costs	274	206
Accumulated Excess over Time	274	480

* FY 1987 figures are estimates based on most recent data available.

** FY 1988 figures are estimates of the revenues that would be collected under the present law at a rate of 0.17% ad valorem, and of the cost of "commercial operations" at 1987 FTE levels.

*** Fees collected from 1 December 1986-30 September 1987.