countervailing duties consistent with the GATT and other relevant agreements, and fees or other charges commensurate with the cost of services rendered.[35]

Despite Article II's importance to the GATT, its enforcement can be difficult because WTO Members frequently disagree about which duty applies to a particular good. A country's tariff schedules address categories and sub-categories of products but do not expressly identify and provide a tariff rate for every potential product variation and nuance.[36] Despite these problems, a country's customs agency must rely on the tariff schedules as written to identify the kind of product under consideration and apply a tariff rate. This leads to problems like the one encountered in *EC – Chicken Classification*, in which Brazil complained that the European Union incorrectly classified fresh chicken packed in salt as fresh chicken cuts rather than salted chicken cuts.[37] At issue was an EU regulation that provided the customs agency with guidance on the distinction between salted and fresh chicken cuts, stating that chicken must be "deeply and homogenously impregnated with salt in all parts" to be subject to the ad valorem duty that was more favorable to foreign imports than the duty that was applied to fresh chicken.[38]

Article VIII: Fees and Formalities

Article VIII:1 of the GATT requires that all fees and charges imposed in connection with importation or exportation be (1) limited in amount to the approximate cost of services rendered, and (2) not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.[39] The first prong (limiting the amount to the cost of services rendered) is actually a dual requirement as it requires (a) that a service was rendered, and (b) that the level of the charge does not exceed the approximate cost of that service.[40] Moreover, the term "services rendered" means services rendered to the individual importer in question.[41]

One of the early disputes involving Article VIII was *US – Customs User Fee*, which was heard by a GATT panel in 1987. In that case, the European Union and Canada challenged the GATT-consistency of an *ad valorem* processing fee charged by the U.S. Customs Service on all commercial merchandise entering the United States.[42] The amount of the fee charged varied depended only on the appraised value of the merchandise, not on the costs incurred by the Customs Service of processing the merchandise.[43] The United States argued that the fee was commensurate with the services rendered because it was commensurate with the sum costs of the Customs Service's commercial operations.[44] The panel disagreed, finding that if the "cost of

services rendered" referred to the total cost of the relevant government activities, rather than to the actual cost of the services rendered to the individual importers charged, Article VIII:1 would not provide an objective standard by which the equitable apportionment of these fees could be ascertained.[45] Accordingly, it ruled that it the U.S. processing fee was inconsistent with Article VIII:1 to the extent that it caused fees to be levied in excess of the approximate cost of the services provided to each individual importer.[46]

Similarly, in *Argentina – Textiles*, the panel found that Article VIII:1 forbade Argentina from imposing an *ad valorem* duty with no fixed fee on textile and footwear imports. In that case, Argentina was calculating an average import price for each tariff line of textiles, apparels, and footwear to determine what the specific minimum duty was for products in that category.[47] Upon the importation of an article within that tariff line, Argentina then applied either the specific minimum duty or an *ad valorem* duty with no fixed fee depending which duty was higher.[48] While Argentina claimed that it applied the higher *ad valorem* duty only to recoup the costs of the "statistical services" involved in calculating the average import price for tariff line, the panel ruled that because the *ad valorem* duty had no fixed maximum fee, it was inherently not limited to the approximate cost of the services rendered and therefore inconsistent with Article VIII:1.[49]

In addition, in *U.S. – Certain EC Products*, a WTO panel ruled that Article VIII barred the United States from increasing bonding requirements on imports from the European Communities in order to secure the collection of future additional import duties that it was going to impose, once authorized by the DSB, for the European Communities' non-compliance with a WTO decision.[50] The United States argued that the increased bonding requirements were a fee for the "early release of merchandise," but the panel found that the United States failed to provide any evidence that the bonding requirements represented any approximate costs of such services.[51]

Article IX: Marks of Origin

Article IX of the GATT disciplines marks of origin laws, that is, laws setting requirements for the labeling of certain products with their country or region of origin. Under Article IX:1, WTO Members may not accord to the products of other Members "treatment with regard to marking requirements" that is "less favorable than the treatment accorded to like products of any third country." Article IX thus requires most favored nation treatment in marks of origin laws just as Article I requires most-favored nation treatment in the broader context of tariffs, other charges, and all rules and formalities connected to importation and exportation. In addition, while Article IX:2 recognizes that origin marking is important for protecting consumers against fraudulent or misleading labels, it calls on WTO Members to reduce the trade barriers that may result from domestic origin marking requirements.

Article IX is not so broad, however, as to govern measures requiring the labeling of process and production methods, even when the measure requires this labeling based on the location where the good was produced or harvested.[52] In *US – Tuna/Dolphin I*, an unadopted report, a GATT panel rejected Mexico's allegations that provisions of the U.S. Dolphin Protection Consumer Information Act (DPCIA) were inconsistent with Article IX.[53] The provisions challenged created civil penalties for selling tuna products with labels or other indications that the tuna was harvested in a manner not harmful to dolphins if the tuna was caught in particular locations by certain methods.[54] The GATT panel agreed with the United States that these labeling provisions were subject to the nondiscrimination rules set by Article I and Article III:4, not the marks of origin rules set by Article IX.[55] The panel reasoned that because Article IX does not entail a national treatment requirement, but only a most favored nation requirement, it was intended to regulate the marking of *origin* of imported products, but not the marking of products or their process and production methods generally.[56]

Article XI: General Elimination of Quantitative Restrictions

Quantitative prohibitions and restrictions on imports include non-tariff trade barriers such as import and export licenses, quotas, bans, and embargoes. In essence, quantitative restrictions are absolute restrictions on imports because they impose fixed rules that cannot be overcome by the importer. Unlike internal regulations enforced at the border, quantitative restrictions hinder the opportunity for a product to enter into, rather than simply compete in, the enforcing country's market.[57]

Article XI:1, a cornerstone GATT obligation, bars WTO Members from placing quantitative prohibitions or restrictions on the importation of any other Member's products or the exportation of any domestic product to another Member's territory. In doing so, Article XI illustrates the strong preference of GATT and Uruguay Round negotiators for tariffs as opposed to non-tariff border restrictions.[58] These negotiators intentionally made tariffs the border protection of choice because they are more transparent and easily satisfied without bringing trade to a halt unlike quantitative restrictions, and, perhaps most importantly, they are capable of definitive reduction over time.[59]

Despite the strong policy choice behind it, Article XI does provide exceptions to its rule, including (1) export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages facing the exporting Party, and (2) import restrictions designed to remove a temporary surplus of the like domestic product.[60] In addition, other GATT articles may be implicated by the

imposition of quantitative restrictions.[61] Under Article XIII, for example, quantitative restrictions must be applied in accordance with most favored nation treatment.

Article XX: General Exceptions to the GATT and "the Chapeau"

Article XX identifies 10 policy-related exceptions to the provisions of the GATT that may justify a GATT-inconsistent measure. To qualify for an exception, the violative measure must not only fall within the scope of one of the 10 exceptions, but it must also be applied in a manner that does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or be a disguised restriction on international trade. This condition on the measure's application is referred to as "the chapeau" of Article XX because it is contained in the introductory clause, or the "hat," of Article XX.

Among the 10 measures excepted from the GATT's provisions are those measures (1) necessary to protect public morals; (2) necessary to protect human, animal, or plant life and health; (3) relating to products of prison labor; (4) imposed for the protection of national treasures of artistic, historic, or archaeological value; or (5) relating to the conservation of exhaustible natural resources which operate in conjunction with restrictions on domestic production or consumption.

Article XX operates as an affirmative defense in a WTO dispute settlement proceeding. Consequently, Article XX is raised after a Member's measures are deemed inconsistent with the GATT and is invoked by the defending Member who bears the burden of proving that Article XX exempts the measures concerned from the provisions of the GATT. The defending Member must first show that the measure fits within one of the exceptions covered by Article XX. For Article XX exceptions that require the defending Member to prove that the measure is "necessary" to achieve an identified goal (e.g., to protect human, animal, or plant health), this means that the defending Member must make a *prima facie* case that (1) the common interests or values protected by the measure are important, (2) the measure materially contributes to the realization of the ends it pursues, and (3) the restrictive impact of the measure on international commerce is outweighed by its contribution to the stated values or interests.[62] The complaining Member may then rebut the defending Member's arguments by showing that there are less restrictive alternatives available. Then the defending Member must show that these alternatives would not be effective or feasible.[63]

If the defending Member is successful in showing that the measure fits into one of the stated Article XX exceptions, it must next show that the measure satisfies the "chapeau," meaning that, as applied, the measure does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Compliance with this standard is generally considered more difficult than establishing that a measure fits into one of the 10 policy exceptions. For example, the United States failed to satisfy the chapeau in *U.S. – Shrimp*. In that case, the United States banned all shrimp harvested under the laws of nations that were not certified by the United States as having sufficient laws to protect