
 Report of the Panel

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I. INTRODUCTION

1.1 On 16 July 1997, the United States requested consultations with India, pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXII:1 of the GATT, Article 19 of the Agreement on Agriculture (to the extent it incorporates by reference Article XXII of the GATT), and Article 6 of the Agreement on Import Licensing Procedures (to the extent it incorporates by reference Article XXII of the GATT), concerning quantitative restrictions maintained by India on the importation of a number of agricultural, textile and industrial products (WT/DS90/1). The United States considered that the quantitative restrictions maintained by India, including, but not limited to, those tariff lines notified in Annex I, Part B of WT/BOP/N/24, appeared to be inconsistent with India's obligations under Article XI:1 and XVIII:11 of the GATT 1994, Article 4.2 of the Agreement on Agriculture and Article 3 of the Agreement on Import Licensing Procedures. At the same time, Australia, Canada, the European Communities, New Zealand and Switzerland requested consultations with India on these quantitative restrictions (WT/DS91/1; WT/DS92/1; WT/DS93/1; WT/DS94/1; WT/DS96/1) on the basis of similar claims to those set forth by the United States.¹ Subsequently, Japan, the European Communities, Canada, Australia, Switzerland and New Zealand asked to join in the consultations requested by the United States (WT/DS90/2, WT/DS90/3, WT/DS90/4, WT/DS90/5, WT/DS90/6, WT/DS90/7). The United States and India formally consulted on these measures in Geneva on 17 September 1997, and Japan participated as an interested third party under Article 4.11 of the DSU.

1.2 On 3 October 1997, the United States requested that the WTO Dispute Settlement Body ("DSB") establish a panel to examine this dispute.² In its request, the United States considered that quantitative restrictions maintained by India, including, but not limited to, the more than 2,700 agricultural and industrial product tariff lines notified to the WTO in Annex I, Part B of WT/BOP/N/24 dated 22 May 1997, appeared to be inconsistent with India's obligations under Articles XI:1 and XVIII:11 of GATT 1994 and Article 4.2 of the Agreement on Agriculture. Furthermore, the import licensing procedures and practices of the Government of India are inconsistent with fundamental WTO

¹ Switzerland did not refer to Article 4 of the Agreement on Agriculture in its request.

² WT/DS90/8, 6 October 1997.

requirements as provided in Article XIII of GATT 1994 and Article 3 of the Agreement on Import Licensing Procedures. The DSB established the panel on 18 November 1997, with the following terms of reference:

"To examine, in light of the relevant provisions of the covered agreements cited by the United States in WT/DS90/8, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.3 On 10 February 1998, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 20 February 1998, the Director-General accordingly composed the Panel (WT/DS90/9) as follows:

Chairman: Ambassador Celso Lafer
 Members: Professor Paul Demaret
 Professor Richard Snape

1.4 The Panel met with the parties on 7 May and 22 and 23 June 1998 and submitted its report to the Parties on 11 December 1998.

II. FACTUAL ASPECTS

A. *Consultations in the Committee on Balance-of-Payments Restrictions*

2.1 At the time the Panel was established, India maintained quantitative restrictions on imports of products falling in 2,714 tariff lines at the eight-digit level of HS96 for which it claimed balance-of-payments justification. These restrictions had been notified to the Committee on Balance-of-Payments Restrictions in May 1997 in the course of consultations being held with India. The restrictions that are within the scope of the dispute appear in Annex I, Part B of WT/BOP/N/24. A previous notification had been made in July 1996 (WT/BOP/N/11 and Corr.1) and included quantitative restrictions maintained for both balance of payments and other reasons.³

2.2 India had been consulting under Article XVIII:B in the Committee on Balance-of-Payments Restrictions regularly since 1957.⁴ During the simplified consultations held on 15 November 1994, the Committee appreciated the courage and sagacity with which India had carried out its economic reform program. It encouraged India to continue implementing its import liberalization programme.

³ According to India, as of 13 April 1998, the number of items on which there were import restrictions had been reduced to 2,296 HS lines at the 8-digit level.

⁴ BISD 8S/74.

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The Committee noted that, if the balance of payments showed sustained improvement, India's aim was to move to a regime by 1996-1997, in which import licensing restrictions would only be maintained for environmental and safety reasons. Members of the Committee welcomed the significant improvement in India's balance-of-payments situation since the last consultation but recognized that it remained volatile.⁵

2.3 Full consultations were begun in December 1995, and first resumed on 20-21 January 1997. During the consultations held on 6 and 8 December 1995, the Committees commended India for the wide-scale economic reforms and comprehensive stabilization programme over the past four years, which had resulted in robust economic recovery. The reforms, which included a considerable measure of trade and financial liberalization, exchange rate unification and a move to current account convertibility, had contributed to a large increase in the share of trade in India's GDP. The Committees noted that, since 1992, rapid export growth and capital inflows had been the source of the turnaround in India's external sector and the steady increase in the level of foreign exchange reserves. However, they took note that, in recent months, there had been a deterioration in the trade balance, investment inflows had slowed and the foreign exchange reserves had declined. In addition, the fiscal deficit and the level of indebtedness remained high. The Committees recalled India's stated aim to move, by 1996-97, to a trade régime under which quantitative restrictions are retained only for environmental, social, health and safety reasons, provided sustained improvement was shown in its balance-of-payments. They also took note of the statement by the IMF that, with continued prudent macro-economic management, the transition to a tariff-based import régime with no quantitative restrictions could reasonably be accomplished within a period of two years. The Committees noted that, since the last full consultation, there had been considerable liberalization of India's import régime, including a gradual increase in the number of consumer items which were freely importable; yet almost one-third of tariff lines at eight-digit level under the HS Classification remained subject to quantitative restrictions. The Committees noted the view expressed by India that, in the context of a deteriorating balance-of-payments situation, it would be neither prudent nor feasible to consider the general lifting of quantitative restrictions on imports at this stage. Many Members supported India's continued use of import restrictions under Article XVIII:B for balance-of-payments reasons in view of the uncertainty and fragility they perceived in India's balance-of-payments position, and they felt that liberalization and structural reform policies should continue at a pace and sequence suited to Indian conditions. Many other Members stated that India's balance-of-payments position was comfortable, that India did not currently face the threat of a serious decline in foreign exchange reserves as set out in Article XVIII, paragraph 9, and that therefore India was not justified in its continued

⁵ GATT document BOP/R/221, 1 December 1994.

recourse to import restrictions for balance-of-payments reasons. Many Members stated that the continued use of quantitative restrictions was inconsistent with paragraphs 1, 2, 3, 4 and 9 of the Understanding and asked India to present a firm time-table for the phasing out of the restrictions, and further information required, before the resumption of the consultations. Others, in the light of the ongoing liberalization, did not share these views. In the light of the above considerations, the Committees welcomed India's readiness to resume the consultations in October 1996, and to notify to the WTO all remaining restrictions maintained for balance-of-payments purposes soon after the announcement of the 1996/97 Export-Import Policy.

2.4 In its resumed consultations with India, in January 1997, the Committee took note of the positive developments in India's economic situation since 1995. The Committee welcomed the Indian authorities' continued commitment to economic reform and liberalization and noted India's progressive removal of quantitative restrictions notified under Article XVIII:B. The Committee noted the statement of the IMF that India's current monetary reserves were not inadequate and were not threatened by a serious decline.⁶ The IMF also expressed the view that the import restrictions could be removed within a relatively short period of time. However, India cautioned that its balance-of-payments needed close monitoring and that the abrupt removal of import restrictions notified under Article XVIII:B could undermine the stability of its economy and the reform process. The Committee agreed to resume the consultations with India at the beginning of June 1997 to consider a proposal from India on a time-schedule for the elimination of its remaining import restrictions notified under Article XVIII:B and to conclude the consultations consistently with all relevant WTO balance-of-payments provisions.⁷

2.5 On 19 May 1997, India notified the Committee of the import restrictions under Article XVIII:B that were being maintained under its Export-Import Policy for 1997-2002.⁸ At the same time India notified a time-schedule for the removal of its remaining import restrictions pursuant to paragraph 11(d) of the 1994 Understanding. This plan contained a time-schedule of nine years from 1 April 1997 to 31 March 2006, divided into three equal phases. The notification also included a list of products in respect of which quantitative restrictions on imports maintained under Article XVIII:B were removed by India since its last notification of July 1996, as well as the import policy changes announced on 1 April 1997 under its annual Export-Import Policy for 1997-1998.

2.6 On 10-11 June 1997, the Committee resumed its consultations with India to discuss the plan. The representative of the IMF noted that his answers to the questions posed during the January 1997 consultation on India's balance-of-

⁶ WT/BOP/R/22, para. 15.

⁷ *Ibid.*

⁸ T/BOP/N/24, Annex I, Part B.

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payments situation had not changed during the interim period. At that meeting all Members expressed their appreciation of India's commitment to eliminate the import restrictions over a period of time and commended India on the comprehensiveness, transparency and timeliness of the plan. Many Members however voiced concern about the length of the time-schedule; some agreed that India should adopt a cautious approach, others encouraging an acceleration of the phase out. Some Members considered that India's balance-of-payments situation no longer justified continued recourse to Article XVIII:B. In this meeting India offered to revise the phase-out plan to seven years. Since no consensus on the revised proposal on the time-schedule could be reached, the Chairman suspended the meeting to permit further reflection.

2.7 When the Committee reassembled on 30 June 1997, India submitted a plan containing a time-schedule of seven years, under which most of the import restrictions would be eliminated in two phases of a length of three years each and a number of items of high sensitivity or bound at very low rates of duty would be eliminated during the third phase, reduced from three years to one year. However, since no consensus on the revised proposal on the time-schedule could be reached, the Chairman closed the meeting on 1 July 1997, noting that the report of the Committee to the General Council would record the views expressed in the Committee.

2.8 The reports of the Committee of the consultations (WT/BOP/R/11; WT/BOP/R/22 and WT/BOP/R/32) were adopted by the General Council.

B. Quantitative Restrictions

2.9 This dispute concerns the 2,714 restrictions listed in Annex I, Part B of document WT/BOP/N/24 dated 22 May 1997. This document is a notification by India to the WTO Committee on Balance-of-Payments Restrictions ("BOP Committee"), the Council on Trade in Goods, and the Committee on Market Access.⁹

1. Legal Basis under Domestic Law for Import Restrictions and Import Licensing

2.10 Indian domestic legislation governing import licensing can be found in: (i) Section 11 of the Customs Act, 1962, (ii) the Foreign Trade (Development and Regulation) Act, 1992, (iii) the rules and orders promulgated under the Foreign Trade (Development and Regulation) Act, 1992, and (iv) the Export and Import Policy 1997-2002.

⁹ T/BOP/N/24, p. 1 (including statement by India that this notification also fulfilled the notification obligations of India under the Decision on Notification Procedures adopted by the Council on Trade in Goods on 1 December 1995 (G/L/59), and that a copy of the notification had been sent to the Chairman of the Committee on Market Access).

2.11 Section 11 of the Customs Act, 1962 provides that the Central Government of India may, by notification in the Official Gazette, prohibit (absolutely or subject to conditions), as specified in the notification, the import or export of any goods. The listed purposes for such prohibition include, *inter alia*: Indian security; maintenance of public order and standards of decency or morality; conservation of foreign exchange and safeguarding of balance of payments; avoiding shortages of goods; prevention of surplus of any agricultural or fisheries product; establishment of any industry; prevention of serious injury to domestic production; conservation of exhaustible natural resources; carrying on of foreign trade in goods by the State or by a State-owned corporation; and "any other purpose conducive to the interests of the general public." Under Section 111 (d) of the Customs Act, goods imported or exported (or attempted to be imported or exported) contrary to any prohibition are liable to confiscation.

2.12 The Foreign Trade (Development and Regulation) Act, 1992 ("FTDR Act") which replaced the Imports and Exports (Control) Act, 1947, authorizes the Central Government to prohibit, restrict or otherwise regulate the import or export of goods, by Order published in the Official Gazette (Section 3(2)). Under section 3(3) of the FTDR Act, all goods to which any Order under section 3(2) applies are deemed to be goods the import or export of which has been prohibited under section 11 of the Customs Act, 1962 (and are therefore subject to confiscation under section 111(d) of the Customs Act).

2.13 The FTDR Act prohibits imports or exports by any person except in accordance with the provisions of the FTDR Act, the rules and orders made thereunder and the Export and Import Policy currently in force (Section 11(1)). Under Section 11(2), when any person makes or abets or attempts to make any import or export in contravention of the FTDR Act, any rules or orders made thereunder, or the Export and Import Policy, he is liable to a penalty of up to 1,000 rupees or five times the value of the goods concerned, whichever is greater. Only persons who have been granted an Importer-exporter Code Number ("IEC Number") by the Director General of Foreign Trade (DGFT) may import or export (Section 7).¹⁰ The Director General, who is authorized to grant, renew or deny import and export licences, under Section 9, may suspend or cancel the IEC Number of any person who has contravened customs laws.¹¹

2.14 Section 9 of the FTDR Act also requires the Director General of Foreign Trade as defined in Section 2(d) of the FTDR Act (the "Director General") to record reasons in writing if he fails to grant or renew an import license. If a license is granted, it specifies both the value and the quantity of the item that may be imported. The reasons for which the Director General may deny a license are clearly set forth in Rule 7(1) of the FTR Rules, and include, among others: that

¹⁰ Imports made in contravention of section 7 of the FTDR Act are in contravention of section 11 of the Customs Act, 1962 and may be confiscated under section 111(d) of the Customs Act: *Uniflex Cables Ltd. v. Collector of Customs, Bombay - 1995 (77) EJ, T.737* (Tribunal).

¹¹ FTDR Act, section 8(1).

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an applicant is not eligible for a license in accordance with any provision of the Export and Import Policy, 1997-2002 (the "Exim Policy"); and, in the case of a license for import, that no foreign exchange is available for the purpose.¹²

2.15 Section 15 of the FTDR Act provides for an appeal against any decision or order made under the Act. This right of appeal extends to any decision to refuse a license. In the case of an order by an officer subordinate to the Director General, appeal lies to the Director General; in the case of an order made by the Director General, an appeal lies to the Central Government. In addition, although Section 15(3) of the FTDR Act states that "the order made in appeal by the Appellate Authority shall be final....", it can be challenged as violating a legal or constitutional right under Article 226 of the Constitution before the High Court of any State that is part of the Indian Union. In addition, if the alleged violation is of a fundamental right contained in Part III of the Constitution, it can be challenged under Article 32 of the Constitution before the Supreme Court of India. A challenge would lie, *inter alia*, on the ground that the decision is arbitrary, irrational or discriminatory. The decision of a High Court in turn can be challenged in an appeal to the Supreme Court of India under various provisions of the Constitution.

2.16 Section 19 of the FTDR Act authorizes the Central Government to make rules for carrying out the provisions of the Act, by notification in the Official Gazette. The Foreign Trade (Regulation) Rules, 1993 were issued under the authority of Section 19 of the FTDR Act. They provide generally for licence applications, licence fees, licence conditions, refusal, amendment, suspension or cancellation of licences, and enforcement.

2.17 Section 5 of the FTDR Act authorizes the Central Government to formulate and announce by notification in the Official Gazette the export and import policy. The first such policy, the Export and Import Policy 1992-1997, was in effect from 1992 until 31 March 1997. The policy currently in effect is the Export and Import Policy 1 April 1997 - 31 March 2002. Export and Import Policy statements have been issued once every five years, effective at the 1 April start of the government fiscal year. Revisions during the five-year period generally are published on 1 April of subsequent years during the five-year period, although changes may be made and announced in public notices at any time. The Export and Import Policy 1997-2002 includes, *inter alia*, the Negative List of Imports ("Negative List") found in Chapter 15 of the Export and Import Policy. The list sets forth various prescribed procedures or conditions for imports, and the eligibility requirements including export performance that must be met to qualify for Special Import Licences. Section 4.7 of the Export-Import Policy 1997-2002 provides that "[n]o person may claim a licence as a right and the Director General of Foreign Trade or the licensing authority shall have the power to refuse to

¹² Rule 7(1)(j) and (l).

grant or renew a licence in accordance with the provisions of the Act and the Rules made thereunder."

2.18 The Handbook of Procedures published on 1 April 1997 effective for the period 1997 to 2002 sets out the procedures that must be followed to export or import specific goods, and provides application forms for import licences. The ITC (HS) Classifications relates the rules set forth in the Export and Import Policy and the Handbook to the 8-digit product categories set forth in the Harmonized System of commodity classification. For each product listed at the 8-digit level, the book indicates five types of information in five columns: the 8-digit code; the item description, the applicable policy (prohibited, restricted, canalized or free); any conditions relating to the Export and Import Policy (these conditions appear either indicated with the particular item or in licensing notes at the end of the HS Chapter or section thereof); and an indication of whether the product can be imported under a Special Import Licence.

2. *Licensing Régime*

2.19 India regulates the import of goods by means of the Negative List. If an item is on the Negative List, a prospective importer must apply for a licence to the DGFT.

2.20 The Negative List classifies all restricted imports in one of three categories: prohibited items, restricted items, and canalized items. None of the prohibited items, listed in Part I of the Negative List, are listed in Annex I, Part B of document WT/BOP/N/24. In WT/BOP/N/24, Annex I, Part B, restricted items are identified with the symbol "NAL" (non-automatic licensing), "SIL" or "STR" in the column "QR symbol". Restricted items are listed in Part II of the Negative List. An item classified as "restricted" under the Negative List is only permitted to be imported against a specific import licence or in accordance with a public notice issued for that purpose.¹³ The leading item on the Negative List is "all consumer goods, howsoever described, of industrial, agricultural, mineral or animal origin, whether in SKD/CKD condition or ready to assemble sets or in finished form."¹⁴ Paragraph 3.14 of the Export and Import Policy further defines "consumer goods" as "any consumption goods which can directly satisfy human needs without further processing and include consumer durables and accessories thereof." The Negative List also lists seven product categories to be treated as consumer goods "for the removal of doubts": consumer electronic goods, equip-

¹³ See Export and Import Policy, 10, para. 4.1 ("Any goods, the export or import of which is restricted through licensing, may be exported or imported only in accordance with a licence issued in this behalf). See also the restrictions listed in Part II of the Negative List of Imports, *id.*, para. 15.2. In a few instances, specific licences are not needed, although importation is still restricted. For instance, the import of radioactive material is allowed without a licence, subject to the recommendation of the Department of Atomic Energy.

¹⁴ Export and Import Policy, Chapter 15, Part II "SKD/CKD" is "semi-knocked down/completely knocked down".

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ments and systems, howsoever described; consumer telecommunications equipments namely telephone instruments and electronic PABX; watches in SKD/CKD or assembled condition, watch cases and watch dials; cotton, woollen, silk, man-made and blended fabrics including cotton terry towel fabrics; concentrates of alcoholic beverages; wines (tonic or medicated); and saffron.¹⁵

2.21 Canalized items, listed in Part III of the Negative List, may in principle be imported only by a designated canalizing (government) agency. A number of canalized items appear in Annex I, Part B of WT/BOP/N/24 (indicated by "STR" in the column labelled "QR Symbol").

2.22 A person intending to import a restricted item must submit an application for an import licence to the Director General of Foreign Trade in India's Ministry of Commerce ("DGFT"), or an officer authorized by him ("licensing authority") with territorial jurisdiction. Import licences are not transferable. Any person who imports or exports (with or without a licence) must have an Importer-Exporter Code (IEC) number, unless specifically exempted.¹⁶ In addition, any person applying for an import or export licence must present a Registration-cum-Membership Certificate (RCMC) granted by the Export Promotion Council relating to his line of business, the Federation of Indian Exporters Organisation, or (if the products exported by him are not covered by any Export Promotion Council) the regional licensing authority.¹⁷ The application forms for the RCMC requires the applicant to claim status as a merchant exporter or manufacturer exporter of a specific product or products.¹⁸

2.23 The application form for import of items covered by the Negative List requests information on the applicant's name and address, the type of unit, the applicant's registration number, the end product(s) to be manufactured with licensed capacity, details of the items applied for export, the total CIF value applied for, past production in the previous year, exports done during the previous year, and "justification for import".

2.24 Whenever imports require a licence, only the "Actual User" may import the goods, unless the Actual User condition is specifically dispensed with by the licensing authority.¹⁹ Paragraph 3.4 of the Export-Import Policy defines "Actual User" as an actual user who may be either industrial or non-industrial. Paragraph 3.5 of the Policy defines "Actual User (Industrial)" as "a person who utilizes the imported goods for manufacturing in his own unit or manufacturing for his own use in another unit including a jobbing unit." Paragraph 3.6 of the Policy defines "Actual User (Non-Industrial)" as "a person who utilizes the imported

¹⁵ Export and Import Policy, Chapter 15, Part II "SKD/CKD" is "semi-knocked down/completely knocked down".

¹⁶ Export and Import Policy, section 4.9.

¹⁷ Export and Import Policy, paras. 4.10 and 13.8 ; Handbook para. 13.3; Handbook Appendix 14.

¹⁸ See "Form of Application for Registration cum Membership with Export Promotion Councils" and "Form of Registration cum Membership Certificate", from Handbook, App. 3A and 3B.

¹⁹ Export and Import Policy, para. 5.2.

goods for his own use in (i) any commercial establishment carrying on any business, trade, or profession; or (ii) any laboratory, Scientific or Research and Development (R&D) institution, university of other educational institution or hospital; or (iii) any service industry." The Actual User then cannot legally transfer the imported goods to anyone except with prior permission from the licensing authority concerned, except for a transfer to another Actual User after a period of two years from the date of import.²⁰

2.25 About ten per cent of tariff lines subject to import licensing may also be imported under Special Import Licences (SILs). These items are listed in WT/BOP/N/24, Annex I, Part B by the symbol "SIL" in the "QR symbol" column.

2.26 Firms receive SILs from the Indian Government in proportion to their exports or NFE (net foreign exchange) earnings. SILs are issued by the DGFT or regional licensing authorities, and are freely transferable (there are SIL brokers and a resale market for SILs).

2.27 There are various methods by which a person or firm may apply for a Special Import Licence. First, an established private or state-run exporter which meets export performance criteria set forth in Chapter 12 of the Export and Import Policy, and elaborated upon in Chapter 12 of the Handbook, can qualify to be recognized by the regional licensing authority or the DGFT as an Export House, Trading House, Star Trading House, or Super Star Trading House.²¹ Such designated exporters automatically qualify for SILs on the basis of entitlement rates set out in paragraph 12.7 of the Handbook.²² Additional bonuses are earned if a designated exporter exports specified products (products made by small-scale industries; fruits, vegetables, flowers or horticultural products; or products made in the North Eastern States) and where over 10% of such an exporter's exports are to one or more of 43 listed Central and Latin American countries and territories.²³

²⁰ Handbook, para. 5.36.

²¹ Status as an Export House, Trading House, Star Trading House, or Super Star Trading House is accorded by the DGFT or the regional licensing authority on the basis of the FOB/Net Foreign Exchange (NFE) value of exports of goods and services by the exporter concerned during the preceding three years or the preceding licensing year, at the option of the exporter. Export and Import Policy, para. 12.3.

²² Super Star Trading Houses must have made Rp. 2,250 crores in exports or Rp. 1,800 crores in net foreign exchange earnings in the preceding licensing year, or averaged Rp. 1,500 crores in exports/1,200 crores in NFE earnings in the preceding three licensing years. Export and Import Policy, para. 12.5.

²³ Handbook Vol.1, para. 12.7. The countries and territories targeted are: Antigua, Argentina, Bahamas, Barbados, Belize, Bermuda, Bolivia, Brazil, British Virgin Islands, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Falkland Islands, French Guiana, Grenada, Guadeloupe, Guatemala, Guyana, Haiti, Honduras, Jamaica, Martinique, Mexico, Montserrat, Netherlands Antilles, Nicaragua, Panama, Paraguay, Peru, St. Vincent, St. Kitts-Nevis-Anguilla, St. Lucia, Suriname, Trinidad & Tobago, Uruguay, Venezuela, Virgin Islands (U.S.). Appendix 33.