

Meaning of substantially the same duties

*From WTO Analytical Index*

(c) Subparagraph 8(a)(ii)

(i) *Interpretation*

634. In *Turkey - Textiles*, the Appellate Body addressed the requirement contained in Article XXIV:8(a)(ii) that constituent members of a customs union apply "substantially the same" duties and other regulations of commerce to their external trade with third countries. The Appellate Body agreed with the Panel that the term "substantially the same" has both "qualitative and quantitative components":

"Sub-paragraph 8(a)(ii) establishes the standard for the trade of constituent members *with third countries* in order to satisfy the definition of a 'customs union'. It requires the constituent members of a customs union to apply 'substantially the same' duties and other regulations of commerce to external trade with third countries. The constituent members of a customs union are thus required to apply a common external trade regime, relating to both duties and other regulations of commerce. However, sub-paragraph 8(a)(ii) does *not* require each constituent member of a customs union to apply *the same* duties and other regulations of commerce as other constituent members with respect to trade with third countries; instead, it requires that *substantially the same* duties and other regulations of commerce shall be applied. We agree with the Panel that:

'[t]he ordinary meaning of the term 'substantially' in the context of sub-paragraph 8(a) appears to provide for both qualitative and quantitative components. The expression 'substantially the same duties and other regulations of commerce are applied by each of the Members of the [customs] union' would appear to encompass both quantitative and qualitative elements, the quantitative aspect more emphasized in relation to duties.'(873)"(874)

635. The Appellate Body in *Turkey - Textiles* further agreed with the Panel that the phrase "substantially the same" in Article XXIV:8(a)(ii) offered a "certain degree of flexibility". However, the Appellate Body objected to the standard of "comparable trade regulations having similar effects" developed by the Panel and held that this standard did not rise to the required standard of "sameness":

"We also believe that the Panel was correct in its statement that the terms of sub-paragraph 8(a)(ii), and, in particular, the phrase 'substantially the same' offer a certain degree of 'flexibility' to the constituent members of a customs union in 'the creation of a common commercial policy.'(875) Here too we would caution that this 'flexibility' is limited. It must not be forgotten that the word 'substantially' qualifies the words 'the same'. Therefore, in our view, something closely approximating 'sameness' is required by Article XXIV:8(a)(ii).(876) We do not agree with the Panel that:

... as a general rule, a situation where constituent members have 'comparable' trade regulations having similar effects with respect to the trade with third countries, would generally meet the qualitative dimension of the requirements of sub-paragraph 8(a)(ii).(877)

Sub-paragraph 8(a)(ii) requires the constituent members of a customs union to adopt 'substantially the same' trade regulations. In our view, 'comparable trade regulations

having similar effects' do not meet this standard. A higher degree of 'sameness' is required by the terms of sub-paragraph 8(a)(ii)."(878)